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Der Europäische Gedanke im Zeitalter des Wiener Kongresses*
(The European Idea in the Time of the Congress of Vienna)

*Diemut Majer**, Wolfgang Höhne****

Abstract

After Napoleons defeat in the battle of Waterloo / Belle Alliance (1815) and his abdication as emperor of France, the governments of all European countries assembled in Vienna, in order to restore the dynastic order and the territorial situation as it has been before the era of Napoleon. This convention, known as the "dancing convention", had – besides the restoration of the "old world" – yet another purpose: To unite the monarchies of Austria (Habsburg), Prussia and Russia to guarantee "law and order" in Europe. This was directed against the national-democratic movements, which had, since the 1830's, spread through Europe. They claimed civil rights and independence from the ruling monarchies. The treaty refering to this collaboration was called "the Holy Alliance". It was followed only some weeks later by the "German Federation" (Deutscher Bund), by which all German states promised to subdue all "revolutionary actions" on their territories, especially in schools and universities. These alliances, althought of strictly upholding the monarchic structures of these states, blocked democratic movements for many years, but was able to keep peace in Europe for almost 60 years.

Key words: *Vienna-convention (1815); Holy Alliance (1815); German Federation (Deutscher Bund 1815); Europe under dynastic rulers; national-democratic movements.*

1. Der Wiener Kongress

Der Wiener Kongress war seit den Kongressen von Münster und Osnabrück (1648) die erste gesamteuropäische Versammlung. Beide dieser Versammlungen standen vor grundlegenden Problemen. 1648 ging es darum, den seit 1618 andauernden Krieg zu beenden und die jeweiligen Gebietsgewinne und -verluste in ein erträgliches Gleichgewicht zu bringen sowie der Gleichberechtigung der katholischen und evangelischen Bekenntnisse unter Anwendung des Prinzips cuius regio – eius religio[1] Rechnung zu tragen.

Zahlreiche europäische Ideen[2] tauchten in dieser Zeit auf, von denen jedoch nur die Ideen des Wiener Kongresses Bedeutung erlangen sollten. Der Kongress begann im November 1814 und endete im Juni 1815. Ähnlich wie in Münster und Osnabrück galt es, eine europäische Neuordnung zu finden. Die Landkarte zeigte einen bunten Flickenteppich von etwa 1800 weltlichen und geistlichen Herrschaften, die jeweils Autonomie gegenüber den Reichsinstanzen beanspruchten. Im Gegensatz zu 1648 ging es aber in Wien nicht um in eine Festschreibung der durch den Krieg verursachten Gebietsverschiebungen, sondern um die *Rückgängigmachung* der napoleonischen Eroberungen und um territorialen Ausgleich. Die vielen hundert Bevollmächtigten ihrer jeweiligen Herrschaftshäuser hatten daher durchaus ein „europäisches" Gefühl, gleichzeitig aber auch den erklärten Willen, sich ein möglichst großes Stück aus der napoleonischen Beute zu sichern. Immerhin zeigten sich schon Vorzeichen einer

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1 Die Bürger eines Landes hatten der Religion des Landesherren anzugehören.

2 So entwarf der Sozialphilosoph Henri de Saint-Simon einen Plan zur Reorganisation der europäischen Gesellschaft (1814). Von Schmidt-Phiseldek, ein Diplomat im dänischen Dienst, entwarf einen „Europäischen Bund" (Kopenhagen 1912), der eine europäische Conföderation, deren Organe einen Bundeskongress sowie eine Bundesversammlung (Deutscher Bund) vorsahen, die in der Mitte Europas in Frankfurt tagen sollten. Ferner forderte er einen stabilen Rechtszustand durch Zusammenwirken aller selbständigen Staaten des christlichen Europa. Die Repräsentanten auf dem Bundeskongress sollten Delegierte der Staatsoberhäupter sein. Dieser Kongress sollte über alle inneren und äußeren Fragen beraten und entscheiden; ein Bundesgericht sollte Streitfälle schlichten, die Staaten müssten durch eine bewaffnete Bundesmacht zur Befolgung der Entscheidung angehalten werden. Das Verhältnis des conföderierten Europas zur übrigen Welt müsse neu gestaltet werden. Dieser Plan ähnelte sehr dem Deutschen Bund von 1815 (Der Europäische Bund, Kopenhagen 1821; zit. nach Geier, S.73f.)

europäischen bündischen Ordnung, da der noch zu erörternde „Deutsche Bund“ in den Artikeln 53 bis 63 Teil der Wiener Kongressakte vom 8. Juni 1815 war. Das passte jedoch nicht so recht in den damaligen allgemeinen Trend zur Nationalstaatenbildung, aber die Sicherheitsbedürfnisse erzwangen eine solche Allianz. Ziel des Deutschen Bundes war es, das Legitimitäts- und Interventionsprinzip dauerhaft zu sichern, vor allem gegen Frankreich. An Europas Fürstenhöfen ging die Furcht vor einer europaweiten konstitutionellen Bewegung um, denn überall wurden Vaterlandsliebe, Nationalgefühl und Beschränkung der fürstlichen Gewalten beschworen. Die Fürsten sollten, so ihre Forderung, Verfassungen erlassen und ständige Landtage einrichten.

Gesamteuropäische Tendenzen zeigten sich insbesondere in den großen Aufständen: Der Aufstand der Griechen 1821 gegen die türkische Besatzung stärkte das europäische Gemeinschaftsgefühl, der polnische Aufstand 1830 und die belgische Revolution 1830 weckten europäische konstitutionelle Bestrebungen. Die Ziele der Fürsten waren gegenläufig: Ruhe und Ordnung unter Eindämmung dieser Bestrebungen.

Wie sollte Europa nach Zerschlagung der napoleonischen Hegemonie aussehen? Maßgeblich war der Wunsch aller beteiligten Mächte, den früheren Zustand der Souveränität der Staaten wiederherzustellen. Im Ergebnis führte dies zu bedeutsamen Verträgen, mit denen politische und territoriale Fragen gelöst wurden. Den Vorsitz führte der österreichische Kanzler, Fürst Metternich; neben ihm war Kaiser Alexander I. von Russland von großem Einfluss. Preußen wurde von König Friedrich Wilhelm III., Frankreich von C. M. de Talleyrand, Großbritannien durch Viscount Castlereagh und später ab 1815 durch den Herzog von Wellington vertreten. Im Zentrum der Verhandlungen standen die territoriale Neuordnung unter dem Aspekt des Gleichgewichts der europäischen Mächte, ferner, wie erwähnt, die Revision der durch Napoleon geschaffenen territorialen Veränderungen und die Aufteilung der Kriegsbeute unter den Alliierten, vor allem aber die Wiederherstellung der alten monarchisch-dynastischen Herrschaftsordnung in Europa.

Durch die drei Grundsätze des Wiener Kongresses *Restauration, Legitimität* und *Solidarität* wurde die Bestandskraft der von Napoleon geschaffenen Veränderungen von den Fürsten nicht länger anerkannt. Der „Kaiser der Franzosen“, aus einer einfachen korsischen Familie stammend, war für sie nichts als ein Emporkömmling (trotz seiner Hochzeit mit Marie-Louise von Österreich) und galt damit an den europäischen Fürstenhöfen als illegitim, die allesamt untereinander eng verwandt waren und jeden Eindringling in die alteuropäischen Fürstengeschlechter strikt ablehnten. Die Rückkehr zur alten Ordnung bedeutete die Rückkehr der alten Dynastien und die Wiederherstellung der Adelsprivilegien, die in den von Napoleon eroberten Gebieten aufgehoben worden waren, vor allem aber Rückgängigmachung der napoleonischen territorialen Verschiebungen, die nach langwierigen Verhandlungen in der Wiener Kongressakte vom 8. Juni 1815 festgelegt wurden.[3]

Der Wiener Kongress stellt darüber hinaus aber auch ein getreues Spiegelbild der Europa-Visionen jener Zeit dar. So kultivierte z.B. Metternich die Idee von Mitteleuropa als ein ethnisch-nationales Völker- und Staatenbündnis zwischen dem russischen Osten und dem atlantisch-außereuropäisch orientierten Westeuropa. Metternichs Grundgedanke war der der Föderation, sowohl für den Deutschen Bund als auch für den Zusammenhalt ganz Europas; bis 1866 ist ihm das gelungen.

2. Die Heilige Allianz

Der Ausdruck Heilige Allianz bezeichnet das Bündnis, das die drei Monarchen Russlands, Österreichs und Preußens nach dem endgültigen Sieg über Napoleon Bonaparte am 26. September 1815 in Paris abschlossen. Frankreich trat der Allianz 1818 bei.

Die Gründung der Heiligen Allianz[4] geschah auf Anregung Kaiser Alexanders I., der auch den Vertrag entworfen hatte. Das Bündnis kam zustande, obwohl alle drei Monarchen unterschiedlichen Konfessionen angehörten: Der russische Kaiser war orthodox, Kaiser Franz I. von Österreich römisch-katholisch und König Friedrich Wilhelm III. von Preußen evangelisch. In der Gründungserklärung der Heiligen Allianz vom 26. September 1815 hieß es u.a.:

> dass „infolge der großen Ereignisse, die Europa in den letzten drei Jahren erfüllt haben, und besonders der Wohltaten, die die göttliche Vorsehung über die Staaten ausgegossen hat, deren Regierungen ihr Vertrauen und ihre Hoffnungen auf sie allein gesetzt haben, die (Vertragspartner) die innere Überzeugung gewonnen haben, dass es notwendig ist, ihre gegenseitigen Beziehungen auf die erhabenen Wahrheiten zu begründen, die die unvergängliche Religion des göttlichen Erlösers[5] lehrt. Sie erklären daher feierlich, dass die gegenwärtige Vereinbarung lediglich den Zweck hat, vor aller Welt ihren unerschütterlichen Entschluss zu bekunden, als die Richtschnur ihres Verhaltens in der inneren Verwaltung ihrer Staaten sowohl als durch in den politischen Beziehungen zu jeder anderen Regierung alleine die Gebote der Gerechtigkeit, der Liebe und des Friedens, die, weit entfernt, nur auf das Privatleben anwendbar zu sein, erst recht die Entschließung der Fürsten direkt beeinflussen und alle ihre Schritte lenken sollen, damit sie so den menschlichen Einrichtungen Dauer verleihen und ihren Unvollkommenheiten abhelfen.“

Wegen der Aufstände in Italien und Portugal entstanden jedoch ab 1820 tiefe Differenzen in der Allianz. Es ging um die Frage, unter welchen Umständen eine Intervention im Falle innenpolitischer Unruhen zulässig sein sollte. Das Interventionsrecht wurde in der Tat im Falle des ungarischen Aufstands

[3] Russland erhielt den größten Teil des Herzogtums Warschau (Kongresspolen). Preußen trat Gebiete an Bayern und Hannover ab und erhielt dafür Schwedisch-Pommern, außerdem die nördliche Hälfte des Königreiches Sachsen, den größten Teil von Westfalen und die Rheinprovinz. Österreich bekam die meisten im Krieg verlorenen Gebiete zurück (Tirol, Vorarlberg, Galizien, Triest, Mailand, Venetien). Dafür trat es seine wallonischen und flämischen Provinzen ab, die es einst im spanischen Erbfolgekrieg erhalten hatte und die zusammen mit Holland zum Königreich der Niederlande vereint wurden. Die Schweiz gewann mit dem Wallis, Neuenburg und Genf drei Kantone hinzu und erhielt die Garantie ihrer immerwährenden Neutralität. England behielt seine Eroberungen aus den Koalitionskriegen: Ceylon, Mauritius, Helgoland, Malta und das Kapland.

[4] Näher: Kissinger, S.363f. Schmale, S.97f; siehe auch Schäder, H.: Autokratie und Heilige Allianz, Darmstadt 1963.

[5] Die Religiosität des russischen Monarchen war besonders ausgeprägt. Die religiösen Formeln gehen auf ihn zurück.

von April 1848 (Kossuth; Bauernbefreiung etc.) praktiziert. Im März 1849 hatte der ungarische Reichstag die habsburgischen Herrscher abgesetzt. Mit der von ihnen angerufenen Hilfe Russlands und dem Einmarsch eines 200.000 Mann starken russischen Heeres gelang es den Habsburgern, den Aufstand niederzuwerfen. Blutige Strafgerichte gegen die Aufständischen folgten.

Ziel des Bündnisses war die Aufrechterhaltung der monarchischen Herrschaftssysteme und des auf dem Wiener Kongress geschaffenen politischen und staatlichen Systems in Europa. Als Vollzugsorgan dienten die regelmäßigen Zusammenkünfte der Vertragsmächte, die durch eine Zusatzvereinbarung vom 20. November 1815 beschlossen wurden. In der Präambel hieß es etwas kryptisch, dass sich die Herrscher „auf Grund der Fülle der göttlichen Wohltaten entschlossen hätten, den Kurs, der sich als falsch erwiesen hatte zu verlassen und den Kurs ihrer Beziehungen von Grund auf zu ändern." Der Aufforderung, der Allianz beizutreten, folgten alle Staaten des Kontinents bis auf den Kirchenstaat (der das überkonfessionelle Engagement ablehnte), das Osmanische Reich (diesem blieb wegen der christlichen Ausrichtung der Allianz der Beitritt verwehrt) und Großbritannien: Zwar erklärte der Prinzregent, Georg IV., persönlich seine Zustimmung und trat in seiner Eigenschaft als König von Hannover auch bei. Großbritannien selbst aber lehnte eine Beteiligung ab, weil die Allianz nur ein Bekenntnis zu abstrakten Grundsätzen, aber keine realen Verpflichtungen enthalte.

Fortan wollten die vertragschließenden Mächte eine „gesamteuropäische Ordnung" etablieren, die sich auf die Prinzipien des Christentums gründete. Zar Alexander I. ging dabei weit über die ursprüngliche Zielsetzung hinaus, setzte den Volkswillen über den Willen der Monarchen und proklamierte „die Vereinigung der Völker unter dem Gebot der Bruderliebe". Weiterhin formulierte er den Gedanken einer einzigen christlichen Nation, in der die „Regierungen nur Glieder und die Monarchen ihre Delegierten [...] unter Jesus als Souverän" seien. Dieser vage formulierte Gegenentwurf zu den Ideen des Absolutismus kann zweifellos als epochemachender internationaler Organisationsversuch angesehen werden, falls er mehr gewesen sein sollte als ein Lippenbekenntnis des Herrschers. Die Interessenpolitik als bestimmende Form europäischer Machtverhältnisse sollte mit einem Schlag durch eine gesamteuropäische, christliche Politik ersetzt werden. Auch die konfessionelle Offenheit der Allianz sowie die Einbeziehung der öffentlichen Meinung in Entscheidungen der Fürsten verdienen Beachtung. Am gleichen Tag, an dem die Zusatzvereinbarung vom 20. November 1815 beschlossen wurde, wurde auch die sogenannte Quadruple-Allianz beschlossen, in der nun auch Großbritannien Mitglied der Allianz wurde.

Bündnisinhalt und Organisation

Inhalt des Bündnisses war, wie ausgeführt, die Sicherung der nachnapoleonischen territorialen Ordnung, die ihm durch die Neubelebung der Revolution in Frankreich hätte drohen können. Die Allianz betonte daher deutlich das Gottesgnadentum der Herrscher und bezeichnete die christliche Religion (auf Initiative des Zaren[6]) als Fundament der herrschenden politischen Ordnung. Die Bündnispartner verpflichteten sich zu gegenseitigem Beistand und zum Schutz dieser Ordnung gegen alle bürgerlichen und nationalstaatlich – konstitutionell inspirierten Umwälzungen.

Die Reaktionen der übrigen Großmächte auf die Entwürfe des Zaren waren durchgängig von Ablehnung gekennzeichnet. Angesichts der desaströsen Folgen der Französischen Revolution waren die europäischen Hegemonialmächte nicht gewillt, erneut liberale Bestrebungen, wie sie der Zar vorgeschlagen hatte, zu dulden oder gar zu befördern. Zudem wirkte auch die Vorstellung des „Souveräns Jesus" befremdlich. So kam es, dass Metternich im Auftrag Kaiser Franz I. die Entwürfe zur „Heiligen Allianz" in Gänze umformulierte und so ein restauratives Instrument der Hegemonialmächte im Geiste des monarchischen Prinzips zur Unterdrückung liberaler und nationaler Tendenzen schuf: Gottesgnadentum, die christliche Religion als Fundament der politischen Ordnung und – als realpolitisch überragender Punkt – gegenseitiger Beistand gegen Umwälzungen und Revolutionen. Dass Alexander trotzdem unterschrieb, zeigt einerseits seine Unbeholfenheit in der Sprache der internationalen Politik und andererseits, welche Bedeutung er „seiner" Allianz trotz aller Änderungen noch zuschrieb. Bis zum Ende des Jahrhunderts gelang es immerhin, die Kriege zwischen den Mächten zu lokalisieren und die Grundstrukturen des internationalen Systems zu erhalten.

Die „Heilige Allianz" beließ es jedoch nicht bei schönen Worten; dazu waren die europäischen Monarchen viel zu sehr Realpolitiker. Sie wurde in den Jahren nach dem Wiener Kongress zum Instrument der monarchischen europäischen Staaten gegen die bürgerlich-nationalen Einheitsbestrebungen seit den 1820er Jahren in Deutschland, Italien, Portugal und Griechenland. Konkret fand dies in mehreren Interventionen seinen Ausdruck. Auf dem Kongress von Aachen (15. November 1818) findet sich ein Höhepunkt dieser Solidaritätspolitik in einer entsprechenden Deklaration, nach der die „Ruhe der Welt" als friedensstiftendes Ziel der Großmächte bezeichnet wurde. Auf diesem Kongress wurden auch Maßnahmen gegen die bürgerlich-nationale Opposition im Deutschen Bund beschlossen, die durch entsprechende Maßnahmen des Deutschen Bundes umgesetzt wurden (so z.B. in den später zu erörternden Karlsbader Beschlüssen von 1819), die oppositionelle Studenten und Dozenten mit Relegation bzw. Entlassung bedrohten. Auf den Kongressen in Troppau und Laibach wurden militärische Interventionen gegen die bürgerlichen Umwälzungen in Italien und die indirekte Unterstützung der Türkei gegen den nationalen Befreiungskampf der Griechen beschlossen. Der letzte Kongress der Heiligen Allianz, der Veroneser Kongress 1822, beauftragte

[6] Zar Alexander wurde er von den Prinzipien des Pietismus getragen: Es wurde Mitglied des Bundes der Pietisten, durch die auch einige mystische Denkschriften des Münchner Philosophen Franz von Baader in die Hände des Zaren gelangten. In diesen sprach Baader von einem theokratischen Staatsaufbau, der Befreiungskraft des Christentums und der damit verbundenen nötigen Ausdehnung desselben vom privaten auf den gesellschaftlichen Bereich. Seiner Ansicht nach war die Gottes- und Nächstenliebe, ausdrücklich auch zwischen den Regierungen, die „Grundlage wahrer Freiheit und Gleichheit, um so den Kampfeswillen der Völker zu ersticken". Nun endlich sah der Zar die Zeit gekommen, seine Vision einer gesamteuropäischen Allianz, über die er bereits seit Jahren sinnierte, in die Tat umzusetzen. In begeistertem Überschwang ersann Alexander den Wortlaut der „Heiligen Allianz".

Frankreich mit der Niederschlagung der bürgerlichen Revolution in Spanien. Bedingt durch die Verfahrenheit der europäischen Mächtekonstellation, verlor die Allianz allerdings ab den 1830er Jahren zunehmend an Einfluss. Jedoch war die Intervention Habsburgs gegen den Aufstand in Ungarn mit russischer Hilfe 1849 so wirksam, dass der Aufstand, wie erwähnt, völlig zusammenbrach.

Was den ursprünglich religiös motivierten Charakter der Allianz betrifft, wandte sich Alexander später von seinen Überzeugungen ab und dem harten realpolitischen Geschäft zu. Dennoch darf nicht außer Acht gelassen werden, dass Alexander in seinen Vorstellungen von einem vereinigten Europa – trotz aller mystischen Schwärmereien – dem Denken seiner Zeit weit voraus war: Wenn er nicht nur bloße „good-will" Bekundungen hätte abgeben wollen, waren der Vorrang des Volkswillens, christliche Werte und Normen als Basis, Solidarität und Gleichheit aller Menschen und nicht zuletzt die Einigung Europas ungeachtet politischer Grenzen starke Signale auch für das Selbstverständnis und die Entwicklung unseres modernen Europa.[7]

Mit der Julirevolution von 1830 in Frankreich verlor die Heilige Allianz, wie erwähnt, viel von ihrem gesamteuropäischen Charakter und Einfluss. Im Herbst 1833 reaktivierten Russland, Österreich und Preußen in der Konferenz von Münchengrätz die Heilige Allianz und bildeten von nun an jenen Mächteblock, der oft als „reaktionär" bezeichnet wird – nicht ganz zutreffend deshalb, weil die Interessen dieser Staaten nur partiell gleich waren und sie keinesfalls als einheitliches „Lager" auftraten.

Nach der Niederwerfung der Revolutionen von 1848/49 in Deutschland erlebte die Allianz in den 1850er Jahren eine Neuauflage, brach jedoch im Krimkrieg 1853 endgültig auseinander. Österreich, das erst 1849 beim Aufstand der Ungarn mithilfe Russlands vor dem möglich scheinenden Zerfall gerettet worden war, hatte Russland am 3. Juni 1854 aufgefordert, sich aus den Donaufürstentümern zurückzuziehen und diese nach dem russischen Abzug selbst besetzt. Das verschlechterte die Beziehungen zwischen Österreich und Russland erheblich. Österreichs Beziehungen zu Preußen im Rahmen des Deutschen Bundes wurden ebenfalls konfliktreicher. Daneben lief es Gefahr, von Großbritannien und Frankreich unter Napoléon III. isoliert zu werden. Langfristig veränderte sich somit die seit dem Wiener Kongress relativ stabil scheinende europäische Mächtekonstellation nachhaltig zu Ungunsten Österreichs.

Im Grunde war die Heilige Allianz ein Fürstenbündnis alten Stils nach den Regeln der „christlichen Republik", das Maßnahmen gegen die Vorherrschaft eines einzelnen ihrer Glieder über die anderen traf. Insofern ist das Bündnis nicht nur eine Vereinigung der reaktionären Kräfte Europas, sondern auch eine Anknüpfung an die ältere Idee der „Republique chretienne". Die Basis des Bündnisses war die Souveränität der Landesväter über ihre Untertanen. Neu daran war aber der Umfang des Bündnisses, denn es traten, wie erwähnt, alle europäischen Staaten der Heiligen Allianz bei, bis auf Großbritannien (das allerdings drei Jahre später [1815] beitrat) und den Vatikan. Aus historischer Sicht war das Bündnis die erste gesamteuropäische Vereinigung dieser Art. Der Europagedanke war also nicht wie in der Nachkriegszeit von 1918 mit der Regierungsform der parlamentarischen Demokratie verknüpft, sondern konnte – bei gleichgelagerten Interessen – durchaus auch in Staaten mit autoritärer Regierungsform zur Entfaltung kommen. Die *Heilige Allianz* war jedoch keine übernationale Institution und hatte keine dementsprechende Organisation. Eher könnte man sie als politische Übereinkunft bezeichnen, die gemeinsame Absichten festlegte und Grundlagen und Bedingungen für ein gemeinsames Handeln festschrieb. Konkrete Formen waren gesamteuropäische Botschafter- und Außenministertreffen sowie Begegnungen der Monarchen der vier Siegermächte und Frankreichs,[8] eine Art Vorläufer der heutigen Gipfelkonferenzen.

Zum ersten Mal wurde so etwas wie ein gesamteuropäisches Bündnis gebildet. Doch auf den wiederhergestellten alten Fundamenten der früheren Ordnung wurde vieles übernommen, was die Revolution und Napoleon geschaffen hatten. Obgleich die Akte noch ausdrücklich von „Untertanen" sprach und nichts von Volkssouveränität wusste, war die Emanzipation des Bürgers nicht mehr rückgängig zu machen. Aus der absolutistischen wurde allmählich die konstitutionelle Monarchie, und schon die bloße Existenz dieser Heiligen Allianz war im Grunde alles andere als Restauration. Denn wenn sie auch die Rückkehr zum Gedanken des Fürstenbundes bedeutete, so wäre ein solcher Fürstenbund *vor* Napoleon nicht denkbar gewesen.[9]

3. Der Deutsche Bund

Wenige Wochen vor Gründung der *Heilige Allianz* wurde der *Deutsche Bund* gegründet. Er bestand aus einem Zusammenschluss gleichberechtigter souveräner Staaten, gerichtet auf die Stabilität nach außen und auf die Abwehr revolutionärer Bestrebungen im Inneren. Er stellte eine Art Ersatz für das 1803 durch den Reichsdeputationsausschuss aufgelöste Heilige Römische Reich Deutscher Nation dar.

In der Bundesakte vom 8. Juni 1815 (die Teil der Wiener Kongressakte war) wurde die auf dem Wiener Kongress geschaffene Verfassung des Deutschen Bundes festgelegt; sie bestimmte die politische Form Deutschlands bis 1866. In der Wieder Schlussakte hieß es dazu:

> **Schlußacte der über Ausbildung und Befestigung des deutschen Bundes zu Wien …**
>
> Art. I. Der deutsche Bund ist ein völkerrechtlicher Verein der deutschen souverainen Fürsten und freien Städte, zur Bewahrung der Unabhängigkeit und Unverletzbarkeit ihrer im Bunde begriffenen Staaten, und zur Erhaltung der innern und äußern Sicherheit Deutschlands.
>
> Art. XI. In der Regel faßt die Bundesversammlung die zur Besorgung der gemeinsamen Angelegenheiten des Bundes erforderlichen Beschlüsse im engern Rathe, nach absoluter Stimmenmehrheit.
>
> Art. XVIII. Da Eintracht und Friede unter den Bundesgliedern ungestört aufrecht erhalten werden soll, so hat die Bundesversammlung, wenn die innere Ruhe und Sicherheit des Bundes auf irgend eine Weise bedroht oder gestört ist, über Erhaltung oder

[7] Menger, S.209ff.
[8] Vgl. Tschubarjan, S.54.
[9] Foerster 1963, S.169.

Wiederherstellung derselben Rath zu pflegen, und die dazu geeigneten Beschlüsse nach Anleitung der in den folgenden Artikeln enthaltenen Bestimmungen zu fassen.

Art. XXV. Die Aufrechthaltung der innern Ruhe und Ordnung in den Bundesstaaten steht den Regierungen allein zu. Als Ausnahme kann jedoch, in Rücksicht auf die innere Sicherheit des gesammten Bundes, und in Folge der Verpflichtung der Bundesglieder zu gegenseitiger Hülfsleistung, die Mitwirkung der Gesammtheit zur Erhaltung oder Wiederherstellung der Ruhe, im Falle einer Widersetzlichkeit der Unterthanen gegen die Regierung, eines offenen Aufruhrs, oder gefährlicher Bewegungen in mehreren Bundesstaaten, stattfinden.

Art. XXXV. Der Bund hat als Gesammtmacht das Recht, Krieg, Frieden, Bündnisse, und andere Verträge zu beschließen.

Nachdem die Wiener Schlussakte den Bund als einen „völkerrechtlichen Verein der deutschen souveränen Fürsten und freien Städte, die unter sich unabhängig blieben, nach außen aber als politische Einheit auftraten"10 definierte, formulierte die Deutsche Bundesakte die Einzelheiten:

Deutsche Bundesakte vom 8. Juni 1815

Im Namen der allerheiligsten und untheilbaren Dreieinigkeit

Die souverainen Fürsten und freien Städte Deutschlands, den gemeinsamen Wunsch hegend, den 6. Artikel des Pariser Friedens vom 30. Mai 1814 in Erfüllung zu setzen, und von den Vortheilen überzeugt, welche aus ihrer festen und dauerhaften Verbindung für die Sicherheit und Unabhängigkeit Deutschlands, und die Ruhe und das Gleichgewicht Europas hervorgehen würden, sind übereingekommen, sich zu einem beständigen Bunde zu vereinigen, und haben zu diesem Behuf ihre Gesandten und Abgeordneten am Congresse in Wien mit Vollmachten versehen, nämlich:

[es folgen die Namen der Bevollmächtigten]

1. Allgemeine Bestimmungen

Art. I. (Art. 53 der Wiener Kongreß-Acte). Deutscher Bund. Die souverainen Fürsten und freien Städte Deutschlands mit Einschluß Ihrer Majestäten des Kaisers von Österreich und der Könige von Preußen, von Dänemark und der Niederlande, und zwar der Kaiser von Österreich, der König von Preußen, beide für ihre gesammten vormals zum deutschen Reich gehörigen Besitzungen, der König von Dänemark für Holstein, der König der Niederlande für das Großherzogthum Luxemburg, vereinigen sich zu einem beständigen Bunde, welcher der deutsche Bund heißen soll.

Art. II. (Art. 54 der Wiener Kongreß-Acte). Zweck des deutschen Bundes. Der Zweck desselben ist Erhaltung der äußeren und inneren Sicherheit Deutschlands und der Unabhängigkeit und Unverletzbarkeit der einzelnen deutschen Staaten.

Art. III. (Art. 55 der Wiener Kongreß-Acte). Gleichheit der Bundesglieder. Alle Bundesglieder haben als solche gleiche Rechte; sie verpflichten sich alle gleichmäßig die Bundesacte unverbrüchlich zu halten.

Der Deutsche Bund war der größte Staatenbund, der je in Europa geschaffen wurde. Mit der Aufnahme in die Wiener Kongressakte wurde der Bund unter den Schutz der Siegermächte gestellt. Dieser Staatenbund war allerdings auf Mitteleuropa beschränkt. Er umfasste die deutschen Staaten sowie Österreich unter Einschluss seiner nichtdeutschen Gebiete (Oberitalien, Südosteuropa, Ungarn, Böhmen und Mähren etc). Österreich war die dominierende Macht und hatte auch den Vorsitz in der Frankfurter Bundesversammlung inne.

Die Fokussierung der Großmächte auf ein Europa als Mitteleuropa[11] wurde schon auf dem Wiener Kongress, der ebenfalls von Österreich (unter dem beherrschenden Einfluss von Kanzler Metternich) gesteuert wurde, verfolgt. Dies entsprach der damaligen politischen Landkarte. Ein starker Block Mitteleuropa sollte zur Abwehr etwaiger Expansionspläne Frankreichs und Russlands dienen.

Nach der Bundesakte waren die Mitgliedstaaten souverän nur gegenüber den Untertanen, nicht gegenüber dem Bund, aus dem sie nicht austreten durften und dessen Mehrheitsbeschlüsse für sie bindend waren. Sie waren verpflichtet, Maßnahmen auf ihrem eigenen Gebiet bei Störung der öffentlichen Ordnung zu ergreifen – hierin kann man durchaus einen Vorläufer der EU-Verträge sehen, in denen sich die Mitgliedstaaten ebenfalls zur Befolgung der Leitlinien der (Unions-) Organe verpflichten. Die Mitgliedstaaten waren an die Entscheidungen der Zentralinstanz, des Deutschen Bundestags in Frankfurt, gebunden.

Die Organisation des Deutschen Bundes im Einzelnen

Mit der Unterzeichnung der Bundesakte trat die auf dem Wiener Kongress verhandelte Neuordnung Deutschlands in Kraft. Der Deutsche Bund konstituierte sich darin als lockere Vereinigung der siebenunddreißig souveränen Fürsten und vier Freien Reichsstädte Deutschlands zu einer Konföderation souverän bleibender Einzelstaaten mit dem Ziel der „Erhaltung der äußeren und inneren Sicherheit", sowie der „Unabhängigkeit und Unverletzbarkeit der einzelnen deutschen Staaten".[12] Die Bundesakte basierte auf den territorialen Veränderungen, die auf dem Wiener Kongress beschlossen worden waren.[13] Sie waren letztlich die Rückgängigmachung der napoleonischen Eroberungen. Den Vorsitz in diesem Staatenbund übernahm Österreich. Da der Deutsche Bund nur einen Staatenbund darstellte, hatte er keine zentrale Exekutive. Das einzige Bundesorgan war die Bundesversammlung der bevollmächtigten Gesandten der Mitgliedsstaaten als Zentralgewalt, die später Bundestag genannt wurde; sie tagte als ständiger Kongress in Frankfurt am Main. Auch bestanden keine einheitlichen Regelungen bezüglich Rechtswesen, Wirtschaftswesen, Finanz- oder Verkehrswesen. Allerdings gab es vieles von dem, was die Befürworter einer europäischen Ordnung vorgeschlagen hatten: Die Bundesmitglieder garantierten sich gegenseitig ihren Besitzstand und verpflichteten sich, sowohl ganz Deutschland

10 Foerster 1967, S.260.

11 Diese Idee spielt auch in der Forschung österreichischer Autoren (Geier, Gehlen) bis ins 20. Jahrhundert hinein eine große Rolle – spiegelt sich in ihnen die Idee des Alten Reiches vor 1803 wider? Von Interesse ist auch Stern, Jacques, Von Leibnitz bis Naumann. S.13ff., 30ff.

12 Er trat an die Stelle des 1806 aufgelösten Heiligen Römischen Reiches, daher blieben diejenigen Teile Österreichs und Preußens, die nicht zum Reichsgebiet gehört hatten, ausgeschlossen, während die Könige Großbritanniens (für Hannover), Dänemarks (für Holstein und Lauenburg) und der Niederlande (für Luxemburg und Limburg) als deutsche Reichsfürsten Mitglieder waren.

13 Der Rheinbund wurde aufgelöst, ebenso das Königreich Westfalen. Die napoleonischen Vergrößerungen Badens, Bayerns und Württembergs blieben jedoch bestehen. Auch die inneren Rechtsreformen (in Anlehnung an den Code Civil) blieben unangetastet.

als auch jeden einzelnen Bundesstaat gegen Angriffe in Schutz zu nehmen, und, falls der Bundeskrieg erklärt werden würde, mit dem Gegner keinen Separatfrieden zu schließen. Hauptpunkte waren also die Abwehr revolutionärer (d.h. freiheitlicher) Bestrebungen in den einzelnen Ländern und die militärische Sicherung nach außen. Das Interventionsrecht wurde während der Revolution 1848 von den teilweise geflüchteten Landesherren angerufen. So bat der Großherzog Leopold von Baden, der 1848 nach Frankfurt geflüchtet war, die preußische Regierung um Truppen zur Niederschlagung der Revolution. Diese und Bundestruppen besiegten dann die Revolutionäre im Mai 1849 und verfolgten sie bis an die Schweizer Grenze. In Friedenszeiten war es den Mitgliedern erlaubt, mit fremden Mächten Bündnisse aller Art einzugehen, sofern sie nicht gegen die Sicherheit des Bundes oder einzelner Mitglieder gerichtet waren. Ferner verpflichteten sich die Bundesmitglieder, ihre Streitigkeiten unter keinen Umständen durch Krieg zu lösen, sondern sie der Bundesversammlung vorzulegen.[14] Artikel 13 enthielt das Versprechen der Einrichtung landständischer Verfassungen in den Mitgliedstaaten, das allerdings nicht eingelöst wurde. Darüber hinaus gewährleistete die Bundesakte Freiheit der christlichen Bekenntnisse, sowie einige bürgerliche Rechte wie die Freizügigkeit, die Freiheit, in die Dienste eines anderen Mitgliedstaats zu treten, soweit dieser zustimmte; Regelungen „über die Preßfreiheit“ und den Schutz von Urheberrechten von Autoren und den Schutz von Verlagen wurden angekündigt. Die folgenden Bestimmungen zeigen die Details:

Besondere Bestimmungen der Deutschen Bundesakte

Art. XIII. In allen Bundesstaaten wird eine landständische Verfassung statt finden.

Art. XVI. Die Verschiedenheit der christlichen Religionspartheien kann in den Ländern und Gebieten des deutschen Bundes keinen Unterschied in dem Genusse der bürgerlichen und politischen Rechte begründen.

Art. XVIII. Die verbündeten Fürsten und freien Städte kommen überein, den Unterthanen der deutschen Bundesstaaten folgende Rechte zuzusichern:

b) Die Befugniß

1. des freien Wegziehens aus einem deutschen Bundesstaat in den andern, der erweislich sie zu Unterthanen annehmen will, auch

2. in Civil- und Militärdienste desselben zu treten, beides jedoch nur insofern keine Verbindlichkeit zu Militärdiensten gegen das bisherige Vaterland im Wege stehe; und damit wegen der dermalen verwaltenden Verschiedenheit der gesetzlichen Vorschriften über Militärpflichtigkeit hierunter nicht ein ungleichartiges für einzelne Bundesstaaten nachtheiliges Verhältniß entstehen möge, so a) Grundeigenthum außerhalb des Staates, den sie bewohnen, zu erwerben und zu besitzen, ohne deßhalb in dem fremden Staate mehreren Abgaben und Lasten wird bei der Bundesversammlung die Einführung möglichst gleichförmiger Grundsätze über diesen Gegenstand in Berathung genommen werden.

c) Die Freiheit von aller Nachsteuer (jus detractus, gabella emigrationis), insofern das Vermögen in einen andern deutschen Bundesstaat übergeht und mit diesem nicht besondere Verhältnisse durch Freizügigkeits-Verträge bestehen.

d) Die Bundesversammlung wird sich bei ihrer ersten Zusammenkunft mit Abfassung gleichförmiger Verfügungen über die Preßfreiheit und die Sicherstellung der Rechte der Schriftsteller und Verleger gegen den Nachdruck beschäftigen.

Zur politischen Dimension des Deutschen Bundes ist zu sagen, dass er für Ruhe und Gleichgewicht in den Verhältnissen der einzelnen Bundesmitglieder untereinander sowie im Inneren der Bundesstaaten sorgen sollte. Das erstgenannte Ziel wurde jedoch nicht erreicht, da von Beginn an die Politik des Bundes von der Rivalität der beiden größten deutschen Staaten Preußen und Österreich beherrscht wurde. Österreich war die dominieren Macht und hatte auch den Vorsitz in der Frankfurter Bundesversammlung inne. Der sich verschärfende Dualismus mündete aufgrund des österreichisch-preußischen Konflikts über die Reform des Deutschen Bundes 1866 in den Krieg Preußens gegen Österreich, an dem der Bund schließlich zerbrach. Seine Nachfolge trat im selben Jahr der „kleindeutsche“ Norddeutsche Bund an.

Allerdings „funktionierte“ der Deutsche Bund „im Inneren“ insofern, als die Restriktionen des Deutschen Bundes gegen die revolutionären Bestrebungen im Vormärz 1848 höchst wirksam eingesetzt wurden (Karlsbader Beschlüsse 1819)[15]. Das galt

[14] Vgl. Foerster 1967, S.260.

[15] **Provisorischer Bundesbeschluß** über die in Ansehung der Universitäten zu ergreifenden Maßregeln vom 20. September 1819 (Protokolle der Bundesversammlung 1819, 35. Sitzung, § 220), abgedruckt in Majer, Hunziker, S.267.

§. 1. Es soll bei jeder Universität ein mit zweckmäßigen Instructionen und ausgedehnten Befugnissen versehener, am Orte der Universität residierender, außerordentlicher landesherrlicher Bevollmächtigter, entweder in der Person des bisherigen Curators oder eines andern, von der Regierung dazu tüchtig befundenen Mannes angestellt werden.

§. 2. Die Bundesregierungen verpflichten sich gegeneinander, Universitäts- und andere öffentliche Lehrer, die durch erweisliche Abweichung von ihrer Pflicht, oder Ueberschreitung der Grenzen ihres Berufes, durch Mißbrauch ihres rechtmäßigen Einflusses auf die Gemüther der Jugend, durch Verbreitung verderblicher, der öffentlichen Ordnung und Ruhe feindseliger oder die Grundlagen der bestehenden Staatseinrichtungen untergrabender Lehren, ihre Unfähigkeit zu Verwaltung des ihnen anvertrauten wichtigen Amtes unverkennbar an den Tag gelegt haben, von den Universitäten und sonstigen Lehranstalten zu entfernen, ohne daß ihnen hierbei, so lange der gegenwärtige Beschluß in Wirksamkeit bleibt, und bis über diesen Punct definitive Anordnungen ausgesprochen seyn werden, irgend ein Hinderniß im Wege stehen könne.

Ein auf solche Weise ausgeschlossener Lehrer darf in keinem andern Bundesstaate bei irgend einem öffentlichen Lehr-Institute wieder angestellt werden.

§. 4. Kein Studierender, der durch einen von dem Regierungs-Bevollmächtigten bestätigten oder auf dessen Antrag erfolgten Beschluß eines akademischen Senats von einer Universität verwiesen worden ist, oder der, um einem solchen Beschlusse zu entgehen, sich von der Universität entfernt hat, soll auf einer andern Universität zugelassen, auch überhaupt kein Studierender ohne ein befriedigendes Zeugniß seines Wohlverhaltens auf der von ihm verlassenen Universität von irgend einer andern Universität aufgenommen werden.

auch für die Pressezensur[16] und die Untersuchungen „revolutionärer Umtriebe".[17]

Es ist nun eine Ironie der Geschichte, dass die Strömungen revolutionärer oder konstitutioneller Art, gegen die sich der Deutsche Bund richtete, ebenfalls wie dieser (mittel-)europäische Komponenten aufwiesen. Die vorkonstitutionellen Bewegungen seit den 1830ern und die Revolutionen 1848 in Wien und anderen deutschen Städten akzeptierten Österreich als selbstverständlichen Teil eines künftigen vereinigten Deutschlands, jedoch nur hinsichtlich der Kronländer. Die Stimmung in der Frankfurter Paulskirche sowie im konstitutionierenden Reichstag in Wien (Mai 1848) war „alldeutsch", die Befürworter einer Einbeziehung Österreichs in das neue Reich waren in der Überzahl. Die Farben der deutschen Burschenschaften Schwarz-rot-gold aus den Befreiungskriegen 1815 wurden zum Symbol[18] der neuen nationalen Identität, ihr Erscheinen in der Öffentlichkeit weckte immer wieder neue Begeisterung, wie das unten abgedruckte Gedicht zeigt.[19] Allerdings sollten die nichtdeutschen Gebiete Österreichs (d.h. die polnischen, ungarischen und italienischen Gebiete) nicht Teil des neuen Reiches werden, sondern nur ein Österreich mit seinen deutschsprachigen Gebieten (Österreich, Böhmen und Mähren, Kraina, Triest, Tirol bis südlich Trient)[20]. Im Verfassungsentwurf von Frankfurt hieß es dazu: „Kein Teil des Deutschen Reiches darf mit nichtdeutschen Ländern zu einem Staat vereinigt sein".[21]

Die Paulskirchenverfassung von 28. März 1849 baute dann für Österreich goldene Brücken und schlug in §§ 1 und 2 einen Kompromiss vor: Danach sollte bei Personalunion zwischen Staatsoberhaupt eines deutschen und nichtdeutschen Landes das deutsche Land (gemeint war Deutsch-Österreich) eine eigene Verfassung und Regierung haben. Nach § 3 musste das Staatsoberhaupt eines deutschen Landes im deutschen Land residieren, oder einen Regenten, der nur Deutscher sein durfte, berufen (d.h. der Kaiser von Österreich, der in Personalunion König von Ungarn war, sollte in Wien residieren). Mit diesen Klauseln sollte Österreich in das künftige Deutsche Reich eingebunden werden.

An dieser Klausel entzündete sich der Konflikt zwischen der großdeutschen und kleindeutschen Partei (Deutschland ohne Österreich), der letztlich zum Siege der kleindeutschen Lösung führte. Der Ministerpräsident der Habsburgischen Monarchie, Fürst Felix von Schwarzenberg, wollte Österreich als Ganzes in das Deutsche Reich führen, d.h. als dominierende Bundesmacht einbringen (Kremsier Erklärung). Dies war für die Paulskirche völlig unannehmbar.[22] Die Mehrheit der Deutsch-Österreicher, und wohl auch der neue konstituierende Reichstag in Wien, wäre wohl, wie es die Paulskirche verlangte, zu einem Verzicht auf diese nichtdeutschen Gebiete um den Preis eines gesamtdeutschen Zusammenschlusses bereit gewesen, zumal in diesen Gebieten mehr und mehr nationalstaatliche Aufstände alle Kräfte der Habsburger-Monarchie beanspruchten. Der Vorschlag Schwarzenbergs wäre keine bundesstaatliche, sondern eine staatenbündische Lösung gewesen, der Nationalstaatsgedanke, Einheit und Freiheit zu verbinden, hätte preisgegeben werden müssen. Doch die Monarchie hielt stur an ihren nichtdeutschen Besitzungen fest, wie in den Worten von Kaiser Franz-Joseph I., der nach der Revolution in Wien den Thron bestiegen hatte, zum Ausdruck kommt: Österreich will alle Länder „zu einem großen Staatskörper vereinigen" (Dezember 1848). Am 7. März 1849 wurde der nach allgemeinem Wahlrecht gewählte konstituierende Reichstag vom Mai 1848 aufgelöst und eine Verfassung oktroyiert (die viele Errungenschaften der Revolution zunichte machte), 1851 jedoch wieder aufgehoben. Es dauerte noch über zehn Jahre, bis in Österreich eine Reformgesetzgebung eingeführt wurde, um die Forderungen der konstitutionellen Bewegung in den Kronländern zu befriedigen (Staatsgrundgesetz 1867)[23]. Im gleichen Jahr wurden auch Gesetze zum Schutz des Versammlungs- und der Vereinsrechts erlassen.[24] Schon am 4. März 1849 hatte der Kaiser durch Oktroi ein Grundrechtspatent eingeführt, das verschiedene Grundrechtsgewährleistungen versprochen hatte.[25] Allen Bestimmungen fehlte jedoch der Rechtsschutz durch Gerichte

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[16] **Bundes-Preßgesetz:** („Provisorische Bestimmungen hinsichtlich der Freiheit der Presse") vom 20. September 1819 (Protokolle der Bundesversammlung 1819, 35. Sitzung, § 220)
§. 1. So lange als der gegenwärtige Beschluß in Kraft bleiben wird, dürfen Schriften, die in der Form täglicher Blätter oder heftweise erscheinen, deßgleichen solche, die nicht über 20 Bogen im Druck stark sind, in keinem deutschen Bundesstaate ohne Vorwissen und vorgängige Genehmhaltung der Landesbehörden zum Druck befördert werden.

[17] **Bundes-Untersuchungsgesetz:** („Beschluß betreffend die Bestellung einer Centralbehörde zur nähern Untersuchung der in mehreren Bundesstaaten entdeckten revolutionären Umtriebe") vom 20. September 1819 (Protokolle der Bundesversammlung 1819, 35. Sitzung, 5 220)
Art. 1. Innerhalb vierzehn Tagen, von der Fassung gegenwärtigen Beschlusses an zu rechnen, versammelt sich in der Stadt und Bundesfestung Mainz eine aus sieben Mitgliedern, mit Einschluß eines Vorsitzenden, zusammengesetzte, außerordentliche, von dem Bunde ausgehende Central-Untersuchungs-Commission.
Art. 2. Der Zweck dieser Commission ist gemeinschaftliche, möglichst gründliche und umfassende Untersuchung und Feststellung des Thatbestandes, des Ursprungs und der mannigfachen Verzweigungen der gegen die bestehende Verfassung und innere Ruhe, sowohl des ganzen Bundes, als einzelner Bundesstaaten, gerichteten revolutionären Umtriebe und demagogischen Verbindungen, von welchen nähere oder entferntere Indicien bereits vorliegen, oder sich in dem Laufe der Untersuchung ergeben möchten.

[18] Zum Ganzen ausführlich: Pilz, S.112. (Der Autor schreibt aus der Sicht der studentischen Burschenschaftler). Diese Rarität befindet sich in Besitz von Dr. W. Höhne, Karlsruhe.

[19] Vgl. Das bei Pilz abgedruckte Gedicht der 1848er Revolution, 1. Strophe:
„So hebt die schwarz-rot-gold'en Fahnen – und lasst sie durch die Lande weh'n; – so gebt den Fahnen eurer Ahnen – ein glorreich neues Aufersteh'n; (...)" (S.108).

[20] Für Preußen galt Entsprechendes: Ost- und Westpreußen sowie Posen gehörten nicht zum Deutschen Bund.

[21] Zit. nach Pilz, S.116.

[22] Pilz, S.116f.

[23] Zit. nach Majer; Hunziger, Verfassungsstrukturen 2009, S.397. Dieses Gesetz wird auch als sog. Dezemberverfassung bezeichnet. Es gewährleistete allgemeine Rechte der Staatsbürger „für die im Reichsrathe vertretenen Staaten und Länder".

[24] Zit. nach Majer; Hunziger, S.395ff. Siehe auch das Gesetz 1868 über die interkonfessionellen Rechte der Staatsbürger, Zit. nach Majer; Hunziger, a.a.O.

[25] Majer, Hunziger, S.395.

und entsprechende Beschwerderechte der Bürger, wie dies die Paulskirchenverfassung vorgesehen hatte. Die Bürger waren auf den guten Willen der Behörden angewiesen, im negativen Falle gab es kein Rechtsmittel. Dies galt auch für verschiedene Freiheitsgewährleistungen, die bereits 1862 eingeführt wurden.[26]

Exkurs: Weitere europäische Ideen im 19. Jahrhundert

Gewissermaßen im Gegensatz zu den Bestrebungen der europäischen Mächte zur Sicherheit und Ordnung in Europa verliefen die Ideen der Freiheitskämpfer der ersten Hälfte des 19. Jahrhunderts, zu deren Unterdrückung ja der Deutsche Bund und die Heilige Allianz ins Leben gerufen worden waren. In diesen Freiheitskämpfen[27] wurden als Folge der Revolutionen zahlreiche europäische Projekte diskutiert, jedoch immer im Zusammenhang mit nationalen Freiheitsbestrebungen. Begeisterung und Beglückung der Menschheit waren ihre Merkmale. Diesen Ideen, schwärmerisch und überschwänglich, kommt jedoch kein eigenständiger Wert zu.[28] [29]

So brachte z.B. auf dem Hambacher Fest der Publizist Wirth (1798–1848) ein dreifaches Hoch auf das „konföderierte republikanische Europa" aus, der Student Brüggemann schwärmte von den „Freistaaten Europas". Zahlreiche Vereinigungen waren aktiv, die sich für Griechenland oder die Polenfrage begeisterten, die in ihrer politischen Haltung liberal, manchmal auch demokratisch waren und im Sinne Victor Hugos an ein brüderliches Europa glaubten. Metternich und der Deutsche Bund pflegten ein Klein- d.h. ein Mitteleuropa. Friedrich Naumann (Theologe und liberaler Politiker) hat dieses Konzept dann im Ersten Weltkrieg in seinem Buch *Mitteleuropa* (1915) näher ausgeführt und Deutschland zum Mittelpunkt Mitteleuropas gemacht.

Auch im Zeitalter des Imperialismus blieb das Thema Vereinigtes Europa aktuell. Vor allem spielten die Friedensbewegungen eine große Rolle. Zu nennen sind hier Bertha von Suttner (1843–1914) und Annette Kolb (1870–1967), die mit der *Internationalen Rundschau* europäischen Intellektuellen, die sich für ein kulturell vereinigtes und friedliches Europa einsetzten, ein Forum zur Verfügung stellten.

Die europäischen Ideen lebten auch in den Bewegungen des Pazifismus in Frankreich weiter. So forderte die Zeitschrift *Les états unies de l'Europe* der 1867 in Paris gegründeten *Ligue internationale de la paix et de la liberté*, ebenfalls die Vereinigten Staaten von Europa, da die Föderation der Völker auf dem Hintergrund des deutsch-französischen Krieges doch nicht zu verwirklichen sei.[30]

Allerdings nahmen diese Überlegungen, wie z.B. die pazifistischen Entwürfe (Victor Hugo) eine eher kulturelle Wendung,[31] nachdem eine politische Einigung nicht möglich erschien. Man berief sich auf die griechisch-römische Kultur, auf das Christentum, auf das römische Recht, ferner auf das überstaatliche Kaisertum, auf die lateinische Sprache – all dies seien Elemente einer europäischen (Kultur-)Gemeinschaft.

Auch der seit Ende des 19. Jahrhunderts wachsende Panslawismus entwickelte Pläne für ein künftiges Europa, die aber ebenfalls von den politischen Machtverhältnissen der damaligen Zeit weit entfernt waren.[32]

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[26] Gesetz von 1862 zum Schutze der persönlichen Freiheit; Gesetz von 1862 zum Schutze des Hausrechts. Alle Bestimmungen in: Österreichisches Recht, Textausgabe, 4.Aufl. Wien 1950, zit. nach Majer; Hunziger, S.395ff.

[27] Z.B. Junges Italien (1831), Junges Polen, Junges Deutschland (Börne, Heine), Junges Europa (1834 in Bern), junge Schweiz (1835), junges Irland (1842) junges Österreich (1848), junges Russland (1843), näher Geier, S.116.

[28] Näher: Borodziej, Wladzimierz u.a. (Hg.) Option Europa. Deutsche, polnische und ungarische Europapläne des 19. und 20. Jh. 3 Bde, Göttingen 2005.

[29] Die europäischen Ideen dieser Bewegungen waren höchst idealistisch, begleitet von Menschheitsbeglückungsideen; so heißt es z.B. in den Instruktionen Mazzinis, dem politischen Sprecher des Jungen Europa:
„Das Junge Europa ist die Verbindung derer, welche, an eine Zukunft der Freiheit, der Gleichheit und der Verbrüderung aller Menschen glaubend, ihr Denken und Handeln der Verwirklichung dieser Zukunft widmen wollen … Glaubensartikel. Ein einziger Gott. Ein einziger Herrscher: sein Gesetz. Ein einziger Ausleger dieses Gesetzes: die Menschheit … Nach dem Gesetze Gottes und der Menschheit sind alle Völker frei, alle Völker gleich, alle Völker Brüder … Jedes Volk hat eine besondere Bestimmung, welche zur Erreichung der allgemeinen menschlichen Bestimmung beitragt. Diese Bestimmung bildet seine Nationalität, diese ist heilig … Die Verbindung des Jungen Europa stellt in ihrer definitiven Organisation die europäische Zukunft dar … [diese] wird die zwei Grundideen der neuen Epoche: Vaterland und Menschheit, vereinigen … Alle Völker, welche sich zu verjüngen streben, werden sich als National-Verbindungen konstituieren, welche alle diejenigen umfassen, die, an eine Zukunft der Freiheit, Gleichheit und Brüderschaft für alle Menschen glaubend, ihr Denken und Handeln der Verwirklichung dieser Zukunft weihen wollen …". Eine Konzeption, die wie ein Aufruf zu einer allgemeinen Weltfriedensordnung betrachtet werden muss, die erst hundert Jahre später in Gestalt der Vereinten Nationen Wirklichkeit geworden ist (Anm. d.V.). Es folgen der Aufruf zur Bewaffnung und zum Kampf für die heilige Sache des Rechtes und des Jungen Europa sowie eine Schwurformel. Näher Geier, S.115ff.

[30] Geier, S.119.

[31] So prophezeite Victor Hugo auf dem internationalen Friedenskongress in Paris: „Der Tag wird kommen, an dem ein Krieg zwischen Paris und London, zwischen Petersburg und Berlin, zwischen Wien und Turin ebenso absurd und unmöglich erscheinen wird, wie heute bereits ein Krieg zwischen Rouen und Amiens, zwischen Boston und Philadelphia absurd und unmöglich ist. Der Tag wird kommen, an dem ihr Franzosen, Russen, Italiener, Engländer, Deutschen, ihr Nationen des Kontinents euch zu einer höheren Einheit, einer größeren Gemeinschaft zusammenschließt, ohne eure besondere Eigenart und eure ruhmvolle Individualität aufgeben zu müssen … Der Tag wird kommen, an dem die Kugeln und Bomben ersetzt werden von den Abstimmungen der Völker, von dem allgemeinen Wahlrecht, von dem ehrwürdigen Schiedsgericht eines großen, souveränen Senats, der für Europa das sein wird, was heute das Parlament für England, die Nationalversammlung für Deutschland, die gesetzgebende Nationalversammlung für Frankreich ist … Der Tag wird kommen, an dem sich die beiden großen Ländergruppen, die Vereinigten Staaten von Amerika und die Vereinigten Staaten von Europa die Hände über die Meere reichen werden, ihre Waren, ihren Handel, ihre Industrie, ihre Künste, ihre Genies austauschen, die Erde urbar machen, die Wildnis kolonisieren … [um] Wohlergehen fur alle zu erzielen! Das Ziel der … Politik wird künftig sein: alle Nationalitäten anzuerkennen, die historische Einheit der Völker wiederherzustellen und diese Einheit durch den Frieden mit der Zivilisation zu verbinden, die Gruppe der zivilisierten Völker unaufhörlich zu vergrößern, den noch barbarischen Völkern ein gutes Beispiel zu geben, Kriege durch Schiedsgerichte zu ersetzen … England hat in unserem alten Europa den ersten Schritt getan und durch sein säkulares Beispiel den anderen Völkern gesagt: Ihr seid frei! Frankreich hat den zweiten Schritt getan und den Völkern gesagt: Ihr seid souverän! Machen wir nun alle zusammen – Frankreich, England, Belgien, Deutschland, Italien, Europa, Amerika – den dritten Schritt und sagen wir den Völkern: Ihr seid Brüder!" (Näher Schmale, S.100.)

[32] Näher Geier, S. 128 m.N.

Baden vor Einführung des Code civil*
(Baden before the Implementation of the Code civil)

*Thomas Gergen***

Abstract

The Civil Code (Napoléonic Code), a codification of natural law (Naturrecht) of 1804, has been introduced in the Grand-Duchy of Baden in 1810 with many additional rules. Our article aims to study the pre-history of the so-called "Badisches Landrecht".

Key words: *Badisches Landrecht of 1810; Civil Code/Napoléonic Code (CC) of 1804; reforms of Grand-duke Karl Friedrich (1728–1811); Johann Michael Saltzer (1710–1760); Johann Georg Schlosser (1739–1799); Johann Niklas Friedrich Brauer (1754–1813).*

Baden erlebte in den Jahren 1803 bis 1815 einen tief greifenden Wandel, der schon in den vorangehenden Jahrzehnten durch die Reformpolitik des Markgrafen und späteren Großherzogs Karl Friedrich (1728–1811) vorbereitet worden war. Einige wichtige Ereignisse säumen den Weg vom Reichsfürstentum hin zu einer modernen aufgeklärten Monarchie; diese ›Wendepunkte‹ sind einmal der Reichsdeputationshauptschluss von 1803 sowie das Ende des Heiligen Römischen Reiches im Jahre 1806.[1] In dieser Zeit wuchs Badens Einwohnerzahl um das Siebenfache, seine Fläche um das Neunfache. Ende des 18. Jahrhunderts besaß das Großherzogtum insgesamt 1.700.000 Einwohner und hatte das Siebenfache an Einwohnern als vorher, d.h. wenn man die beiden Grafschaften Baden-Baden und Baden-Durlach zugrundelegt.[2]

Obwohl die napoleonischen Eroberungskriege und die Gründung des Rheinbundes das Verfassungsgefüge des Alten Reiches aufgelöst hatten, schufen sie eine neue Abhängigkeit zu Frankreich unter der Führung des Kaisers. Gleichwohl war Raum geschaffen für nachhaltige Reformen in Staat und Gesellschaft, die sich nun verstärkt an das französische Vorbild anlehnten.

1. Die Zersplitterung Badens und die Breisgau-Konferenz von 1806

Am 25. Februar 1803 traf der letzte Reichstag in Regensburg eine wichtige Entscheidung: Dieser « Reichsdeputationshauptschluss » verhandelte über die Entschädigung der Souveräne, die Land links des Rheines an Frankreich verloren hatten. Außerdem ging es um Fragen der Abschaffung der geistlichen Fürstentümer und die Säkularisierung, die Mediatisierung der Reichsstädte sowie die Schaffung der Herzogtümer Baden, Würtemberg, Hessen, Kassel und Salzburg. Gemäß § 5 des « Reichsdeputationshauptschlusses » musste Baden an Frankreich Territorien links des Rheines abtreten. Im Gegenzug gewann Baden dergestalt, als es sich der Reste der Bistümer Konstanz, Straßburg,

* Der Verfasser widmet diesen bescheidenen Beitrag zum Badischen Landrecht der verehrten Frau Universitätsprofessorin em. Dr. Diemuth Majer, Karlsruhe. Es handelt sich um den verschriftlichten Vortrag, den er anlässlich der Feier ihres 75. Geburtstag im Ettlinger 'Erbprinz' am 6. Juli 2013 hielt. Das Hauptthema war „Das badische Landrecht in der deutschen Rechtsgeschichte". Es sprach hernach zur Bedeutung des Badischen Landrechts für die deutsche Rechtsgeschichte Richter am BGH Dr. Detlev Fischer, zugleich Erster Vorsitzender des Rechtshistorischen Museums Karlsruhe. Claus Dieter Hanauer thematisierte „300 Jahre Musik in Karlsruhe und Baden". Prof. Robert Mürb vom Vorstand der Landesvereinigung 'Baden in Europa' hatte das Thema gewählt „Baden im Strudel der Jubiläen: Rückbesinnung oder Aktionismus?". Die Feier schloss mit dem 'Badner Lied'. Der Kurt-Linster-Stiftung, Wallerfangen-Oberlimberg, sei an dieser Stelle aufrichtig gedankt.

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1 Fehrenbach, Elisabeth: Vom Ancien Régime zum Wiener Kongress. 4. Aufl. München: Oldenbourg 2001 (Oldenbourg Grundriss der Geschichte 12); Wunder, Bernd: Die Entstehung des modernen Staates in Baden und Württemberg. In: Württembergisches Landesmuseum Stuttgart (Hrsg.): Baden und Württemberg im Zeitalter Napoleons. Bd. II. Stuttgart: Ed. Cantz 1987, S. 103–120; Ullmann, Hans-Peter: Baden 1800–1830. In: Schwarzmaier, Hansmartin / Schaab Meinrad (Hg.): Handbuch der Baden-Württembergischen Geschichte. Bd. III: Vom Ende des Reichs bis zum Ende der Monarchien. Stuttgart: Klett-Cotta 1992, S. 25–570.

2 Die Territorien links des Rheins und das Herzogtum Berg hatten sogar insgesamt 6.700.000 Einwohner; Becker, Hans Jürgen: Rheinisches Recht, in: Handwörterbuch zur Deutschen Rechtsgeschichte HRG IV, Berlin, 1990, Sp. 1021–1026 sowie Becker: Das Rheinische Recht und seine Bedeutung für die Rechtsentwicklung in Deutschland im 19. Jahrhundert, in: Juristische Schulung (JuS) 5 (1985), S. 339-345, insbes. S. 338.

Basel und von sieben Kaiserstädten sowie Teilen der Pfalz (Kurpfalz) um Mannheim und Heidelberg bemächtigte.[3]

Bei der Breisgauer Konferenz vom 29. Januar bis 2. Mai 1806 trat eine wichtige Person hervor: Johann Niklas Friedrich Brauer (1754–1813).[4] Er war nach dem Studium des Rechts in Gießen und Göttingen in den Dienst des Markgrafen Karl Friedrich von Baden eingetreten. Schon 1790 war er Hofratsdirektor mit Sitz und Stimme im Geheimratskollegium. 1808 wurde Brauer zum Mitglied des Staatsrats und zum Ministerialdirektor im Ministerium der Justiz ernannt. Bereits vorher hatte Brauer die Gesetzgebung des Großherzogtums maßgeblich beeinflusst (Organisationsedikte von 1803 und Konstitutionsedikte von 1807 an). Als Mitglied des Hohen Rates von Baden schlug Brauer vor, ein badisches Zivilgesetzbuch in Anlehnung an den französischen Code civil einzuführen.[5]

Damit sollte der Zerstreutheit des badischen Rechts entgegengewirkt werden. An einigen Orten war nämlich überhaupt nicht klar, welches Recht genau anzuwenden war.[6]

2. Die Rechtslandschaft vor Einführung des Code civil

«eine echte Musterkarte der verflossenen Reichsherrlichkeit» diagnostizierte Willy Andreas 100 Jahre nach Einführung des Badischen Landrechts, also im Jahre 1910.[7] Gemeines deutsches Pandektenrecht, Naturrecht, partikulare Landrechte, Verordnungen, Statuten und Offnungen, altüberkommene Rechte und Privilegien, Rechtsgewohnheiten und Gerichtsgebräuche wechselten sich auf dieser Karte ab, überschnitten oder ergänzten sich, ja widersprachen sich mitunter.

Ende des 18. Jahrhunderts existierten in den badischen Stammlanden vor allem

- das baden-badische Landrecht von 1588, welches auf dem Württembergischen Landrecht von 1555 beruhte und unter Markgraf Philipp II. verfasst, aber erst 1805 gedruckt erschien in der «Sammlung der Landrechte, Landes-Ordnungen der Markgrafschaft Baden-Baden; wie auch der Statuten der neuacquirierten Länder von Offenburg, Gengenbach und Zell, der Lahrer und Mahlberger Erbordnung und dem in den sämtlichen Badischen Kurlanden gültigen Frankfurter Wechselrechte &»[8];
- das baden-durlachische Landrecht von 1654, das mit dem Kurpfälzer Landrecht von 1610 weitgehend übereinstimmte. Dieses Landrecht war bereits 1622 zu Durlach im Druck erschienen, Neudrucke folgten erst 1710 und 1773. Zivilrechtliche Bestimmungen enthielten ebenfalls die Landesordnungen für die Herrschaft Badenweiler von 1517 (erneuert 1559), die Landesordnung für die Herrschaften Sausenberg und Rötteln von 1517 sowie die «Landsordnung der Fürstenthummer und Landen der Marggraffschafften Baden und Hachberg, Landgraffschafft Sausenberg, und Herrschaft Rötteln, Badenweiler, Lahr und Mahlberg &», erschienen in Durlach im Jahre 1715.

Zur allmählichen Angleichung der beiden Landrechte von Baden-Baden und Durlach wurden seit der Vereinigung der beiden Markgrafschaften (1771) zahlreiche Verordnungen erlassen. In den neu gewonnenen Gebieten herrschten insbesondere

- das Kurpfälzische Landrecht von 1610 in der Fassung «Churfürstlicher Pfaltz bey Rhein ernewert und verbessertes Landrecht», gedruckt in Heidelberg 1611, nochmals 1657 und 1700 abgedruckt;
- das Württembergische Landrecht in der Druckfassung von 1610: «Des Herzogthumbs Württemberg Ernewert Gemein Landtrecht», zuletzt gedruckt in Stuttgart 1743;
- Vorderösterreichische Privatrechtssammlungen von 1792-94[9] sowie
- Speyerische und Würzburgische Landesverordnungen aus den Jahren 1788, 1776 und 1806;
- die Solmser Gerichts- und Landsordnung von 1571, neu gedruckt in Frankfurt a.M. 1716;
- Speyerische Gesetze und Landesverordnungen: «Sammlung der hochfürstlich Speierischen Gesetze und Landesverordnungen» (Vier Teile, Bruchsal 1788);
- das Mainzer Landrecht von 1755: «Churfürstlich-Mayntzisches Landrecht und Ordnungen für sämtliche Chur-Mayntzische Landen, ausschließlich deren Erffurtischen und Eichsfeldischen, sodann deren gemeinherrschaftlichen Orthen» (Mainz 1755);
- die Würzburger Landgerichtsordnung des Herzogtums Franken von 1618: «Des hochlöblichen Stiffts wirtzburgs und

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3 Schroeder, Klaus-Peter : 'Aut Caesar, aut nihil' - Der Heidelberger Rechtsprofessor Karl Salomo Zachariae von Lingenthal (1769–1843), Festschrift Erik Jayme, Bd. 2, München 2004, S. 1735–1750, insbes. S. 1736.

4 Würtz, Christian: Johann Niklas Friedrich Brauer (1754–1813). Badischer Reformer in napoleonischer Zeit. Stuttgart: Kohlhammer 2005; Schubert, Werner: Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozessrecht. Köln, Wien: Böhlau 1977 (Forschungen zur Neueren Privatrechtsgeschichte 24), S. 323f.; Kroener, Bernhard R.: Johann Nikolaus Friedrich Brauer (1754–1813). In: Jeserich, Kurt G.A. (Hg.): Persönlichkeiten der Verwaltung. Biographien zur Deutschen Verwaltungsgeschichte 1648–1945. Stuttgart: Kohlhammer 1991, S. 61–94 sowie Müller-Wirth, Christof / Wagner, Christina (Hrsg.): Code Napoléon – Badisches Landrecht. Wegbereiter Deutscher Rechtsgeschichte. Ausstellungskatalog. Heidelberg: Müller 1997, S. 74f.; Sturm, Fritz: 200 Jahre Badisches Landrecht, Karlsruhe 2011 (Heft 23 Schriftenreihe des Rechtshistorischen Museums Karlsruhe).

5 Kroener, S. 61-94.

6 Behagel, Wilhelm : Das Badische Bürgerliche Recht und der Code Napoléon, 2. Aufl., Freiburg/Br. 1875/76, S. 11-12.

7 Willy, Andreas: Die Einführung des Code Napoléon in Baden, in: ZRG GA 31 (1910), S. 184-185.

8 2 Bände, Karlsruhe, 1805/6, zitiert bei Julius Federer, Beiträge zur Geschichte des Badischen Landrechts, Karlsruhe 1948, S. 85. Zu Federer: Hollerbach, Alexander: Julius Federer – Rechtshistoriker und Verfassungsrichter, Karlsruhe 2007 (Heft 13 Schriftenreihe des Rechtshistorischen Museums Karlsruhe).

9 Die „Systematisch-chronologische Sammlung aller jener Gesetze und Verordnungen, die von ältesten Zeiten her bis auf 1792 für die vorderösterreichischen Lande erlassen worden sind und itzt noch bestehen" war allein für Vorderösterreich bestimmt. Herausgegeben wurde sie von Joseph Petzek, Freiburg i.Br. 1792–1796 in 9 Bänden. Petzek hat in seinen „Grundsätzen des vorderösterreichischen Privatrechts" (Freiburg i.Br. 1792–1794, 3 Bände), das „in Tausenden zerstreuter allerhöchster Verordnungen" enthaltene vorderösterreichische Privatrecht gesammelt und in drei Büchern vom Recht der Personen, der Sachen und der Klagen systematisch geordnet. Siehe dazu Federer, S. 86.

herzogthumbs zue Frankhen Kayserlichen Landgerichts-Ordnung» von 1570, revidiert 1580 und 1618 sowie die «Sammlung der Hochst. Würzburger Landesverordnungen» (Würzburg 1776 und 1801, Nachtrag 1802).

- Daneben galten mehrere Stadtrechte und sonstige lokale Rechtsordnungen[10], die oftmals lediglich in Handschriften niedergelegt oder sogar nur mündlich überliefert waren. Die «Nüwe Stattrechten und Statuten der loblichen Statt Fryburg im Pryßgow gelegen» von Ulrich Zasius von 1520 hatten seit dem 13. September 1784 nur noch subsidiäre Geltung.

Baden hatte damals eine Viel-, ja unüberschaubare Unzahl von Rechtsordnungen, die auch materiell gesehen rückständig waren und in Gerichtsprozessen Unsicherheit bei der Rechtsanwendung erzeugten. So urteilten die bischöflichen Beamten in der zum Hochstift Konstanz gehörigen Herrschaft Homburg in erster Instanz nach gemeinem Recht, die Appellation beurteilte das Landgericht in Hegau und Madach aufgrund der österreichischen Normen.[11]

Reformen waren also nötig und ließen nicht sehr lange auf sich warten.

3. Reformpolitik des jungen Großherzogtums Baden : Karl Friedrich und die Juristen Saltzer, Schlosser und schließlich Brauer

In den Jahren 1803–1815 erlebte Baden eine radikale Veränderung infolge der Reformpolitik von Großherzog Karl Friedrich (1728–1811).[12] Die Organisations- und Verfassungsedikte der Jahre 1803 und 1807 legten den Akzent auf diese Reformen, bis 1809 Sigismund von Reitzenstein begann, einen zentral und straff geführten Badischen Staat einzuführen.

Die Gründung des Rheinbundes bedeutete das Aus für die Zugehörigkeit Badens zu den Strukturen des Alten Reiches. Trotz der Zugehörigkeit zum napoleonischen Frankreich ermöglichte dieser Wandel einen großen Freiraum für die Einführung politischer wie administrativer Reformen. Der Code civil kam gerade recht, um auf zivilrechtlichem Gebiet die angefangenen Reformen voranzubringen,[13] sodass Brauer in Freiburg 1806 mit guten Gründen die Einführung eines neuen Badischen Landrechts, das auf dem Code basierte, vorschlagen konnte. Dieser Vorschlag hatte aber wiederum seine Geschichte, denn Brauer war sicherlich sehr begabt, hatte aber auch gute Vorarbeiten zu Kodifikationen in Baden als Vorlagen.

Markgraf Karl Friedrich hatte nämlich bereits Vorschläge zur Neuherausgabe einer Gesetzessammlung angefordert. Der damalige Oberamtsverweser **Johann Michael Saltzer** (1710–1760) erhielt wohl unter dem Eindruck des in den Jahren 1749-51 in Preußen veröffentlichten, aber noch unvollendeten «Projekts des Corpus juris Fridericiani» Samuel von Coccejis am 28. Februar 1754 den Auftrag, einen Entwurf zur Revision und Ergänzung des Landrechts und der Landesordnung auszuarbeiten. Saltzer riet dazu, die markgräflichen «Landrechte und Ordnungen nach denen reinesten Quellen der heutigen Zeiten abzuändern, von denen Schlacken der verdorbenen Juristerey zu reinigen, und aus denenselben ein so viel möglich an einander hängendes volständiges System zu machen, welches den huldvollen Willen eines Fürsten in sich fassen solle, mit dem eine Menge Christlicher Unterthanen von ihrem liebreichen Landes Vater nicht sowohl beherrschet, sondern als Kinder zu ihrem Wohlergehen geleitet werden sollen.» Das alte Durlacher Landrecht war nach Auffassung Saltzers überholt und forderte dazu auf, «nach dem Exempel eines Königs in Preußen und anderer Potentaten nicht nur die Proceß Ordnung zu verkürtzen, sondern auch durch deutliche, klare und ungekünstelte Gesetze, die Quellen der Processen zu verstopffen, und der juridischen Chicane zu steuren und Eurer Hochfürstl. Durchl. Interesse und die Geistl.- und Leibl. Wohlfahrt des Landes durch treffliche Einrichtungen und Ordnungen zu beförderen.»

Das Werk kam zwar nie zustande, denn Saltzer starb 1760, doch war das Resultat eine Zusammenfassung des markgräflichen Rechts in der Form eines Rechtslexikons, das die neuernannten Hofräte von Günderode und Brauer in wenigen Wochen im Jahr 1780 zustandebrachten.

Johann Georg Schlosser (1739–1799), Oberamtsverweser in Emmendingen, wurde von Markgraf Karl Friedrich 1790 nach Karlsruhe in den Geheimen Rat berufen, zum Direktor des Hofgerichts ernannt und beauftragt, nach seinen ursprünglichen Plänen, das deutsche bürgerliche Recht ohne Abschaffung des römischen Gesetzbuches (Leipzig 1777), zu verbessern sowie durch wissenschaftliche Vereinfachung und klare Heraushebung der Grundgedanken des römischen Rechts ein Gesetzbuch für Baden zu entwerfen. Schlosser war in Wien 1783 an den gesetzgeberischen Arbeiten der österreichischen Juristen beteiligt. Er wurde auch von Kaiser Joseph II. zu Gesetzesverbesserungsvorschlägen konsultiert – so berichtet Alfred Nicolarius in seiner Schlosser-Biographie. Auch dieses Projekt wurde indes nicht beendet, doch gelangten Schlossers Vorarbeiten -wie die von Saltzer- an Brauer.[14]

4. Welche Kodifikation ist die richtige?

Aber wieso orientierte sich Baden nicht an Preußen oder an Österreich? Das ALR von 1794 war erst 12 Jahre jung und war eine frische Kodifikation, die den badischen Privatrechtsordnun-

[10] Federer, S. 85-87; Becker, Das Rheinische Recht, S. 339. Stadtrechte bestanden etwa in Überlingen (1707), Pfullendorf, Zell am Harmersbach, Gengenbach und Offenburg (1347).

[11] Federer, S. 87.

[12] Wunder, Bernd: Die Entstehung des modernen Staates in Baden und Württemberg, in: Württembergisches Landesmuseum Stuttgart (Hg.), Baden und Württemberg im Zeitalter Napoleons, Bd. 2, Stuttgart, 1987, S. 103-120; Ullmann, Hans-Peter: Baden 1800–1830, in: Handbuch der Baden-Württembergischen Geschichte, Bd. 3 (Vom Ende des Reichs bis zum Ende der Monarchien), Stuttgart, 1992, S. 25ff.

[13] Wadle, Elmar: Vom französischen Recht zum Rheinischen Recht. Recht als Instrument und Indikator politisch-sozialen Wandels, in : Wadle, Elmar (Hg.), Französisches Recht in Deutschland. Acht Beiträge zur Geschichte des 19. Jahrhunderts (Annales Universitatis Saraviensis. Rechts- und Wirtschaftswissenschaftliche Abteilung 132), Köln/Berlin/Bonn/München 2002, S. 19-39.

[14] Federer, S. 88-92.

gen überlegen waren. Außerdem waren die Vorschläge Schlossers für die Bearbeitung des römischen Rechts, die Errichtung der Gesetzeskommission und die Sammlung und Sichtung der Provinzialrechte für die preußische Gesetzgebungsarbeit grundlegend, insbesondere für Carl Gottlieb Svarez, der Schlossers Arbeiten hoch schätzte und ihn vergeblich nach Berlin berufen hatte.[15]

Gewiss glänzte das ALR durch Anschaulichkeits- und Praxisnähe. Indes meinten die badischen Juristen, das ALR sei sprachlich zu unscharf und verteidige immer noch ein Staatsmodell des Alten Reiches. Des Weiteren enthielt das ALR neben Zivilrecht auch Straf- und öffentliches Recht, ja sogar Kirchenrecht; Baden benötigte aber lediglich ein modernes Zivilrecht. Der öffentlich-rechtliche Teil des ALR war keineswegs vereinbar mit den Reformen Badens, welches seinerseits den Verwaltungsreformen Napoléons anhing.

Die andere Option, das ABGB Österreichs trat erst 1811 in Kraft. Brauer wollte aber schnell reagieren und konnte nicht auf das österreichische Gesetzbuch warten. Damit waren auch unterschiedliche Kultur und vor allem Sprache kein Hindernis; die Schnelligkeit, mit der Brauer den Code von 1804 zu übertragen[16] wusste, beweist sicherlich seine exzellenten Sprachkenntnisse, doch konnte er sich auf die Übersetzung des Code civil durch den rheinischen Juristen Heinrich Gottfried Wilhelm Daniels (Köln 1805) stützen. Das französische Recht studierte Brauer anhand der französischen Literatur zum Code civil, und der ersten Auflage von Zachariaes Handbuch des französischen Civilrechts (1808).[17]

Brauer hatte die Rezeption des Code sogar vorgeschlagen, noch ehe Napoléon diese im Dezember 1807 empfehlen konnte. Er war nämlich der Ansicht, dass nur eine rasche Rezeption des französischen Code die Freiheit Badens garantieren konnte, in der Zukunft gewisse Normen zu verändern bzw. zusätzlich einzuführen. Daher entschied Brauer sich für eine Vielzahl an Zusatznormen, die unter Kleinbuchstaben angefügt wurden. Brauer wollte den Code noch verbessern, indem er dessen Lücken zu schließen wusste, etwa auf dem Gebiet des geistigen Eigentums (protection de la propriété intellectuelle) und Teilen des Handelsrechtes (der Code de commerce français datiert von 1807 und befand sich in der Vorbereitungsphase); schließlich musste er die alten badischen Normen mit dem Code harmonisieren, Übergangsregelungen und eine saubere Terminologie bzw. sorgsame Verdeutschung erschaffen. Dazu formulierte Brauer sehr eindrucksvoll: «Fügt man diesem Allem den gerechten Wunsch hinzu, der in jedem Deutschen leben muß, mit den wandelnden Gestalten der Wellen, die so manches unhaltbar gewordene deutsche weggespült haben, doch nicht gar auch seine Volks Eigenheit untergehen zu sehen, sondern für diese an einem Ort das Land zu gewinnen, das ihm auf der andern Seite entzogen wird, so mag dieses genug gesagt seyn, um den Entschluß der Verbannung der römischen Ausdrücke - bis auf wenige, die auch in der gemeinen Volkssprache verbürgert und allbekannt sind - zu rechtfertigen.»[18]

Wie aber einzelne Rechtsinstitute des neuen Badischen Landrechts aussahen, ist bereits vielfach Vortragsgegenstand gewesen, so vor allem das geteilte Eigentum. Art. 544 Cc wurde ergänzt durch Art. 544 a, 544 b und 544 c : Neben der allgemeinen Definition des Eigentums (544 und 544 a) sah Art. 544 b die Grenzen und Lasten vor, die vom Eigentum zu trennen waren. Schließlich definierte Art. 544 c die beiden Formen des geteilten Eigentums[19] : Jemand hat das Nuz-Eigenthum, wenn er infolge einer Erbschaft den Nutzen an einem Grundstück sowie das Recht, ganz darüber zu verfügen. Das *dominium directum* (Grundeigenthum) bezeichnet die Aussicht des Eigentümers, eines Tages neben seinem Eigentum auch noch das Nutzrecht und das Verfügungsrecht darüber zu erhalten.[20]

Anders gewendet ging es Brauer darum, die traditionelle Unterscheidung von dominium directum und dominium utile in das Badische Landrecht einzufügen. Obwohl der allgemeine Eigentumsbegriff in Art. 544 Code civil auch im Landrechtssatz (LRS) 544 des Badischen Landrechtes eingeführt wurde, fügte Brauer im LRS 544 a und den folgenden badische Besonderheiten ein. Des Näheren trennte er einzelne »Gattungen des Genusses« einer Sache vom Eigentum ab; das »Nuz-Eigenthum« (dominium utile) stattete Brauer als Belastung fremden Bodeneigentums (dominium directum) aus (LRS 544 b).[21]

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15 Federer, S. 92.

16 Zu Rezeption und zur juristischen Übersetzung in der Rechtsgeschichte nunmehr Gergen, Thomas: Rezeption, Translation und Examination bei grenzüberschreitenden Rechtsfällen. In: Les Cahiers du droit luxembourgeois 21 (2014), S. 21-59; Gergen: Translation von und durch Normen. Forschungsansätze zur juristischen Übersetzung. In: Pasicrisie luxembourgeoise 4/2014, S. 309-336.

17 Federer, S. 99.

18 Brauer, Erläuterungen, Bd. 1, S. 13 sowie Federer, S. 103-104.

19 L'art. 544 c wörtlich: „Hat jemand und zwar erblich den Genuß einer Liegenschaft nebst dem Recht zu allen Verfügungen über die Sache, welche ihre bessere Geniesbarkeit bezielen, und ein Anderer hat daran nur die Rechts-Erwartung des einstigen Heimfalls des Genusses auf bestimmte Fälle sammt dem Recht zu allen Verfügungen über die Sache, welche ihre Erhaltung im Stand einer unveränderten Geniesbarkeit bezwecken ; so hat keiner ein volles, sondern jeder nur ein *zertheiltes* Eigentum, nemlich der Erstere das Nuzeigenthum und der Andere das Grund-Eigenthum“ ; siehe Brauer, S. 489 f.

20 Wadle, Elmar: Rezeption durch Anpassung: Der Code civil und das Badische Landrecht – Erinnerung an eine Erfolgsgeschichte. In: Zeitschrift für Europäisches Privatrecht 2004, S. 947–960, hier insb. S. 952–953; zur Übersetzungsqualität des Badischen Landrechts: Schubert, Werner: Die ersten deutschen Übersetzungen des Code civil / Code Napoléon (1804–1814). In: Eckert, Jörn / Hattenhauer, Hans (Hrsg.): Sprache – Recht – Geschichte. Rechtshistorisches Kolloquium 5.–9. Juni 1990, Christian-Albrechts-Universität zu Kiel. Heidelberg: Müller 1991, S. 133–168, hier S. 158–162. Nun auch Hattenhauer, Christian / Schroeder, Klaus Peter (Hrsg.), 200 Jahre Badisches Landrecht von 1809/1810, Frankfurt a.M.: Lang 2011 (Rechtshistorische Reihe 415).

21 LRS 544 c definierte »Nuz-Eigenthum« und »Grund-Eigenthum« (Einzelheiten in LRS 577 aa bis 577 ar) wie folgt: »Hat jemand und zwar erblich den Genuß einer Liegenschaft nebst dem Recht zu allen Verfügungen über die Sache, welche ihre bessere Geniesbarkeit bezielen, und ein Anderer hat daran nur die Rechts-Erwartung des einstigen Heimfalls des Genusses auf bestimmte Fälle sammt dem Recht zu allen Verfügungen über die Sache, welche ihre Erhaltung im Stand einer unveränderten Geniesbarkeit bezwecken; so hat keiner ein volles, sondern jeder nur ein zertheiltes Eigenthum, nemlich der Erstere das Nuzeigenthum und der Andere das Grund-Eigenthum.«

Der Code Napoléon strebte einen Staat ohne Stände (un Etat sans états) an, das Hauptresultat der Französischen Revolution, die in Baden glorreiche Erfolge feierte, mehr als in jedem anderen deutschsprachigen Staat. Der freie Bürger, die Gleichheit und der Schutz der Person waren seine Trümpfe, des Weiteren die Vertragsfreiheit. Gewisse konservative Züge des Code wollte Brauer beibehalten, wie vor allem die Familie als wichtige Keimzelle für einen festen Staat, dazu passte der alte Art. 213, der den Gehorsam der Ehefrau gegenüber ihrem Manne vorsah (La femme doit obéissance ŕ son mari.).[22]

Brauer entschied sich letztlich für zahlreiche Zusatznormen, mit denen er zwei Ziele verfolgte: Er wollte dem noch jungen Großherzogtum ein einheitliches Zivilrecht geben, das einfach und zweckmäßig sowie zeitnah eine Vereinheitlichung des Zivilrechts brachte und dabei gleichzeitig die hergebrachten badischen Rechtsinstitute fortführte. Darüber hinaus sollten bestimmte privatrechtliche Materien, die in den französischen Code civil nicht Eingang gefunden hatten, in das Badische Landrecht aufgenommen werden, wozu bekanntlich große Teile des Handelsrechts und die wesentlichen Normen zum Schutz des »Schrift-eigenthums« gehörten.[23]

Vgl. hier Brauer, Johann Nikolaus Friedrich: Erläuterungen über den Code Napoléon und die großherzogthlich Badische bürgerliche Gesetzgebung. Bd. 1. Karlsruhe 1809, S. 489f.; vgl. auch Ogris, Werner: Artikel Dominium (privatrechtlich). In: Erler, Adlabert / Kaufmann, Ekkehard (Hrsg.): Handwörterbuch zur Deutschen Rechtsgeschichte. Bd. 1. Berlin 1971, Sp. 755–757; Gergen, Thomas: Le Code civil des Français, un modčle abandonné en Pays de Bade. In: Revet, Thierry (Hrsg.): Code civil et modčles. Des modčles du Code au Code comme modčle. Paris 2005 (Bibliothčque de l'Institut André Tunc, Université Paris I Panthéon-Sorbonne 6), S. 553–565; Deutsch, Andreas: Badisches Landrecht. In: Cordes, Albrecht / Lück, Heiner / Werkmüller, Dieter (Hrsg.): Handwörterbuch zur Deutschen Rechtsgeschichte, 2. Aufl. Berlin: Erich Schmidt 2005, Sp. 405f.; Sturm, Fritz: Le Code civil du Grand-Duché de Bade. Coexistence du droit commun et du droit français. In: Chiusi, Tiziana J. / Gergen, Thomas / Jung, Heike (Hrsg.): Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadle zum 70. Geburtstag. Berlin: Duncker & Humblot 2008, S. 1147–1162.

[22] Martin, Xavier: Fundamentos políticos del Código Napoleón, in : La Codificación : Raíces y prospectiva, Bd. 1 : El Código Napoleón, Buenos Aires, 2003, S. 157-185 sowie Martin : Fonction paternelle et Code Napoléon, in : Annales historiques de la Révolution Française 305 (1996), S. 465-475; Wadle, Rezeption durch Anpassung : Der Code civil und das Badische Landrecht – Erinnerung an eine Erfolgsgeschichte, in : Zeitschrift für Europäisches Privatrecht (ZEuP) 2004, S. 947-960, hier S. 952-954.

[23] Gergen, Thomas: Badisches Urheberrecht im 19. Jahrhundert: Die Fälle Pestalozzi, Allioli, Schleiermacher, Grillparzer sowie Goethe und Schiller. In: Archiv für Geschichte des Buchwesens (AGB) 66 (2011), S. 109-143, sowie Gergen: Zwischen französischem droit d'auteur und deutscher Privilegientradition: Praxis und Entwicklung des badischen Urheberrechts im 19. Jahrhundert. In: UFITA - Archiv für Urheber- und Medienrecht I/2011, S. 131-158.

Die österreichische Gemeindeselbstverwaltung im Neoabsolutismus (1851 – 1859)
(Municipal Self-Government in Austria 1851 – 1859)

*Sonja Pallauf**

Abstract

The self-government, the basis of municipal constitution, was established in Austria after the revolutionary events of 1848 in the early constitutional movement. The reorganisation of the municipalities based on the principle of municipal autonomy, liberty and democracy. Due to the reimported absolutism in the fifties of the 19th century all municipalities lost their corporate status. The gradual reduction of local administrative autonomy is in the focus of research.

Key words: *Habsburg Empire; Austria; constitutional and administrative law; rural municipality, municipal self-government, development of municipality law; 1851 – 1859.*

I. Einleitung

Ortsgemeinden rangieren im österreichischen Kaiserstaat als unterste Verwaltungseinheiten. Ihre Entstehung verdanken sie der liberalen Bewegung der frühkonstitutionellen Ära des 19. Jahrhunderts.[1] Die Geschichte dieses Jahrhunderts lehrt uns, dass eine Änderung der Staatsverfassung auch immer eine gesetzliche Anpassung auf dem Gebiet der Gemeindeorganisation zur Folge hatte.

Die rechtliche Basis der „freien", also vom Staat unabhängigen, Ortsgemeinden bildeten die frühkonstitutionellen Verfassungen der Jahre 1848 und 1849[2]. Darauf aufbauend schuf Graf Stadion[3] „sein" provisorisches[4] Gemeindegesetz, RGBl. Nr. 170/1849, das die *freie Gemeinde als Grundfeste des freien Staates* etablierte. Mit diesem Gesetz gab er dem österreichischen Kaiserstaat, der bis dahin eine einheitliche Verwaltungsorganisation auf kommunaler Ebene entbehrt hatte, eine zentralistisch konzipierte von der Idee der freien Selbstverwaltung beherrschte Kommunalverfassung.[5]

II. Der allmähliche Abbau der Gemeindefreiheit und die Verfassungsgrundsätze von 1852 (Silvesterpatente)

Die Vorarbeiten zur Aktivierung der territorialen Selbstverwaltung auf der Grundlage des provisorischen Gemeindegesetzes wurden zu Jahresende 1849 mit innenministerieller Weisung vom 29.10.1849[6] vorübergehend sistiert. Dies kann aber noch nicht als Anzeichen eines absolutistischen Wandels gewertet werden, da die neuerrichteten Bezirkshauptmannschaften die Weisung hatten, als eine ihrer ersten Aufgaben die Konstituierung der Ortsgemeinden nach dem provisorischen Gemeindegesetz vorzunehmen.[7]

Im Laufe des Jahres 1850 fanden daher in fast allen Kronländern[8] Gemeindevertretungswahlen auf der Grundlage des provisorischen Gemeindegesetzes statt, die in liberal und konstitutionell gesinnten Kreisen die Hoffnung auf Abhaltung von Landtags- und Reichstagswahlen weckten, welche jedoch nie stattfanden.

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1 Dazu ausführlich in PALLAUF Sonja, *Die Entstehung der Gemeindeselbstverwaltung in Österreich 1848 -1850*, in: Journal on European History of Law, Vol 4/2013, No.2, S. 60- 69.

2 Kaiserliches Manifest v. 25.4.1848, Politische Gesetzessammlung (PGS), Nr. 49 (Pillersdorfsche Verfassung); Kaiserlicher Erlass v. 4.3.1849 (Oktroyierte Märzverfassung), näher dazu PALLAUF, *Entstehung der Gemeindeselbstverwaltung* (wie Anm. 1), S. 63-65.

3 Reichsgraf Franz Stadion (geb. 1806, gest. 1853 in Wien), Jurist; 1841 Statthalter der Küstenlande in Triest; 1847 Statthalter in Gallizien; 1848 – 1849 Innenminister unter der Regierung des Ministerpräsidenten Schwarzenberg; „Schöpfer" einer vollkommen neuen Gemeindeverfassung.

4 Provisorisch wird es genannt, weil es durch ein in der Reichsverfassung vorgesehenes Parlament noch sanktioniert werden sollte.

5 PALLAUF, *Entstehung der Gemeindeselbstverwaltung* (wie Anm. 1), S. 66-68.

6 Siehe Sbg. LGBl. Nr. 91/1850, S. 245. Die Aktenzahl des Ministerialerlasses vom 29.10.1849 wird hier nicht genannt.

7 KLABOUCH Jiri, *Die Gemeindeselbstverwaltung in Österreich 1848 – 1918*, Wien 1968, S.40.

8 Mit Ausnahme von Dalmatien, Galizien und der Bukowina.

Die an der Wende vom Frühkonstitutionalismus zum Neoabsolutismus durchaus zügig durchgeführte Inauguration der Ortsgemeinden wirkte so nachhaltig, dass die meisten der heutigen österreichischen Gemeinden ihre Geburtsstunde in den Jahren 1850 und 1851 hatten!

Bei der Konstituierung der neuen territorialen Verbände musste der faktische Bestand der Pfarrgemeinden mit den dazugehörigen Steuergemeinden[9] gewahrt bleiben. Die Gerichtssprengel spielten nur insofern eine Rolle, als Gemeinden, die zu verschiedenen Bezirksgerichten gehörten, nicht zusammengefügt werden durften.

Die Einführung von Ortsgemeinden war insbesondere auf dem Land von einschneidender Bedeutung, da es zur Zerschlagung der Patrimonialverwaltung in den böhmischen und in fast allen österreichischen Gebieten der Monarchie kam.

Der Aufgabenkreis, der durch das provisorische Gemeindegesetz den neuen, meist an Volkszahl und Vermögen gering ausgestatteten Ortsgemeinden übertragen wurde, war kaum zu bewältigen. Zudem war die Gesetzeslage zu komplex und schien anfangs nicht durchschaubar.[10]

Die Schaffung autonomer Gemeinden und die im Gesetz verankerte Integrierung des Gutsbesitzes in den örtlichen Gemeindeverband brachte für den Adel zweifelsohne Nachteile mit sich, die zu dessen verstärkter Unzufriedenheit führten.

Wenn auch der damalige Präsident des Reichsrates Karl Friedrich von Kübeck[11] nicht unbedingt als Vertreter adeliger Interessen angesehen werden kann, so war es dennoch sein oberstes Ziel, den von Stadion geschaffenen „liberalen Zentralismus" in einen „bürokratischen Zentralismus", welcher den politischen Vorstellungen der feudalen Kräfte im Lande, dem Hof und der Armee eher entsprach, umzuwandeln. Aufgrund dieser sich mehr und mehr durchzusetzenden vom Kaiser forcierten politischen Trendwendung wurde der weitere Fortgang der Vorarbeiten zur erfolgreichen Umsetzung des provisorischen Gemeindegesetzes unterbunden.

Beispielsweise wurde von Anfang an von der Konstituierung autonomer Bezirks- und Kreisgemeinden Abstand genommen, indem diese wegen angeblicher Überlastung der politischen Behörden auf unbestimmte Zeit verschoben wurde. Dies war eine Entscheidung von grundsätzlicher Bedeutung. Sie konnte nämlich zu keinem anderen Ergebnis führen, als dass die Ortsgemeinden vom Beginn an in ihrem autonomen Wirkungskreis nicht den gewählten Organen der höheren Gemeinden, sondern gleich dem übertragenen Wirkungskreis der politischen Behörden unterstellt wurden.

Das wichtigste Prinzip des Gemeindegesetzes von 1849, die Selbstverwaltung als zweites Geleise der öffentlichen Verwaltung neben den staatlichen Behörden und ihre Unabhängigkeit in ihrem natürlichen Wirkungskreis, ist damit noch früher gefallen, als es verwirklicht werden konnte.[12]

Eine strikte Trennung zwischen natürlichem (eigenem) und übertragenem Wirkungskreis war somit nicht mehr gewährleistet. Darüber hinaus erfuhr der natürliche Wirkungskreis der Gemeinde bereits mit Verordnung vom 7. März 1850, RGBl. Nr. 116, eine massive Einschränkung: Darin wurde den politischen Behörden das Recht eingeräumt, durch einseitige Verfügung den Gemeinden die Ausübung der Ortspolizei zu entziehen und dieses Recht an staatliche Organe zu übertragen.

Die fortschreitende Reaktion führte immer mehr zu einer Verdrängung der liberalen Elemente des provisorischen Gemeindegesetzes. Die im Gesetz vorgesehene Wählbarkeit der Gemeindevertreter und die Öffentlichkeit der Sitzungen waren den konservativen Kräften in der Regierung und im Reichsrat, der zum beratenden Organ degradiert wurde, schon lange ein Dorn im Auge.

Mit Kabinettschreiben vom 20. August 1851, RGBl. Nr. 197, wurde die in den Jahren 1850 und teilweise noch 1851 krampfhaft aufrechterhaltenen Fassade der Verfassungsmäßigkeit vom Kaiser erstmals offiziell in Frage gestellt. Als oberstes staatspolitisches Ziel bezeichnete er darin die Schaffung eines monarchischen Einheitsstaates. Mit weiterem Kabinettschreiben, gleichfalls datiert mit 20. August 1851, RGBl. Nr. 196, wurde die prinzipielle Entscheidung gefällt, eine Revision aller nach dem Jahre 1848 herausgegebenen Gesetze, und somit auch des Gemeindegesetzes durchzuführen.[13]

Daraufhin wurde eine aus drei Mitgliedern des Reichsrates und drei Ministern zusammengesetzte Kommission unter Kübecks Vorsitz ins Leben gerufen, die jene vom Kaiser gestellte Aufgabe sofort in Angriff nahm. Auf die kommissionsinternen Beratungen und Auseinandersetzungen wie auch die einzelnen von den Kommissionsmitgliedern verfassten Denkschriften betreffend die Revision des Gemeindegesetzes vor dem Erlass der neuen Verfassung näher einzugehen, erscheint entbehrlich[14]. Denn maßgeblich für die weitere Entwicklung des Gemeinderechts waren ausschließlich die in diesem beratenden Gremium gefällten Beschlüsse, welche Aufnahme in den kaiserlichen Erlass vom 31. Dezember 1851, RGBl. Nr. 4 /1852 (Silvesterpatent) über *die Grundsätze für organische Einrichtungen in den Kronländern des österreichischen Kaiserstaates* fanden.[15]

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[9] = Katastralgemeinden.

[10] Ausführlich PALLAUF Sonja, *Salzburgs Landgemeinden auf dem Weg in die Eigenständigkeit 1848–1867*, in: Salzburg. Geschichte & Politik. Mitteilungen der Dr. Hans Lechner Forschungsgesellschaft, S. 23 -25 u. S. 100-103.

[11] Karl Friedrich Freiherr von Kübeck von Kübau (geb. 1780 in Iglau/Mähren, gest. 1855 in Hadersdorf/Niederösterreich), 1850 Ernennung zum Präsidenten des neuerrichteten ständigen Reichsrates, Berater Kaiser Franz Josephs I. bei Einführung des Neoabsolutismus.

[12] KLABOUCH, *Die Gemeindeselbstverwaltung* (wie Anm. 2), S. 42.

[13] Näher FRIEDJUNG Heinrich, *Österreich von 1848- 1860*, 1. Bd, Stuttgart 1908, S. 473 ff u. SCHLITTER, Hanns *Versäumte Gelegenheiten. Die oktroyierte Verfassung vom 4. März 1849, Ein Beitrag zu ihrer Geschichte*, Zürich 1920, S. 67 ff.

[14] Dazu FRIEDJUNG Paula, *Die Geschichte der Gemeindegesetzgebung von 1849–1859 (Geisteswissenschaftliche Dissertation)*, Wien 1927, 2. Bd, S. 17 ff.

[15] Die Rückkehr zu einem absolutistischen Staatssystem, in welchem alle Staatsgewalten in der Person des Monarchen vereinigt wurden, erfolgte letztendlich durch die drei „Silvesterpatente" vom 31. Dezember 1851. Im 1. Patent (RGBl. Nr. 2/1852) wird die Aufhebung der oktroyierten Märzverfassung (RGBl. Nr. 150/1849) verfügt; die Gleichheit aller Staatsangehörigen vor dem Gesetz und die Aufhebung jedes bäuerlichen Untertänigkeits- oder Hörigkeitsverbandes wird aber weiterhin garantiert. Das 2. Patent (RGBl. Nr. 3/1852) normiert u.a. die Aufhebung des Grundrechtspatents (RGBl. Nr. 151/1849) und in der Beilage zum 3. Patent (RGBl. Nr. 4/1852) werden in 36 Punkten die Grundsätze für organische Einrichtungen des österreichischen Kaiserstaates formuliert, welche im Text oben auszugsweise zitiert sind.

Darin wurden neue Prinzipien zur Gestaltung der öffentlichen Verwaltung formuliert, die sich von den liberalen Zielvorstellungen des frühkonstitutionellen Gemeindesystems wesentlich unterschieden. Jene die Gemeinde tangierenden Grundsätze werden im nachstehenden wörtlich wiedergegeben. Sie verdeutlichen durch ihre punktuelle Formulierung recht prägnant die Zielsetzungen des Kaisers und der Regierung in kommunalen Angelegenheiten und leiten

Die Punkte 7-16 RGBl. Nr. 4/1852 (Beilage) lauten, wie folgt:

Pkt. 7

Als Ortsgemeinden werden die faktisch bestandenen oder bestehenden Gemeinden angesehen, ohne deren Vereinigung da, wo sie notwendig ist oder begründet gewünscht wird, nach Maßgabe der Bedürfnisse und Interessen auszuschließen.

Pkt. 8

Bei der Organisierung der Ortsgemeinden ist der Unterschied zwischen Land- und Stadtgemeinden, besonders in Ansehung der letzteren, die frühere Eigenschaft und besondere Stellung der königlichen und landesfürstlichen Städte zu berücksichtigen.

Pkt. 9

Bei der Bestimmung der Landgemeinden kann der vormals herrschaftliche große Grundbesitz unter bestimmten, in jedem Land näher zu bezeichnenden Bedingungen von dem Verbande der Ortsgemeinden ausgeschieden und unmittelbar den Bezirksämtern untergeordnet werden. Mehrere vormals herrschaftliche unmittelbar anstoßende Gebiete können sich für diesen Zweck vereinigen.

Pkt. 10

Die Gemeindevorstände der Land- und Stadtgemeinden sollen der Bestätigung und nach Umständen selbst der Ernennung der Regierung vorbehalten werden. Es soll deren Beeidigung für Treue und Gehorsam an den Monarchen und gewissenhafte Erfüllung ihrer sonstigen Pflichten stattfinden. Auch sollen da, wo die Gemeindeverhältnisse es rätlich machen, höhere Kategorien von Gemeindebeamten der Bestätigung der Regierung unterzogen werden.

Pkt. 11

Die Wahl der Gemeindevorstände und Gemeindeausschüsse wird nach zu bestimmenden Wahlordnungen den Gemeinden mit den gesetzlichen Vorbehalten zugestanden.

Pkt. 12

Die Titelnamen der Gemeindevorstände und Gemeindeausschüsse sind nach den früher bestandenen landesüblichen Gewohnheiten zu bestimmen.

Pkt.13

Der Wirkungskreis der Gemeinden soll sich im allgemeinen auf ihre Gemeindeangelegenheiten beschränken, jedoch mit der Verbindlichkeit für die Gemeinden und deren Vorstände, der vorgesetzten landesfürstlichen Behörde in allen öffentlichen Angelegenheiten, die durch allgemeine oder besondere Anordnungen bestimmte und in Anspruch genommene Mitwirkung zu leisten. Auch in den eigenen Gemeindeangelegenheiten sollen wichtigere, in den Gemeindeordnungen näher zu bestimmende Akte und Beschlüsse der Gemeinden der Prüfung und Bestätigung der landesfürstlichen Behörden vorbehalten werden.

Pkt. 14

Die Öffentlichkeit der Gemeindeverhandlungen, mit Ausnahme besonderer feierlicher Akte, ist abzustellen, ohne für die beteiligten Gemeindeglieder die Einsichtnahme besonderer Gegenstände zu beseitigen.

Pkt. 15.

Die Gemeinden werden in der Regel den Bezirksämtern und nur ausnahmsweise nach Verhältnis ihrer besonderen Eigentümlichkeiten den Kreisbehörden oder den Statthaltereien unmittelbar untergeordnet.

Pkt.16

Nach diesen Grundsätzen sind für jedes Land den besonderen Verhältnissen desselben entsprechende Ordnungen für die Landgemeinden und für die Städte zu bearbeiten. Es ist bei diesen Arbeiten ferner von dem Gesichtspunkte auszugehen, dass den überwiegenden Interessen auch ein überwiegender Einfluss zugestanden und sowohl bei den Aktiv- und Passivwahlen für die Bestellung der Gemeindevorstände und Ausschüsse, als in den Gemeindeangelegenheiten dem Grundbesitze nach Maßgabe seiner in den Gemeindeverband einbezogenen Ausdehnung und seines Steuerwertes, dem Gewerbsbetriebe aber in dem Verhältnisse zu dem Gesamtgrundbesitze - in den Stadtgemeinden, insbesondere dem Hausbesitze - dann so viel als möglich den Corporationen für geistige und materielle Zwecke das entscheidende Übergewicht gesichert werde.

In ihrer Gesamtheit bedeuten diese Grundsätze für die gesamte Gemeindeorganisation zweifelsohne nichts Geringeres als die Abschaffung ihrer Autonomie und die abermalige Unterordnung unter die politische Beamtenverwaltung. Den landesfürstlichen Behörden (in diesem Fall den Bezirksämtern) oblag das Aufsichtsrecht in ausnahmslos allen Belangen der Gemeinde. Deren Kompetenz konnte von der politischen Verwaltung beliebig erweitert wie auch reduziert werden.

Einen besonders hervorzuhebenden Rückschritt in der Gemeindeverwaltung stellt die Tatsache dar, dass die wichtigsten demokratischen Elemente in der kommunalen Verwaltung wie die freie Wahl des Gemeindevorstandes durch den Gemeindeausschuss (= die Gemeindevertretung) - und zwar ohne gesetzliche Vorbehalte - sowie die Öffentlichkeit der Ausschusssitzungen ausgeschaltet werden sollten. Das Silvesterpatent sah zwar Gemeindevertretungswahlen vor, stellte sie aber unter einen stark einschränkenden Vorbehalt, indem es den Grund- und Hausbesitzern sowie den Unternehmen ein entscheidendes Übergewicht im Gemeindeausschuss sicherte.

Nicht nur dem vermögenden Bürgertum, sondern auch dem Adel wurden Zugeständnisse gemacht. Zwar akzeptierte man grundsätzlich die bereits konstituierten Ortsgemeinden, aber dort, wo die Eingliederung des Gutsbesitzes noch nicht erfolgt war, sollte sie unterbleiben. Des Weiteren wurde den Gutsbesitzern, deren Besitzungen bereits eingegliedert waren, die Möglichkeit eröffnet, unter bestimmten vom Gesetz vorzusehenden Bedingungen aus dem Gemeindeverband auszuscheiden und sich unmittelbar den Bezirksämtern unterstellen zu lassen. Schließlich kam man dem Adel auch darin entgegen, dass die bisherige zentralistisch ausgerichtete Gemeindegesetzgebung aufgegeben wurde.

Die Gemeindeordnungen sollten laut Punkt 8 des Erlasses unterschiedlich für die einzelnen Kronländer der Monarchie erarbeitet werden. Bemerkenswert ist, dass gerade das absolutistisch orientierte Regime das Gemeinderecht föderalistisch umgestalten wollte. Zudem wurde zwischen Land- und Stadtgemeinden differenziert.

Die Frage, warum vom Prinzip des einheitlichen Gemeindebegriffes abgegangen und eine Einteilung in Stadt- und Landgemeinden vorgenommen werden sollte, darf nicht unbeantwortet bleiben: Zum einem vertrat man die Auffassung, Städte könn-

ten mehr und diffizilere Agenden als Landgemeinden bewältigen, zum anderen wollte der Staat aus der größeren materiellen Leistungsfähigkeit der Städte Vorteile ziehen. Zugleich war man bestrebt, die politische Bevormundung der Gemeinden im städtischen Bereich zu intensivieren. Denn Städte galten immer als Keimzellen für systemkritische, revolutionäre und auch demokratische Kräfte.

Das gegenständliche Kabinettschreiben enthält nicht unmittelbar anwendbare Normen, sondern lediglich Leitprinzipien, nach denen sich die beabsichtigte Überarbeitung des bisherigen Gemeindegesetzes richten sollte.

Das provisorische Gemeindegesetz von 1849 wurde ja nicht formell aufgehoben! Bis zur Fertigung eines neuen Gemeindegesetzes versuchte man sich im Laufe der fünfziger Jahre mit kaiserlichen Verordnungen (in diesem Fall mit Erlässen des Innenministeriums) zu behelfen, die aufgrund ihrer Konformität mit den obigen Grundsätzen eine Beseitigung sämtlicher in die Realität bereits umgesetzter liberaler Elemente im noch geltenden provisorischen Gemeindegesetz herbeiführten.

So wurde mit Ministerialverordnung vom 15. Jänner 1852, RGBl. Nr. 17, die Öffentlichkeit von den Verhandlungen des Gemeindeausschusses mit Ausnahme besonders feierlicher Akte ausgeschlossen, ferner durch Verordnung vom 19. März 1852, RGBl. Nr. 67, festgelegt, dass in Zukunft die Vorstände der Landgemeinden und jener Stadtgemeinden, bei denen mangels besonderer Statute keine kaiserliche Genehmigung erforderlich war, von den staatlichen Behörden (Bezirksämtern) bestätigt und in Eid genommen werden müssen.[16]

Weiters wurden Ergänzungswahlen, durch die alljährlich ein Drittel der Gemeindeausschüsse erneuert werden sollten, nicht ausgeschrieben. Als das dreijährige Mandat der Gemeindeausschüsse gänzlich abgelaufen war, wurde es einfach mit Verordnung vom 23. Februar 1854, RGBl. Nr. 46, bis zur Neuregelung des Gemeinderechts verlängert. Auf die durch Tod oder Resignation frei gewordenen Stellen wurden von der politischen Verwaltung neue Mitglieder ernannt.[17]

Der Umschwung der politischen Verhältnisse und der damit verbundene Abbau der Gemeindefreiheit wurde von den Gemeinden im allgemeinen, soweit dies aus dem Schriftum[18] zu entnehmen war, mit einem merkwürdigen Gleichmut hingenommen.

Es kann daher angenommen werden, dass die Einholung der Bestätigung der Gemeindevorstände relativ reibungslos vor sich ging. Über etwaige Proteste der Bevölkerung hinsichtlich des Verbotes der Öffentlichkeit der Gemeindeausschusssitzungen gibt uns die einschlägige Literatur keinerlei Information.

Wahrscheinlich konzentrierte sich das Hauptaugenmerk der Gemeindeeinwohner auf dem Land eher auf die Lösung der Untertänigkeitsproblematik, sodass die Auseinandersetzung mit dem Gemeinderecht im Allgemeinen und der Gemeindeautonomie im Besonderen auf der Strecke blieb.

Hinsichtlich des Verbots der Ausschreibung von Neuwahlen im Jahr 1854 machte sich aber in den Gemeinden ein leichter Widerstand bemerkbar. Insbesondere die Gemeindefunktionäre selbst waren nicht mehr motiviert, den Gemeindedienst über die Dauer ihres Mandats zu versehen. Zu ungewiss war der Zeitpunkt des Endes ihrer Funktionsperiode. Die Initiative der Gemeindeorgane wurde aber durch die bürokratische Bevormundung der staatlichen Verwaltung unterbunden.

Dazu kam noch, dass vielfach die Gemeindeorgane die zu übernehmenden staatlichen Aufgaben aufgrund ihrer Vielfalt und Komplexität schwer bewältigen konnten, denn der ihnen von der politischen Verwaltung einseitig auferlegte übertragene Wirkungskreis erweiterte sich während der fünfziger Jahre ununterbrochen; und mit jeder neu übertragenen Aufgabe wuchs die Abhängigkeit der Gemeinden von den Behörden und verschlimmerte sich ihre Wirtschaftslage.[19]

III. Das Gemeindegesetz von 1859 - Entstehung und Inhalt im Überblick

Die Vorarbeiten zur Kodifizierung des neuen Gemeinderechtes erfolgten gleichzeitig mit jenen zur organisatorischen Neuordnung der staatlichen Verwaltung und der Justiz. Die neue im Geiste des Neoabsolutismus gestaltete staatliche Verwaltungs- und Gerichtsorganisation wurde im Jahre 1855[20] tatsächlich ins Leben gerufen.

Die Umgestaltung des Gemeinderechtes und der Kommunalbehörden hingegen ließ auf sich warten; immer wieder wurde die definitive Beschlussfassung des neuen Gemeindegesetzes auf unbestimmte Zeit verschoben. Die Entstehung des Gemeindegesetzes 1859 dauerte unvergleichbar länger als seine Geltung.[21]

Die ministeriellen Entwürfe des Jahres 1852 über die Grundzüge einer Landgemeinde- und Städteordnung[22] waren das Werk des damaligen Innenministers Alexander Bach[23]. Ganz allgemein kann zu diesen Entwürfen gesagt werden, dass sie völlig konform mit den im Silvesterpatent proklamierten „organischen Grundsätzen“ gehen.

Als Vorlage diente in formaler Hinsicht das Gemeindegesetz von 1849. Es wurde jedoch im Sinne der „organischen Grundsätze“ so überarbeitet, dass es ein vollkommen neues Gesicht bekam. An gewissen Errungenschaften der Revolution wurde allerdings unverbrüchlich festgehalten. Beispielsweise blieben die Grundherren als Obrigkeiten nach wie vor ausgeschaltet.

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16 Vgl. REDLICH Josef, *Geschichte der österreichischen Gemeindegesetzgebung und die Entstehung des Reichsgemeindegesetzes von 1862*, in: Schriften des Vereins für Socialpolitik, 122. Bd., Verfassung und Verfassungsorganisation der Städte, Leipzig,1907, S. 72.

17 Näher KLABOUCH, *Die Gemeindeselbstverwaltung* (wie Anm. 2), S. 48.

18 FRIEDJUNG H., *Österreich von 1848–1860*, 2 Bde, Stuttgart 1908 u. FRIEDJUNG P., *Die Geschichte der Gemeindegesetzgebung* (wie Anm.9).

19 KABOUCH, *Die Gemeindeselbstverwaltung* (wie Anm. 2), S. 49.

20 RGBl. Nr. 52/1855.

21 Die neue Salzburger Zeitung (NSZ) beispielsweise berichtete mehrmals von erheblichen zeitlichen Verzögerungen bei der Kodifizierung des Gemeindegesetzes. So NSZ Nr. 67 v. 23.3.1852; NSZ Nr. 147 v. 30.6.1856 und NSZ Nr. 134 v. 16.6.1858.

22 Näher FRIEDJUNG P., *Die Geschichte der Gemeindegesetzgebung* (wie Anm. 9), S. 24 ff.

23 Alexander Frh. v. Bach (geb.1813 in Loosdorf/Niederösterreich, gest. 1893 in Wien), Jurist und Rechtsanwalt; Justizminister und danach Innenminister; führte die Reformen zur umfassenden Neuordnung der österreichischen Staatsverwaltung im konservativen Sinne durch.

Ein weiterer Gesichtspunkt in diesen Entwürfen darf keinesfalls unerwähnt bleiben - nämlich der von Innenminister Bach so vielfach hervorgehobene Grundsatz, dass das neue Gemeinderecht nur den Rahmen für Bestimmungen der einzelnen Kronländer schaffen sollte. Bachs Ziel war es also, dass Gemeindewesen auf die jeweiligen landesüblichen Verhältnisse anzupassen. Nicht Unbedeutendes hätten die einzelnen Kronländer zu bestimmen gehabt; so die Modalitäten über die Trennung und Vereinigung von Ortsgemeinden, über die Ausscheidung des Großgrundbesitzes, über den Aufgabenbereich des Gemeindeausschusses etc.. Die von Bach so vehement vertretene Idee der föderalistischen Ausrichtung des Gemeinderechts konnte sich aber nicht durchsetzen.

In weiterer Folge wurden Philipp Krauß[24], welcher vom ständigen Reichsrat zum Referent über das Gemeindewesen bestellt wurde, die Bachschen Entwürfe zur Begutachtung übergeben. Rund zwei Jahre vergingen, ohne etwas über die legistische Ausarbeitung des Gemeindegesetzes zu hören.

Es lag daran, dass Reichsrat Krauß der Organisierungskommission gänzlich neu überarbeitete Gesetzesfassungen vorlegte. Sie unterschieden sich formell und inhaltlich von den Bachschen Entwürfen.

Die reichsrätlichen Operate des Jahres 1854[25] umfassten ein allgemeines Gemeindegesetz, eine Städte- und eine Landgemeindeordnung. In dem allgemeinen Gesetz hatten die der Städte- und Landgemeindeordnung gemeinsamen Bestimmungen Aufnahme gefunden, ferner Regelungen über die Gemeindezugehörigkeit und die Ausscheidung des herrrschaftlichen Grundbesitzes. Innenminister Bach hingegen dachte in seinen Gesetzesentwürfen an die Erlassung selbständiger das Heimatrecht und den Gutsbesitz regelnder Sondergesetze.

Die Bestimmungen der reichsrätlichen Operate waren im Gegensatz zu den ministeriellen Entwürfen so detailliert ausgearbeitet, dass sie den einzelnen Kronländern im Rahmen ihrer Ausführungsgesetzgebung keinen Spielraum zur Berücksichtigung landespezifischer Verhältnisse ließen. Der Zentralismus des Stadionschen Gemeindesystems wurde hier aufrechterhalten!

Ein Grundprinzip ist aber den Bachschen und Kraußschen Gesetzesentwürfen gemeinsam- nämlich die Absicht, die Gemeindeautonomie so weit als möglich auszuschalten! Beide Gesetzesvorschläge sahen eine starke staatliche Bevormundung gegenüber den Ortsgemeinden vor.

Die von Bach abermals redigierten Gesetzesvorlagen wanderten im Jahre 1857 erneut in den Reichsrat, wo sie einer eingehenden Begutachtung unterzogen wurden. Der Reichsrat vermisste in den druckfertigen Ministerratsvorlagen unter anderem heimatrechtliche und gemeindewahlrechtliche Regelungen wie auch Bestimmungen über den Einfluss und Obliegenheiten der Gutsherren und über den staatlichen Aufgabenbereich der Gemeinden.

Daraufhin wurde die gegenständliche Regierungsvorlage zur prinzipiellen Umarbeitung zurückgestellt. Aufgrund der gegensätzlichen Positionen, die Minister- und Reichsrat einnahmen, dauerte es noch weitere zwei Jahre, bis das von Reichsrat Krauß verfertigte und von Bach unterfertigte Gemeindegesetz, welches sich inhaltlich den reichsrätlichen Operaten des Jahres 1854 anschloss, mit Patent vom 24. April 1859, RGBl. Nr. 58, vom Kaiser sanktioniert und mit Wirksamkeit für den ganzen Umfang des Reiches mit Ausnahme des lombardisch-venetianischen Königreiches, Dalmatiens und des Militärgrenzlandes publiziert wurde.

Vorab sei vermerkt, dass dieses die kommunale Materie höchst umständlich regelnde Gemeindegesetz von 1859 mit Ausnahme der Bestimmungen über das Heimatrecht nie zur Durchführung gelangte.

Die Ortsgemeinde wird hier als Körperschaft verstanden, die die gemeinschaftlichen Interessen der Gemeindeglieder wahrnimmt und zugleich vom Gesetz oder der Verwaltung zugewiesene öffentliche Angelegenheiten besorgt. Diese Legaldefinition ist nicht sehr aussagekräftig. Sie bringt auch nichts Neues. Grundsätzlich sollten die aufgrund des Gemeindegesetzes von 1849 konstituierten Ortsgemeinden bestehen bleiben. Man wollte nach Möglichkeit vermeiden, die große Arbeit der Bildung der Ortsgemeinden in ihrem ganzen Umfang nochmals von Amts wegen vornehmen zu lassen. Neu ist aber der Umstand, dass konsequent zwischen Stadt- und Landgemeinden unterschieden wurde. Neu ist auch, dass als zweite Einheit der Ortsverwaltung neben den Ortsgemeinden die Gutsgebiete konstruiert wurden, mit eigener Heimatzuständigkeit, aber ohne jedwede Vertretungsgarantien für die Bewohner.

Das neue Gesetz spricht im Gegensatz zum provisorischen Gemeindegesetz von 1849 nur mehr von einem Wirkungskreis. Bemerkenswerterweise wurde aber innerhalb dieses Wirkungskreises eine Zweiteilung vorgenommen, die die ganze Gemeindeorganisation durchzog. Das Gesetz unterschied nämlich in „innere“ und „öffentliche“ Gemeindeangelegenheiten.

Die inneren Angelegenheiten wie die Vertretung der Gemeinde nach außen, die Verwaltung des Gemeindeeigentums, die gesamte Finanzverwaltung, die Leitung der Gemeindeanstalten, das Gesundheitswesen, die Straßenbeleuchtung, das Armen-, Bau- und Straßenwesen etc. fand nicht Aufnahme in den allgemeinen Gemeindebestimmungen, sondern wurden differenziert nach Landgemeinden, Städten und Sondergebieten (= Gutsgebiete) geregelt. In all diesen Belangen sollte der Gemeindeausschuss die Beschlüsse fassen.

Bei der Besorgung der öffentlichen Angelegenheiten hingegen handelte die Gemeinde ausschließlich als ein Organ der unteren staatlichen Instanz. Kurz zusammengefasst umfassen die öffentlichen Angelegenheiten Agenden der Ortspolizei, des Militärs, Gesetzeskundmachungen, Abfuhr der direkten Steuern und auch gewisse gerichtliche Funktionen. Die Gemeinde sollte nun im wahrsten Sinne des Wortes ein Staatsorgan werden.

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[24] Philip Frh.v. Krauß (geb. 1792 in Lemberg/Galizien, gest. 1861 in Wien), 1848 - 1851 Finanzminister; blieb als einziger Minister während der Oktoberrevolution in Wien; war als Liberaler gegen die von Ministerpräsident Schwarzenberg und Kübeck durchgesetzte Aufhebung der Märzverfassung; war während der neoabsolutistischen Periode Mitglied des ständigen Reichstages.

[25] Näher FRIEDJUNG P., *Die Geschichte der Gemeindegesetzgebung* (wie Anm. 9), S. 47ff.

Dieser Entwicklung wurde auch im Gesetz durch einen weiteren Ausbau der staatlichen Gemeindeaufsicht, unabhängig davon ob es sich um „innere“ oder „öffentliche“ Agenden handelte, entsprochen.[26]

IV. Schlussbemerkung

Abschließend kann also gesagt werden, dass durch die in der neoabsolutistischen Ära geschaffenen neuen Gemeinderegelungen die Gemeindeautonomie auf ein Minimum herabgedrückt wurde. An Stelle der freien Gemeinde trat ein Staatsorgan zur Verwaltung des örtlichen Gemeindeverbandes!

Dieses Konzept einer landesfürstlichen Beamtenverwaltung entsprach aber weder den Vorstellungen des liberal gesinnten Bürgertums, dem es um die Wiederbelebung des Systems der Selbstverwaltung ging, noch denen des Adels und der Großgrundbesitzer, welchen die Verwandlung der Länder in Reichs-Einzelstaaten vorschwebte.

Zweifelsohne hätte sich die vorliegende Gemeindeordnung behaupten können, wenn die politischen Bestrebungen nach Einführung eines konstitutionellen Verwaltungssystems erfolgreich unterdrückt worden wären. Die Entwicklung zu einer neuen, auf konstitutionellen Prinzipien beruhenden Verfassung ließ sich glücklicherweise aufgrund der militärischen, wirtschaftlichen und politischen Misserfolge des Neoabsolutismus sowie der stark ansteigenden Nationalitätenkonflikte in den transleithanischen Ländern des österreichischen Kaiserstaates[27] und zufolge der tiefen Unzufriedenheit der Bevölkerung mit dem System nicht mehr aufhalten. Der Neubeginn der konstitutionellen Entwicklung in Österreich, welche 1860 mit Erlass des Oktoberdiploms[28] einzusetzen begann, hatte das Wiederaufleben der im Frühkonstitutionalismus entwickelten Ideen und Prinzipien von der Gemeindefreiheit bewirkt.

Eine grundlegende gesetzliche Neuordnung im Bereich des Kommunalwesens bedarf immer einer konformgehenden Verfassungsordnung. War es im Neoabsolutismus das Silvesterpatent, das die Richtlinien für ein neues Gemeinderecht vorgab, so ist es an der Wende zur konstitutionellen Periode das Oktoberdiplom und das Februarpatent.[29]

Abschließend sei nochmals vermerkt, dass die Gemeindeorganisation zweifelsohne Dauerthema der neoabsolutistischen Regierung und ihres ständigen Reichstages war. Das darauf aufbauende Gemeindegesetz von 1859 wurde aber nie rechtswirksam und konnte rechtspolitisch gesehen im Gegensatz zum Gemeindegesetz von 1849 wenig nachhaltige Wirkung entwickeln.

[26] Ausführlich dazu PALLAUF, *Salzburgs Landgemeinden* (wie Anm. 5), S. 35- 39.
[27] Unter „Transleithanien“ versteht man die Länder der ungarischen Krone - Ungarn einschließlich Kroatien und Slawonien und Siebenbürgen.
[28] Kaiserliches Diplom vom 20. Oktober 1860, RGBl. 226 (Oktoberdiplom).
[29] Kaiserliches Patent vom 26. Februar 1861, RGBl. Nr. 20 (Februarpatent). Auf Basis des Februarpatents erging 1862 das Reichsgemeindegesetz, RGBL. Nr. Nr. 18/1862. Dieses gab die Rahmenbedingungen für die Erlassung weiterer Gemeindeordnungen der einzelnen Kronländer vor.

Gründe für den Abschluss einer Schiedsvereinbarung im römischen Recht
(The Reasons to enter into Arbitration Agreements in Classical Roman Law)

*Rainer Lukits**

Abstract

This article deals with the parties' reasons to enter into arbitration agreements in classical Roman law. For this purpose, the ordinary court procedure is compared with arbitration proceedings. In particular, the article compares the selection of judges and arbitrators, the choice of the place of proceedings, confidentiality, the influence of the magistrates, the possibility of appeal and the enforcement of decisions. The selection of arbitrators was not a main reason for choosing arbitration, because also in ordinary proceedings judges could usually be agreed on by the parties. However, the determination of the respective number of arbitrators could have been a reason for concluding arbitration agreements. Further, the free choice of the place of arbitration and the higher degree of confidentiality could have been in favour of arbitration. Also the reduced influence of the magistrates on the proceedings might have influenced the choice of arbitration. In addition, the determination of the matter in dispute and the larger discretion of the arbitrator could have played a role in certain proceedings. Most likely also the fact was important that arbitral awards could not be appealed and could be enforced quite effectively in comparison with regular judgments.

Key words: *arbitration agreement; arbiter ex compromisso; judge; recuperatores; place of proceedings; place of arbitration; confidentiality; lex Irnitana; enforcement; stipulatio poenae.*

1. Allgemeines

Bereits im römischen Recht konnten Streitparteien vereinbaren, dass ihre Streitigkeit durch einen privaten Schiedsrichter (*arbiter ex compromisso*) entschieden wird. Diese Vereinbarung wurde in der Regel abgeschlossen, indem sich die Parteien wechselseitig eine Strafsumme für den Fall der Nichtbefolgung des Schiedsspruches stipulierten[1]. Die Beweggründe der Parteien zur Durchführung eines privaten Schiedsverfahrens anstelle eines ordentlichen Prozesses waren in römischer Zeit vermutlich so vielfältig wie heutzutage. Eine spezielle Auseinandersetzung mit den Vor- und Nachteilen eines Schiedsverfahrens ist uns aus römischer Zeit nicht erhalten. Auch in der Forschung wurden die Motive für die Vereinbarung eines Schiedsverfahrens offenbar noch nicht näher untersucht, sodass dies im Rahmen dieses Beitrags erfolgen soll.

Das Anfangsfragment des Digestentitels 4,8 zum privaten Schiedsverfahren stellt programmatisch fest, dass das Schiedsverfahren nach dem Muster des ordentlichen Zivilverfahrens geführt wird:

> Paul. 2 ed. D. 4,8,1: Compromissum ad similitudinem iudiciorum redigitur et ad finiendas lites pertinet.
>
> Das Schiedsverfahren wird ähnlich den ordentlichen Verfahren durchgeführt und gehört zu den streiterledigenden Verfahren[2].

In diesem Sinne heißt es in den Digesten auch, ein Schiedsrichter habe die Aufgaben eines Richters übernommen (*iudicis partes suscepit*)[3]. Die Ähnlichkeit zum ordentlichen Verfahren bezeugt auch eine Konstitution Justinians (*compromisso, quod iudicium imitatur*)[4]. Diesem allgemeinen Verhältnis kann man zumindest entnehmen, dass Unterschiede zwischen Schiedsverfahren und ordentlichem Verfahren im Wesentlichen nur dort bestehen, wo solche durch den speziellen Charakter des Schiedsverfahrens bedingt sind. Zu den besonderen Wesensmerkmalen

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1 Siehe Ulp. D. 4,8,3,2, D. 4,8,11,2, D. 4,8,27,7; Ziegler, *Das private Schiedsgericht im antiken römischen Recht*, 1971, 47-73; Knütel, *Stipulatio poenae*, 1976, 36; Lukits, *Die private Schiedsgerichtsbarkeit im römischen Recht und heute*, SchiedsVZ 5 (2013), 269-271.

2 Übersetzung nach Behrends/Knütel/Kupisch/Seiler (Hgg.), *Corpus Iuris Civilis, Text und Übersetzung*, Bd. II, Digesten 1-10, 1995, 433.

3 Ulp. D. 4,8,13,2.

4 Iust. 530 C. 3,1,14,1 (Krüger).

des Schiedsverfahrens muss man insbesondere das höhere Maß an Parteiherrschaft zählen, da das gesamte Schiedsverfahren maßgeblich auf der von den Parteien freiwillig geschlossenen Schiedsvereinbarung beruht und an die Bestimmungen der Schiedsvereinbarung gebunden ist[5]. Das Schiedsverfahren richtete sich demnach primär nach der Schiedsvereinbarung und dem mutmaßlichen Willen der Parteien[6]. Fraglich ist natürlich, bis zu welchen Grenzen die erhöhte Parteiautonomie im Schiedsverfahren im Einzelnen reichte.

Allgemein wissen wir etwa aus Plautus' Komödie „Mostellaria", dass ein Gerichtsverfahren in römischer Zeit mit erheblichen Beschwerlichkeiten verbunden war: *„nescis quam metuculosa res sit ire ad iudicem"*[7]. Diese überspitzte Aussage bezieht sich aber nicht auf einen Vergleich zwischen ordentlichem Verfahren und Schiedsverfahren und nennt auch keine näheren Gründe. Zudem wurde der Begriff *iudex* nicht nur speziell für den Urteilsrichter im ordentlichen Verfahren verwendet, sondern zum Teil auch für den Schiedsrichter[8].

Für die konkreten Vor- und Nachteile eines Schiedsverfahrens anstelle eines ordentlichen Verfahrens ist daher ein Vergleich der beiden Verfahren anzustellen.

2. Einigung der Parteien

Wie bereits erörtert, beruht ein privates Schiedsverfahren maßgeblich auf der Einigung der Parteien, ihre Streitigkeit durch einen privaten Schiedsrichter entscheiden zu lassen, wobei diese im römischen Recht in der Regel erst nach Entstehen der Streitigkeit getroffen wurde[9]. Im Gegensatz dazu konnte der Beklagte im ordentlichen Verfahren zumindest indirekt vom Gerichtsmagistrat dazu gezwungen werden, an der Durchführung des Verfahrens mitzuwirken[10].

Ein Schiedsverfahren unterschied sich daher insofern maßgeblich von einem ordentlichen Verfahren, als es nach Entstehen der Streitigkeit noch eine konstruktive Gesprächsbasis der Streitparteien erforderte.

3. Auswahl der Richter

Maßgeblicher Grund für die Durchführung eines Schiedsverfahrens ist in der modernen Rechtspraxis die verstärkte Möglichkeit der Einflussnahme der Parteien auf die Auswahl der Schiedsrichter. Dies geschieht hauptsächlich durch Einigung der Schiedsparteien auf bestimmte Schiedsrichter, die Möglichkeit, jeweils eine bestimmte Zahl an Schiedsrichtern vorschlagen zu dürfen oder durch Einigung auf ein bestimmtes Verfahren zur Schiedsrichterbestellung[11]. Im ordentlichen Verfahren hingegen haben heutige Streitparteien in der Regel nur geringe Möglichkeiten, Einfluss auf den entscheidenden Richter auszuüben. Denn in der Regel können nur ernannte Berufsrichter, denen Akten nach einem im Vorhinein festgelegten System zugeteilt werden, über Streitfälle entscheiden.

Ein solches Berufsrichtertum gab es im klassischen römischen Zivilprozess jedoch nicht. Vielmehr konnten sich die Streitparteien auch im ordentlichen Einzelrichterprozess auf einen Richter einigen, der schließlich vom Gerichtsmagistrat eingesetzt wurde. Einigten sich die Parteien nicht, wurden vom Gerichtsmagistrat Urteilsrichter aus einer Richterliste ausgewählt, die den oberen Schichten vorbehalten war[12].

Waren im ordentlichen Verfahren mehrere Urteilsrichter (Rekuperatoren) einzusetzen, bestand jedoch offensichtlich nur eingeschränkte Wahlfreiheit der Parteien. So konnten etwa nach der *lex Irnitana* Rekuperatoren nur aus der munizipalen Richterliste (*ex iis qui in iudicum numero erunt*) bestellt werden. In einem ersten Schritt wurden aus der Richterliste sieben Personen ausgewählt. Dies erfolgte grundsätzlich durch wechselweise Ablehnung (*reiectio*) der vorgeschlagenen Richter. Nahm eine Partei keine Ablehnung vor, so wurde ihrem Gegner die Auswahl der sieben Personen aus der Richterliste überlassen (*optione data*)[13]. Die Parteien konnten sich also auf sieben Richtervorschläge einigen und die verabredete Auswahl unter Umständen durch eine Stipulationsstrafe absichern. Daneben konnten sich die Parteien auch einigen, dass die sieben Richtervorschläge durch Los bestimmt würden. In einem zweiten Schritt wurde die erforderliche Anzahl von Rekuperatoren (in der Regel drei oder fünf) aus den sieben Richtervorschlägen durch Los bestimmt. Eine einverständliche Auswahl der Rekuperatoren war somit in verschiedener Hinsicht eingeschränkt[14].

War im ordentlichen Verfahren also ein Einzelrichter zuständig, bestand bezüglich der Auswahl des Richters wohl kein entscheidender Unterschied zum privaten Schiedsverfahren. Hatten im ordentlichen Verfahren jedoch Rekuperatoren über eine Streitigkeit zu entscheiden, konnte die freie Wahlmöglichkeit der privaten Schiedsrichter ein Grund für den Abschluss einer Schiedsvereinbarung sein.

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5 Siehe etwa Paul. D. 4,8,32,15, Paul. D. 4,8,32,21.

6 Siehe etwa Matthiass, *Die Entwicklung des römischen Schiedsgerichts*, in: Festschrift zum fünfzigjährigen Doctorjubiläum von Bernhard Windscheid, 1888, 88.

7 Plautus, Mostellaria, 5. Akt, 1101 (Dutoit).

8 Paul. D. 4,4,34,1; Call. D. 4,8,41; Ulp. D. 26,5,4; Baron, *Der Process gegen den Schauspieler Roscius*, ZRG RA 1 (1880) 119.

9 Vgl. Paul. D. 4,8,46; Ziegler, *Das private Schiedsgericht im antiken römischen Recht*, 1971, 62 f; Roebuck/Loynes de Fumichon, *Roman Arbitration*, 2004, 201; Weizsäcker, *Das Römische Schiedsrichteramt unter Vergleichung mit dem officium judicis*, 1879, 6.

10 Kaser/Hackl, *Das römische Zivilprozessrecht*, 2. Auflage, 1996, 274 ff.

11 Vgl. Art. 11 UNCITRAL Model Law on International Commercial Arbitration (1985); Kerr, *Introduction*, in: Bernstein/Wood (Hgg.), *Handbook of Arbitration Practice*, 1993, 3.

12 Pomp. D. 5,1,80; Kaser/Hackl (o. Fn. 10) 192 ff; Weizsäcker (o. Fn. 9) 6; *Lex Irnitana* Kap. 97, IX C 30-32, 43-48 (Wolf); siehe auch Wolf, *Lex Irnitana*, Gesammelte Aufsätze, 2012, 270; Simshäuser, *Stadtrömisches Verfahrensrecht im Spiegel der lex Irnitana*, ZRG RA 109 (1992) 183-184; Birks, *New Light on the Roman Legal System: The Appointment of Judges*, Cambridge Law Journal 47 (1988) 39-40; Lehne, *Die Stellung der Juristen im Formularverfahren*, ZRG RA 131 (2014) 296-301; Gagliardi, *Zur Figur des iudex privatus im römischen Zivilprozess*, RIDA 55 (2008) 242; Metzger, *A New Outline of the Roman Civil Trial*, 1997, 62.

13 *Lex Irnitana* Kap. 88, X A, 3-6; anderer Ansicht Lehne, *Die Stellung der Juristen im Formularverfahren*, ZRG RA 131 (2014) 299.

14 *Lex Irnitana* Kap. 88, X A, 3-9; vgl. Simshäuser (o. Fn. 12) 185; Kaser/Hackl (o. Fn. 10) 198-199, § 26 II.2; überzeugend Birks (o. Fn. 12) passim; vgl. jedoch Wolf (o. Fn. 12) 275.

4. Anzahl der Richter

Heutzutage wird die mögliche Bestimmung der Anzahl der Schiedsrichter durch die Parteien als Vorteil des Schiedsverfahrens gegenüber dem ordentlichen Verfahren angesehen[15]. Auch im römischen Recht stand die Bestimmung der Anzahl der Schiedsrichter den Schiedsparteien grundsätzlich frei, während die Anzahl der Richter im ordentlichen Verfahren nach der Art des Verfahrens festgelegt war[16]. Die Bestimmung der Anzahl der Schiedsrichter kann also eine Rolle für die Wahl eines Schiedsverfahrens gespielt haben.

5. Verhandlungsort

Im römisch-rechtlichen Schiedsverfahren ergab sich der Verhandlungsort wie in der heutigen Schiedspraxis[17]) primär aus der Schiedsvereinbarung der Parteien. Dabei galt im Zweifel jener Ort als vereinbart, an dem die Parteien die Schiedsvereinbarung abgeschlossen hatten. Die nähere Bestimmung des Verhandlungsortes oblag dem Schiedsrichter[18]. Aus dem pompejanischen Archiv der Sulpizier etwa sind drei Verhandlungsanberaumungen des privaten Schiedsrichters M. Barbatius Epaphroditus bekannt, in welchen das *Chalcidicum Octavianum* bzw. das *Chalcidicum Hordionianum* in Puteoli als Verhandlungsort bestimmt wird[19].

Die ordentliche Gerichtsbarkeit wurde von römischen Gerichtsmagistraten in Rom oder in den autonomen Gemeinden von Munizipalmagistraten ausgeübt, die unter Umständen Urteilsrichter einsetzten. Welche Streitigkeiten der stadtrömischen Jurisdiktion bzw. der Munizipalgerichtsbarkeit unterlagen, ist nicht genau bekannt. Im Zivilverfahren gab es offensichtlich Streitwertgrenzen für die munizipale Gerichtsbarkeit[20]. Inwieweit die Parteien im ordentlichen Verfahren Gerichtsstandsvereinbarungen treffen konnten, ist unklar. Nach Ulp. D. 5,1,1 waren Gerichtsstandsvereinbarungen grundsätzlich zulässig, auch wenn sich diese Stelle ursprünglich auf den Gerichtsmagistrat und nicht auf den Richter bezog[21]. Von Cato ist uns aus republikanischer Zeit eine vertragliche Gerichtsstandsvereinbarung zugunsten Roms bekannt (*si quid de iis rebus controversiae erit, Romae iudicium fiat*)[22]. In späterer Zeit konnte unter der Streitwertgrenze der Munizipalgerichtsbarkeit aber vermutlich nicht mehr die römische Gerichtsbarkeit vereinbart werden, da ansonsten das römische Gerichtswesen überlastet worden wäre[23]. Über der Streitwertgrenze konnten die Parteien grundsätzlich eine munizipale Gerichtsbarkeit vereinbaren[24]. Ob anstelle einer munizipalen Gerichtsbarkeit die Zuständigkeit einer anderen vereinbart werden konnte, ist hingegen fraglich. Die *lex Irnitana* gewährt den Parteien offenbar die Möglichkeit, in Privatsachen einverständlich die Zuständigkeit der munizipalen Gerichtsmagistrate zu begründen (*[...] si uterque inter quos ambigeretur volet de ceteris quoque omnibus de quibus privatim agetur [...] iuris dictio [...] esto*). Es ist jedoch unsicher, ob sich diese Prorogationsmöglichkeit nur auf die genannte Streitwertgrenze von tausend Sesterzen bezieht, oder auch auf das vorher aufgestellte Erfordernis, dass die Streitparteien Bürger oder Bewohner dieses Munizipiums sein müssen[25]. Die sonst überflüssige Betonung, dass für *alle* übrigen Privatstreitigkeiten die munizipale Gerichtsbarkeit einverständlich begründet werden kann, sowie die alleinige Einschränkung, dass es sich um private Streitsachen handeln muss, sprechen jedoch dafür, dass die munizipale Gerichtbarkeit auch für fremde Streitparteien einverständlich begründet werden konnte.

Die Verhandlungen vor dem Gerichtsmagistrat und dem eingesetzten Urteilsgericht fanden in der Regel am Forum bzw. *comitium* oder in den als *basilicae* bezeichneten Hallen statt[26]. Zumindest in einem Einzelrichterprozess konnten die Parteien jedoch auch einen anderen Verhandlungsort vereinbaren[27].

Während also der Verhandlungsort im Schiedsverfahren grundsätzlich frei gewählt werden konnte, gab es im ordentlichen Verfahren diesbezüglich möglicherweise Beschränkungen. Die Wahl des Verfahrens- und Verhandlungsortes konnte die Streitparteien demnach veranlassen, anstelle eines ordentlichen Prozesses ein Schiedsverfahren durchzuführen.

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15 Siehe etwa Art. 10 UNCITRAL Model Law on International Commercial Arbitration (1985); Kerr (o. Fn. 11) 4.

16 Siehe etwa Ulp. D. 4,8,7,1; Ulp. D. 4,8,17,2; Ulp. D. 4,8,17,4-7; Ulp. D. 4,8,27,3; Paul. D. 4,8,32,13; Ziegler (o. Fn. 9) 124 f; Kaser/Hackl (o. Fn. 10) 197 ff; Wolf, *Die Lex Irnitana*, Gesammelte Aufsätze, 2012, 275 f.

17 Siehe etwa Art. 20 UNCITRAL Model Law on International Commercial Arbitration (1985); Kerr (o. Fn. 11) 4.

18 Ulp. D. 4,8,21,10-11; vgl. Ziegler (o. Fn. 9) 132; Matthiass (o. Fn. 6) 101; Weizsäcker (o. Fn. 9) 86; Loynes de Fumichon, *Recherches sur l'arbitrage ex compromisso en droit romain classique*, 2002, 179.

19 TPSulp Nr. 35-37, Camodeca, *Tabulae Pompeianae Sulpiciorum, Edizione critica dell'archivio puteolano dei Sulpicii*, 1999, 106-109; Camodeca, *L'Archivio Puteolano dei Sulpicii*, Band I, 1992, 130-135; Roebuck/Loynes de Fumichon (o. Fn. 9) 247; Wolf, *Neue Rechtsurkunden aus Pompeji*, 2. Auflage, 2012, 65-70.

20 Eck, *Die staatliche Organisation Italiens in der hohen Kaiserzeit*, 1979, 20; siehe etwa *Lex Irnitana* Kap. 84 (Wolf); Wolf, *Lex Irnitana*, Gesammelte Aufsätze, 2012, 9 ff; Simshäuser, *Iuridici und Munizipalgerichtsbarkeit in Italien*, 1973, 186 ff; 195-198.

21 Siehe dazu Pugliese, *Il processo civile romano*, Bd. II, *Il processo formulare*, 1963, 161-162, 167 („iudex invece che del magistrato"); Kaser/Hackl (o. Fn. 10), 247, § 33 Fn. 44 („zwecks Verallgemeinerung verfälscht"); Ziegler, *Kompetenzvereinbarungen im römischen Zivilprozessrecht*, in: Medicus/Seiler (Hgg.), Festschrift für Max Kaser zum 70. Geburtstag, 1976, 560 f, 572; vgl. Ulp. D. 5,1,2 pr.; Ulp. D. 2,1,15.

22 Cato, de agric. 149; vgl. Pugliese (o. Fn. 21) 167; Ziegler (o. Fn. 21) 558; Simshäuser (o. Fn. 20) 189.

23 Siehe Simshäuser (o. Fn. 20) 189; Ziegler (o. Fn. 21) 559; Kaser/Hackl (o. Fn. 10), 247, § 33 Fn. 42.

24 Paul. D. 50,1,28 (*inter convenientes et de re maiori apud magistratus municipales agetur*); vgl. *Lex Irnitana* Kap. 84, VIIII B, 1-28 (Wolf); Rodger, *The Jurisdiction of Local Magistrates: Chapter 84 of the Lex Irnitana*, ZPE 84 (1990) 147-151; Simshäuser (o. Fn. 20) 190; Ziegler (o. Fn. 21) 560; Birks (o. Fn. 13) 41; Metzger, *A New Outline of the Roman Civil Trial*, 1997, 69-70; Galsterer, *Neues zu den römischen Stadtgesetzen*, ZRG RA 114 (1997) 399; Hackl, *Der Zivilprozeß des frühen Prinzipats in den Provinzen*, ZRG RA 114 (1997) 151 f; vgl. aber Wolf (o. Fn. 12) 9-40 passim, insb. 36-37.

25 *Lex Irnitana* Kap. 84, VIIII B, 1-28 (Wolf).

26 Sen. dial. 5,33; Quint. 12,6,5; Tac. Dial. 34, 1; Suet. Aug. 29; Sen. Rhet. contr. 9, 2-5; *Lex Irnitana* Kap. 91, X B, 12-14 (Wolf); Cic. Brut. 289; Macrob. Sat. 3, 16, 15-16; vgl. Kelly, *Studies in the Civil Judicature of the Roman Republic*, 1976, 104-105; Kaser/Hackl (o. Fn. 10) 51, 201-202, 203; vgl. Weizsäcker (o. Fn. 9) 86.

27 Vitr. arch. 6,5,1-2 (Prof. Knütel und Prof. Manthe sei für diesen Hinweis herzlich gedankt); vgl. auch *Lex Irnitana* Kap. 91, X A, 45-47, X B, 10-14 (Wolf); Kelly (o. Fn. 25) 103-111; Lintott, *Legal Procedure in Cicero's Time*, in: Powell/Paterson (Hgg.), *Cicero the Advocate*, 2004, 64; Platschek, *Studien zu Ciceros Rede für P. Quinctius*, 2005, 6; González, *The Lex Irnitana*, JRS 76 (1986) 234-235.

6. Vertraulichkeit

Heutzutage ist jedenfalls die erhöhte Vertraulichkeit des Schiedsverfahrens ein wichtiger Grund für den Abschluss von Schiedsvereinbarungen[28]. In den Quellen zum römischen Schiedsrecht wird dieser Umstand jedoch nicht hervorgehoben. Dass aber Schiedsverhandlungen nach Ulpian auch in „ländlicher Zurückgezogenheit" (*in secessibus*) durchgeführt werden konnten[29], deutet auf die mögliche Vertraulichkeit des Schiedsverfahrens hin. Auch das aus Herculaneum bekannte Schiedsverfahren zwischen L. Cominius Primus und L. Appuleius Proculus fand vermutlich bei einem privaten Gastgeber statt[30]. Das ordentliche Verfahren fand in der Regel öffentlich statt[31]. Da jedoch zumindest im privaten Einzelrichterverfahren der Verhandlungsort vereinbart werden konnte[32], ist anzunehmen, dass solche Verfahren nicht zwingend in der Öffentlichkeit stattfinden mussten. Die Vertraulichkeit des Verfahrens konnte demnach vor allem dann ein Grund für die Durchführung eines Schiedsverfahrens sein, wenn im ordentlichen Verfahren Rekuperatoren über die Sache zu entscheiden hatten.

7. Rolle der Gerichtsmagistrate

Die Aufgabe des Gerichtsmagistrats im ordentlichen Zivilverfahren bestand hauptsächlich in der Einsetzung des Streitverfahrens sowie in der Einleitung und Überwachung der Vollstreckung. Zur Streiteinsetzung gehörte insbesondere die Zulassung eines Verfahrens, die Erteilung der Klagformel und die Einsetzung von Urteilsrichtern zur Durchführung des Beweisverfahrens und zur Urteilsfindung[33].

Die Einsetzung des Schiedsgerichts und die Bestimmung der zu entscheidenden Rechtsfrage oblagen im privaten Schiedsverfahren hingegen nicht einem Gerichtsmagistrat, sondern wurden von den Parteien in der Schiedsvereinbarung bestimmt[34]. Dennoch übte der Gerichtsmagistrat (d.h. in der Regel der Prätor) auch über private Schiedsverfahren eine gewisse Kontrolle aus. Diese bestand insbesondere im möglichen Einsatz von Zwangsmitteln gegen schuldhaft untätige Schiedsrichter und in der gerichtlichen Durchsetzung einer Vertragsstrafe[35]. Der Gerichtsmagistrat wurde also grundsätzlich erst dann tätig, wenn ein Schiedsrichter seine Entscheidungspflicht verletzte oder eine Partei den erlassenen Schiedsspruch nicht befolgte[36]. Grundsatz und Ausdruck der verstärkten Parteiautonomie im Schiedsverfahren war demnach die Nichteinmischung des Prätors, wie dies auch in den Digesten festgehalten ist: *summa rei est, ut praetor se non interponat [...]*[37].

Entsprechend dem privaten Charakter des Schiedsverfahrens war somit die Einwirkung der Gerichtsmagistrate auf private Schiedsverfahren geringer als im ordentlichen Zivilverfahren, insbesondere was die Einleitung des Prozesses betrifft. Dies bedeutete im Einzelnen natürlich mehr Gestaltungsspielraum der Parteien bzw. des Schiedsrichters, was für die Parteien ein Anreiz für die Durchführung eines Schiedsverfahrens sein konnte.

8. Streitgegenstand

Wie bereits angedeutet, war der Streitgegenstand im ordentlichen Verfahren auch von den im Zivil- und Honorarrecht zur Verfügung stehenden Klagen und von dem durch den Gerichtsmagistrat gewährten Prozessprogramm abhängig. Im Gegensatz dazu wurde der Streitgegenstand im Schiedsverfahren in der Schiedsvereinbarung festgelegt und konnte von den Parteien dementsprechend frei gestaltet werden[38]. So konnte der Schiedsrichter etwa auch zu einer Strafzahlung an den Fiskus verurteilen, wenn dies in der Schiedsvereinbarung vorgesehen war[39].

9. Entscheidungsspielraum des Richters

Damit verbunden ist auch der Entscheidungsspielraum, der dem Richter im jeweiligen Verfahren gewährt wurde. Dieser richtete sich im ordentlichen Verfahren nach der Art der zur Verfügung stehenden Klagformel, wobei Klagen mit weiterem und Klagen mit eingeschränkterem Ermessensspielraum bestanden[40]. Im Unterschied dazu dürfte sich im Schiedsverfahren der Entscheidungsspielraum des Schiedsrichters in erster Linie nach der entsprechenden Schiedsvereinbarung als privatautonomer Grundlage des Verfahrens gerichtet haben. In dieser Hinsicht wurde von Cicero in seiner Rede für den Schauspieler Roscius (*pro Roscio comoedo*) das strenge *iudicium* dem freieren *arbitrium* gegenüber gestellt:

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28 Siehe etwa Paulsson, *International Commercial Arbitrations*, in: Bernstein/Wood (Hgg.), *Handbook of Arbitration Practice*, 1993, 427; International Court of Arbitration, Resolving Business Disputes Worldwide, 2. überarbeitete Auflage, Paris 2010, 4; Kerr (o. Fn. 11) 4.

29 Ulp. D. 4,8,21,10 nach Behrends/Knütel/Kupisch/Seiler (o. Fn. 2) 444 (Übersetzung Schiemann); vgl. Matthiass (o. Fn. 6) 101.

30 Arangio-Ruiz/Pugliese Carratelli *Tabulae Herculanenses V*, La parola del passato, 10 (1955) 452-455, Nr. 78-79.

31 Sen. Rhet. contr. 9, 4-5; Tac. Dial. 34, 3-4; Kaser/Hackl (o. Fn. 10) 11; Kaser/Knütel, *Römisches Privatrecht*, 20. Auflage, 2014, 429, § 80 Rz 5; Weizsäcker (o. Fn. 9) 86.

32 Siehe oben Kapitel 5.

33 Siehe etwa Kaser/Hackl (o. Fn. 10) 41 f, 45.

34 Vgl. Matthiass (o. Fn. 6) 78 f, 88.

35 Siehe insb. Ulp. D. 4,8,3-5; Ulp. D. 4,8,9,2-4, Ulp. D. 4,8,11; D. 4,8,15-17; Ziegler (o. Fn. 9) 84-104; Matthiass (o. Fn. 6) 24 f.

36 Siehe jedoch Ulp. D. 4,8,17,6, D. 4,8,21,5; Paul. D. 4,8,32,6, D. 4,8,32,10.

37 Paul. D. 4,8,32,3.

38 Siehe Paul. D. 4,8,32,15-17; vgl. Roebuck/Loynes de Fumichon (o. Fn. 9) 120; Matthiass (o. Fn. 6) 79: „In der Fixirung des Streitgegenstandes haben die Parteien völlig freie Hand."

39 Pap. D. 4,8,42.

40 Siehe insb. Kaser/Hackl (o. Fn. 10) 334, 316-320.

Cic. Q. Rosc. 4,10: Hic tu si amplius HS nummo petisti, quam tibi debitum est, causam perdidisti, propterea quod aliud est iudicium, aliud est arbitrium. Iudicium est pecuniae certae, arbitrium incertae; […]	Wenn du hier um einen Sesterzen mehr gefordert hast, als dir geschuldet wurde, hast du den Fall verloren, weil ein iudicium eine Sache ist und ein arbitrium eine andere. Ein iudicium betrifft eine bestimmte Summe Geldes, ein arbitrium eine unbestimmte […][41]

Im Fall des Schauspielers Q. Roscius ist anzunehmen, dass vor dem ordentlichen Verfahren, in dem Cicero seine Rede vorträgt, ein privates Schiedsverfahren durchgeführt wurde, da in diesem Zusammenhang der technische Ausdruck für die private Schiedsvereinbarung (*compromissum*) verwendet wird[42]. Dennoch ist davon auszugehen, dass sich der Vergleich Ciceros zwischen *iudicia* und *arbitria* nicht auf einen Vergleich zwischen dem ordentlichen Zivilverfahren und dem Schiedsverfahren bezieht, sondern zwischen strengrechtlichen Klagen einerseits sowie freieren Klagen und Schiedsverfahren andererseits. Davon ist schon deshalb auszugehen, weil auch im ordentlichen Verfahren freiere Klagen bestanden, die nicht auf eine bestimmte Summe Geldes gerichtet waren[43]. In diesem Zusammenhang werden somit freiere Klagen im ordentlichen Verfahren und das Schiedsverfahren gleichgestellt und mit demselben Begriff *arbitria* bezeichnet.[44]

Im Schiedsverfahren dürfte der zugestandene Entscheidungsspielraum jedenfalls in der Regel sehr weit gewesen sein. In Bezug auf das vorherige Schiedsverfahren spricht Cicero sogar davon, dass dem Schiedsrichter mit seiner Wahl „unbegrenzte Ermessensfreiheit" (*infinitam largitionem*)[45] eingeräumt wurde. Ein Unterschied zwischen ordentlichem und schiedsrichterlichem Verfahren ergab sich für die Parteien also vor allem dann, wenn im ordentlichen Verfahren über eine strengrechtliche Klage zu entscheiden war, was von der Art der Streitigkeit abhing.

10. „Neutralität" des Schiedsgerichts

Als Vorteil der Schiedsgerichtsbarkeit wird heutzutage oftmals die größere „Neutralität" eines Schiedsgerichtes angeführt[46]. Damit meint man, dass sich Streitparteien aus verschiedenen Ländern oder Territorien in der Regel nur ungern der Gerichtsbarkeit in der Heimat der anderen Streitpartei unterwerfen, weshalb unter Umständen der Abschluss einer Schiedsvereinbarung attraktiver ist.

Ein solches Verlangen der Parteien nach einem „neutralen" Schiedsgericht konnte im römischen Reich insbesondere im Bereich der munizipalen Gerichtsbarkeit gegeben gewesen sein, wenn die Streitparteien verschiedenen Munizipien angehörten. Wie bereits angesprochen, konnte eine solche „Neutralität" aber unter Umständen auch durch eine Gerichtsstandsvereinbarung der Parteien erreicht werden[47].

11. Endgültigkeit der Entscheidung

Heutzutage ebenfalls häufig als bedeutender Vorteil der Schiedsgerichtsbarkeit angeführt wird der Umstand, dass Schiedssprüche privater Schiedsgerichte im Unterschied zu Urteilen staatlicher Gerichte in der Regel keinem Instanzenzug unterliegen und Schiedsverfahren aus diesem Grund weniger langwierig und kostspielig seien[48]. In der Regel kann nur ein staatliches Gericht einen Schiedsspruch wegen bestimmter, schwerwiegender Fehler aufheben oder seine Vollstreckung verweigern[49]. Auch im römischen Recht war ein Schiedsspruch grundsätzlich endgültig:

Ulp. 13 ed. D. 4,8,27,2: Stari autem debet sententiae arbitri, quam de ea re dixerit, sive aequa sive iniqua sit: et sibi imputet qui compromisit. […]	Man muss aber einen Schiedsspruch, den der Schiedsrichter über den Streitgegenstand erlassen hat, befolgen, mag er gerecht oder ungerecht sein. Wer einen Schiedsvertrag [auf einen bestimmten Schiedsrichter] abgeschlossen hat, muss sich dies selbst zuschreiben. […][50]

Eine Konstitution Caracallas aus dem Jahr 213 n. Chr. macht deutlich, dass eine Berufung gegen einen Schiedsspruch nicht zulässig war[51]:

Antonin. C. 2,55,1 (a. 213): Ex sententia arbitri ex compromisso iure perfecto aditi appellari non posse saepe rescriptum est […]	Es wurde schon oft durch Reskript entschieden, dass gegen den Schiedsspruch eines Schiedsrichters, der aufgrund einer gültigen Schiedsvereinbarung ersucht worden war, nicht berufen werden kann […]

Nur aus gewissen wichtigen Gründen war ein Schiedsspruch nichtig. Dies bedeutete, dass bei Verletzung des Schiedsspruchs die vereinbarte Strafsumme nicht erfolgreich eingeklagt werden konnte[52].

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41 Übersetzung nach Fuhrmann (Hg.), Cicero, Die Prozessreden, Bd. I, 1997; 108-110; siehe auch ibid. 830-831; Ziegler (o. Fn. 9) 18-20; Broggini, *Iudex arbiterve*, 1957, 199-218, Platschek, *Zum Text von Cic. Q. Rosc. 4,11-12*, Philologus 155 (2011) 2, 369-374.

42 Cic. Q. Rosc. 4,12 (Fuhrmann); Broggini (o. Fn. 41) 201 f; Baron, *Der Process gegen den Schauspieler Roscius*, ZRG RA 1 (1880) 118-121.

43 Broggini (o. Fn. 41) 202.

44 Vgl. Kelly, *Studies in the Civil Judicature of the Roman Republic*, 1976, 119.

45 Cic. Q. Rosc. 4,12 (Fuhrmann).

46 Siehe etwa Paulsson, *International Commercial Arbitrations*, in: Bernstein/Wood (Hgg.), *Handbook of Arbitration Practice*, 1993, 427.

47 Siehe oben Kapitel 5.

48 Siehe etwa Kerr (o. Fn. 11) 4; Paulsson (o. Fn. 46) 427.

49 Siehe etwa Artt. 34-36 UNCITRAL Model Law on International Commercial Arbitration; Art. V New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

50 Übersetzung nach Behrends/Knütel/Kupisch/Seiler (o. Fn. 2) 446 f.

51 Vgl. dazu Litewski, *Das Problem der Bindung des römischen Schiedsrichters durch das materielle Recht*, in: Schermaier/Rainer/Winkel (Hgg.), *Iurisprudentia universalis*, Festschrift für Theo Mayer-Maly, 2002, 410; Ziegler (o. Fn. 9) 137.

52 Siehe etwa Ulp. D. 4,8,3 pr.; Ulp. D. 4,8,9,2; Ulp. D. 4,8,17,3; Callistr. D. 4,8,41, Anton. 213 C. 2,55,1; Weizsäcker (o. Fn. 9) 93.

Auch Urteile des ordentlichen Gerichtsverfahrens konnten aus bestimmten Gründen nichtig sein. Im Gegensatz zum Schiedsverfahren entwickelte sich seit Augustus gegen Urteile aber auch die Möglichkeit einer Berufung (*appellatio*) an den Kaiser[53]. In der Kaiserzeit konnte daher wie heute die Vermeidung eines Berufungsverfahrens Grund für den Abschluss einer Schiedsvereinbarung gewesen sein.

12. Durchsetzung der Entscheidung

In der heutigen Zeit ist auch die Vollstreckung privater Schiedssprüche ein wichtiger Grund für den Abschluss von Schiedsvereinbarungen, nachdem das sogenannte New Yorker Übereinkommen[54] eine verhältnismäßig einfache Vollstrekkung[55] ausländischer Schiedssprüche erlaubt und das Übereinkommen von einem Großteil der Staatengemeinschaft ratifiziert wurde[56].

Im klassischen römischen Recht zeichnet sich die Durchsetzung von Schiedssprüchen dadurch aus, dass bei einer maßgeblichen Verletzung des Schiedsspruchs die stipulierte Strafsumme mithilfe der *actio ex stipulatu* oder der *condictio* eingeklagt werden konnte[57]. Da in diesem Fall die Strafsumme bereits feststand, musste lediglich eine Verletzung des Schiedsspruchs durch die Gegenpartei nachgewiesen werden. Dass der durch die Verletzung entstandene Schaden vielleicht geringer war als die stipulierte Strafsumme, spielte keine Rolle[58]. Die Vereinbarung einer Strafsumme in einer Schiedsvereinbarung hatte somit auch pönalen und abschreckenden Charakter, wie dies auch in der angeführten Konstitution Caracallas aus dem Jahr 213 n. Chr. ausgesprochen wird:

Anton. C. 2,55,1 (a. 213): […] et ob hoc invicem poena promittitur, ut metu eius a placitis non recedatur.	[…] und deshalb wird gegenseitig eine Strafe versprochen, damit aus Angst vor ihr nicht von den Entscheidungen (des Schiedsrichters) abgewichen wird.

Mit dem Verfall der Strafsumme bei Nichtbeachtung des Schiedsspruchs war die Durchsetzung von Schiedssprüchen sicherlich vergleichsweise effizient, wenn nicht unter Umständen schon gar zu harsch. Entsprechend der Schiedsvereinbarung konnte die Strafsumme sogar mehrmals fällig werden[59]. Zu beachten ist jedoch, dass auch die erfolgreiche Stipulationsklage gegebenenfalls noch einer eigenen Vollstreckung bedurfte. Eine entsprechend hohe Strafsumme wird die unterlegene Partei aber in den meisten Fällen von einer Nichtbefolgung des Schiedsspruches abgehalten haben.

13. Ergebnis

Für den Abschluss einer Schiedsvereinbarung bedurfte es in der römischen Rechtspraxis einer einigermaßen intakten Gesprächsbasis, obwohl zu diesem Zeitpunkt die Streitigkeit in der Regel bereits entstanden war[60]. Die Auswahl der Richter spielte bei der Entscheidung für ein Schiedsverfahren vermutlich nur dann eine Rolle, wenn im ordentlichen Verfahren mehrere Urteilsrichter zu bestellen waren, auf die sich die Streitparteien nur sehr eingeschränkt einigen konnten[61]. Die Bestimmung der Anzahl der Schiedsrichter könnte in jedem Fall für den Abschluss einer Schiedsvereinbarung gesprochen haben[62]. Ein weiteres Motiv dürfte die freiere Wahl des Verhandlungsorts und die höhere Vertraulichkeit eines privaten Schiedsverfahrens gewesen sein, insbesondere wenn im ordentlichen Verfahren Rekuperatoren einzusetzen waren[63]. Auch die geringere Beteiligung der Magistrate kann ein Faktor für die Durchführung von Schiedsverfahren gewesen sein[64]. Daneben spielte womöglich auch die freiere Bestimmung des Streitgegenstands und des schiedsrichterlichen Entscheidungsspielraums eine Rolle[65]. Maßgeblich war vermutlich auch, dass gegen einen Schiedsspruch keine Berufung zulässig war[66]. Wesentlich scheint insbesondere die effiziente Durchsetzung einer Schiedsvereinbarung bzw. eines Schiedsspruchs mithilfe einer vereinbarten Strafsumme gewesen sein[67]. Aufgrund der hohen Entwicklung des römischen Schiedsrechts und der zahlreichen Belege[68] muss jedenfalls davon ausgegangen werden, dass das Schiedsverfahren eine gebräuchliche Alternative zur Beschreitung des ordentlichen Rechtswegs darstellte.

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53 Kaser/Hackl (o. Fn. 10) 375, 501 ff; Litewski (o. Fn. 51) 410.

54 New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (1958).

55 Siehe aber Lukits, *The Certification Trap - The Austrian Supreme Court and Art IV NYC*, in: Geistlinger/Roth (Hgg.), *Yearbook on International Arbitration*, Band I, 2010, 215-233.

56 Siehe etwa Paulsson (o. Fn. 46) 442; Coe, *International Commercial Arbitration*, 1997, 61.

57 Ulp. 4,8,21,12; Diocl./Maxim. 290/293 C. 2,55,3 (Krüger); Kaser/Hackl (o. Fn. 10) 334; Kaser, *Das römische Privatrecht I*[2], 1971, 542; Knütel, *Stipulatio poenae*, 1976, 22.

58 Vgl. Paul. D. 4,8,32 pr.

59 Paul. D. 4,8,34,1; vgl. Ziegler (o. Fn. 9) 96; Knütel, *Der mehrfache Verfall von Kautionen*, SZ 92 (1975), 158-160; Babusiaux, *Id quod actum est, Zur Ermittlung des Parteiwillens im klassischen römischen Zivilprozeß*, 2006, 81-82.

60 Siehe oben Kapitel 2.

61 Siehe oben Kapitel 3.

62 Siehe oben Kapitel 4.

63 Siehe oben Kapitel 5 und 6.

64 Siehe oben Kapitel 7.

65 Siehe oben Kapitel 8 und 9.

66 Siehe oben Kapitel 11.

67 Siehe oben Kapitel 12.

68 Siehe etwa D. 4,8 passim; CIL IX 2827; Arangio-Ruiz/Pugliese Carratelli *Tabulae Herculanenses V*, La parola del passato, 10 (1955) 448-460, Nr. 76-82; Camodeca, *Tabulae Pompeianae Sulpiciorum, Edizione critica dell'archivio puteolano dei Sulpicii*, 1999, 103-111, Nr. 34-39; Wolf, *Neue Rechtsurkunden aus Pompeji*, 2. Auflage, 2012, 66-67, Nr. 34.

The Early Historical Influences on Separation of Property in English Law

*Meryl Thomas**

Abstract

It is curious that a community of property regime has never developed between the spouses in England and Wales, as it has in continental Europe. This paper seeks to examine the historical factors which have influenced the development of separation of property in England and Wales. The approach taken to the issue is a comparative one, with the region of northern France (and in particular Normandy) being chosen as the comparator for several reasons, namely, because of the political connection of parts of northern France with England during the High Middle Ages, the fact that customary law operated in both legal systems and finally both systems were subject to Germanic influence in the early medieval period. The paper examines whether there is evidence for community of property in the early Germanic codes, the role of the morning gift and dower, and development in the pays de droit coutumier in the early Middle Ages. It also discusses the position in England, examining a married woman's property rights both in Anglo-Saxon times and post Norman conquest. There is clear evidence that community did not develop in Normandy during this period, and that it did not exist in England and Wales, and the paper suggests this may be more than coincidence. Finally the factors that influenced the development of a married woman's property rights in England and Wales are examined, and it seems that these factors had a profound (yet inadvertent) influence on the way in way a woman's property rights developed in England and Wales.

Key words: *Community of property; married woman's property; Norman law; dower; morning-gift; classification of land; acquęts and propres.*

I. Introduction

to a modern civilian lawyer the absence of community of property[1] between the spouses in English law appears curious, and at variance with the tenet in most European countries that the act of marriage, *per se*, affects the ownership of property during the marriage, and its devolution on the termination of the marriage. From the outset it must be made clear that this article is not concerned with discussing whether separation of property is better than community or *vice versa*, and a number of articles have already covered this point. Marriage in civil law countries 'creates' a patrimony that is jointly owned by the husband and wife, and separate from the patrimonies they own as individuals, and the devolution of property upon divorce and death is predetermined by the regime to which the parties are subject. The idea of separation of property between spouses has been a central feature in English law since the Dower Act 1833 and the Married Women's Property Act 1882. The former allowed a man to dispose of his real property as he wished, save for the restriction on devises for charitable purposes which was removed by the Mortmain and Charitable Uses Act 1891, section 5, and thus any curtailment upon his testamentary freedom in respect of realty by means of a widow's right of dower was abolished;[2] moreover the Wills Act 1837, section 3 had made it clear that a person had complete freedom of testation in respect of personalty. Combined with this, the Married Women's Property Act 1882 changed the law so that neither spouse acquired any rights in the other's property merely by means of the marriage, with the result that married women were fully 'emancipated' in relation to their property interests. England had been wedded to dower as the central method by which a widow was provided with a home on the death of her husband. It is of 'ancient origin'[3] and the common law right of dower, which existed until 1833, had crystallised at the end of the thirteenth century, so that by the time of Edward I it had become an irreducible third. It provided the means by which the interests of the widow were accommodated within the wider framework of property ownership in a family, and within wider property principles.

The first problem is to determine what is meant by the term 'community of property'. There is no comprehensive defini-

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1 The term 'community property' is used in the US.

2 The widow's right could be avoided by making provision for her before the marriage by means of jointure or by employing a variety of conveyancing devises.

3 Eileen Spring, Law, Land and Famil: Aristocratic Inheritance in England 1300 to 1800 (1994, Chapel Hill), 40.

tion. Cooke, Barlow and Callus, when discussing community of property in a modern setting, state that the term means the 'automatic sharing of property… during [a] relationship [of marriage]'[4] and "a rule-based sharing of property when the community is dissolved on death."[5] A slightly different meaning was ascribed to it by Lemaire[6] who, when examining the origins of community of property in France, said that it meant an association of pecuniary interests between the spouses, with the wife participating only in *acquêts.*[7] Watkin,[8] whose description is close to that of Lemaire's, says it means "… a patrimony containing property owned jointly by a husband and wife which is separate from the patrimonies they own severally as individual persons." While there are common threads to these definitions, all of them, for example, emphasize the importance of the matrimonial unit, there are also differences, and this may lead to problems when assessing how, when and why community of property originated. The adoption of one definition may produce a conclusion that community of property existed, whereas another may not. The definition formulated for the purpose of this paper is as follows: (a) there must be special rules or a system of law which comes into operation in relation to property because the state of marriage exists; (b) such a system must permit the wife's heirs to take the share she would have taken had she not predeceased the husband; (c) during the joint lives of the spouses, they are regarded as joint owners or partners of all property acquired and debts accruing during the marriage; and (d) the husband is not allowed to dispose of the community property by his will which would defeat the interest of the widow.

In the twentieth century there was a conscious decision in England to reject a community régime.[9] Aside from the main question of why community had not emerged prior to this, a number of related sub-questions are required to be addressed, namely, could community have developed within the legal structure that pertained in English law: were conditions present in English law, which were present in systems where community developed; and what were the factors that led to the emergence of community in other systems? These questions, and the analysis and exposition of the answers, form the basis of this paper. The approach taken to addressing them is a comparative one, examining a system where community developed with that of England. The region of northern France[10] has been chosen for comparison for several reasons, which include the political connection of parts of northern France with England during the High Middle Ages, the fact that customary law operated in both systems and finally both legal systems had been subject to Germanic influence in the early medieval period. The time frame within which the examination takes place is the fifth century to the beginning of the fourteenth century, since, as we shall see, it is not until the fourteenth century that the term community of property was used in the *coutumiers* of northern France, and England was firmly wedded to dower by that date. We begin our discussion in the fifth century in order to determine whether community had its roots in the law of the Germanic races, since, as we shall see, writers from an earlier period had suggested this to be so.

II. Married Women's Property – The Evidence in the Early Germanic Codes

The Germanic peoples who migrated into areas formerly governed by the Roman Empire[11] brought with them their own laws including, *inter alia*, those in relation to marriage, inheritance and property.[12] These peoples were by no means a homogenous group, either in language or culture, although their laws were textualised under the influence of the church,[13] and this led to a degree of cohesion amongst these laws.[14]

In the early societies of the Indo-Germanic peoples the kingoup was the most important institution in private law and comprisesd the whole body of kindred.[15] In very early Germanic and Anglo-Saxon society it is likely that the kin-group owned and administered the property in common,[16] but as the kin-group crumbled a new family structure evolved.[17] The household became important and was comprised of a much smaller group which included, amongst others, the husband, wife and children. The household was distinct from the kin-group, but

4 Elizabeth Cooke, Anne Barlow, and Therese Callus, Community of property a regime for England and Wales? (2006, The Nuffield Foundation), 5.
5 *Id.*
6 André Lemaire, *Les Origines de la Communauté de Biens Entre Époux*, 4(7) (1928) Revue Historique de Droit Français et Etranger 584, 585-586.
7 Property can be divided into that which is inherited, i.e., family property, which is termed *propres*, and property that is acquired by means of, for example, gift or purchase. Acquired property, in turn, can be subdivided into property which is acquired during a marriage – *conquêts* - and that which is acquired before the marriage - *acquêts*. A further point needs to be made in that the strict division into *conquêts* and *acquêts* is not always adhered to in this paper, and the term *acquêts* is frequently used in both this paper and more generally to encompass property acquired both before and after marriage.
8 Thomas Glyn Watkin, An Historical Introduction to Modern Civil Law (1999, Dartmouth), 192.
9 *See* Inheritance (Family Provision) Act, 1938; *see also* Report by the Royal Commission on Marriage and Divorce, 1956, Cmd. 9678 (U.K.) (the Commission examined and rejected the idea of a community of property regime in England and Wales).
10 This is the area north of the *central massif*. It is the region of customary law or the *pays de droit coutumier*.
11 *See* James A. Brundage, Law, Sex and Christian Society in Medieval Europe (1988, University of Chicago Press), 124ff.
12 Jo Ann McNamara and Suzanne Wemple, *The Power of Women through the Family*, *in* Women and Power in the Middle Ages 85, eds. Mary Erler and Maryanne Kowaleski, (University of Georgia Press, 1988), 85.
13 Ian N. Wood, *The Code in Merovingian Gaul*, *in* The Theodosian Code, eds. Jill Harries and Ian Wood (Cornell Univesity Press, 1993) 161-177.
14 Edith Ennen, The Medieval Woman (1989, Blackwell), 26.
15 Frank Stenton, Anglo-Saxon England (1971, Oxford University Press), 293.
16 By the time of Ine and Wihtraed in Anglo-Saxon England, this was no longer the case. *See* Ernest Young, *The Anglo Saxon Family Law, in* Essays in Anglo-Saxon Law (1905, Boston, Little Brown and Co.), 121, 123 *et seq*.
17 Brundage, *supra* note 12, at 126.

also part of it,[18] and the relationship of the household to the kin-group, and the dynamics between the two can be illustrated by the laws pertaining to the wife. She never completely passed out of her own kin-group: she was never regarded as kin of her husband's kin.[19] On her marriage her father and brother still retained a type of guardianship over her and would watch over her, although the husband received 'true' guardianship of her.[20] Marriage, in these early Germanic societies, reflected the tribal tradition of being an alliance between two kin-groups,[21] and it was a useful tool in forging alliances and ending feuds.

Early Germanic laws contain no evidence of a community of property regime: earlier writers, such as Huebner and Schroeder, who argued that there are traces of community in the early Germanic laws are in error, since an examination of the Germanic laws of the time give no indication of such a system.[22] What is clear from the early Anglo-Saxon laws is that there was an exchange value to a marriage,[23] with the woman being regarded, certainly at a societal (and possibly at an individual) level as a transactional commodity, although whether marriage was an actual sale by the father (as guardian of the woman) to the bridegroom is less clear.[24] The *weotuma* or bride-price which was originally the purchase price paid to the father for relinquishing control of the maiden's *mundium* or his guardianship over her, [25] changed in nature and in most of the laws became a gift received by the woman in her own right.[26] This change may well have coincided with the disintegration of tribal society; the evolution of the smaller family unit firstly into the form of the household, and ultimately, by the 800's, into the family as "a coresidental primary descent group";[27] the increasing role of the 'state' in family matters; and, the diminution of the exchange value of the marriage. Its importance in the evolution and development of community of property (and the financial provision accorded to the wife generally) cannot be overstated, for once the *weotuma* or bride-price changed from being a gift to the father to one which was a gift to the wife, the economic dynamics between the three parties to the marriage changed, with the father's position waning and the wife's waxing, thereby paving the way for the development of a wife possessing property interests in her own right.

As the importance of the father's *mundium* faded, the bride-price mutated into the *dos ex marito* (or Germanic marriage portion), and that, together with the morning-gift, rose to prominence. The morning-gift was the price paid for the woman's honour, was made to her by her husband on the morning following the consummation of the nuptials,[28] and was linked to a new sexual and domestic union. It was present in most of the continental Germanic and Anglo-Saxon laws,[29] but it varied in amount.

III. Decline of the Morning-Gift and the Rise of Dower

Towards the end of the eighth century in the Frankish kingdom things began to change, the morning-gift began to fade and disappeared in the course of the tenth and eleventh centuries,[30] although in parts of the Mediterranean south it remained until the end of the Middle Ages, but it was largely symbolic.[31] The fading of the morning-gift was another important step in the evolution of the property interests of a married woman since its decline provided an opportunity for other rights to emerge and take its place. The reasons for the demise of the morning-gift are difficult to pinpoint. Goody links its earlier demise in the north of Europe compared with the south to the postponement of the age of marriage in the north compared with the south.[32]

[18] Young, *supra* note 17, at 123.

[19] *Id.*

[20] *Id.*, at 124.

[21] *See* Frederic Seebohm, Tribal Custom in Anglo-Saxon Law (1902, Longmans), 32 (for a similar function of marriage in Cymric tribal society).

[22] Rudolf Huebner, A History of Germanic Private Law (1918, Little, Brown and Company) 621-46; Richard Schroeder, Geschichte des Ehelichen Güterrechts in Deutschland, Vol. II (1863-74, Stettin) 325.

[23] *See e.g.*, Æthelberht §77, 82, 83 and Ine §31 *in* B. Thorpe, Ancient Laws and Institutes of England (2003, The Lawbook Exchange).

[24] *Compare* Jacob Grimm, Deutsche Rechtsalterthümer 421 (Nabu Press, 2010) and Schroeder, *supra* note 23, at 325 (both arguing the sale was an actual sale of the woman by her father), *with* Young, *supra* note 14, at 172 (arguing that it was not the 'person of the woman, but the right of guardianship' that was subject to the sale). It is likely from the evidence available that Young is correct certainly in relation to the later Anglo-Saxon period.

[25] *See* Noël Senn, Le contrat de Vente de la Femme en Droit Matrimonial Germanique (1946, Portentruy). This corresponds to the marriage by purchase (*Kaufehe*) described by Brundage, *supra* note 12, at 128.

[26] *See* the Kentish Betrothal of King Edmund, Thorpe, *supra* note 24; *Lex Burgundionum*, 86, 2, *in* Leges Nationum Germanicarum (LNG) Leges Burgundionum, (L.R. de Salis ed., Hanover, 1892); *Lex Visigothorum* III, I, 6, *in* Monumenta Germaniae Historica, LNG Leges Visigothorum (K. Zeumer ed., Hanover, 1902); *Lex Baiuariorum*, 8, 14, *in* Mon. Germ. Hist. LNG Lex Baiuariorum (E. von Schwind ed., Hanover, 1892–1969); and *Lex Alamannorum*, LIV, I, *in* Leges Alamannorum (E. Heymann ed., Hanover, 1888). The exception were the laws of the *Lex Saxonum* of Charlemagne, where the bride-price was not paid to the woman but to the father - *Leges Saxonum*, 47, *in* Mon. Germ. Hist, Leges V, ed. Karl von Richthofen, 1863. Interestingly it was the same as the amount paid to the father or guardian for the violation of her person.

[27] Brundage, *supra* note 12, at 134.

[28] It also served to distinguish a legal marriage, in which a morning-gift was present, from a 'concubinage' in which the morning-gift formed no part.

[29] There is evidence in the earliest Anglo-Saxon law codes of the existence of the morning-gift. Law §81 of the dooms of Æthelberht of Kent (from about 600 AD) states, "If she [the wife] bear no child, let her paternal kindred have the fioh and the morgen-gyfe" *see* Thorpe, *supra* note 24.

[30] Didier Lett, Famille et Parenté Dans l'Occident Médiéval Ve- XVe Siècle (2000, Paris, Hachette), 89. Although Brissaud says that there however is evidence of a morning-gift in a deed of 1282 – "*dote seu dotalicio quod vulgariter dicitur morgangaba*". Jean Brissaud and Rapelje Howell, A History of French Private Law V2 (Little Brown & Company, 1912 (Reprint 2010)), 755.

[31] *See* Lett, *supra* note 31, at 88-89 where he says that there is evidence of the morning-gift in Genoa and Milan at the end of the twelfth century and in Tuscany at the end of the Middle Ages. Moreover, we can find evidence in the marriage charters of Visigothic Spain of the tenth and eleventh centuries of husbands making gifts to their wives in acknowledgment of their virginity. See, for example, Pualo Merêa, Estudos de Direito Hispânico Medieval Vol. I, (1948, Por ordern da Universidade), Docs 3-4, 8, 12, 17.

[32] Jack Goody, The Development of the Family and Marriage in Europe (1983, Cambridge), 240ff.

He argues where a woman marries at a younger age there is a briefer courtship and less likelihood of her being deflowered. While this may explain the difference in the treatment of the morning-gift in the north of Europe compared with the south, it provides, at best, a partial and incomplete explanation.

Brissaud, on the other hand, rather enigmatically suggests that the church's "reaction against the facilitation of divorce" caused the morning-gift to become obsolete.[33] It is difficult to see the causal link between the decline of the morning-gift and the increasing difficulty of obtaining a divorce. The decline in the use of the morning-gift does occur at the same time as the rise in the church's antagonism to divorce, but the church's control of family matters was far from settled at this time. In Germanic law divorce had been relatively easy for a man,[34] and the first year of the marriage was viewed as a trial period, at the end of which the marriage could be terminated unless a child was conceived,[35] in which case divorce became more difficult, although not impossible. McNamara and Wemple describe Germanic marriage as a union contracted, sealed and symbolised by sexual relations, which could be dissolved at will (at least if you were a man).[36] It is true that the church, on the other hand, looked upon marriage as a life-long bond between husband and wife, which was contracted by the parties and more importantly their families,[37] but despite this divorce by mutual consent remained common in seventh and eight century Gaul and elsewhere.[38] Even in the tenth century (when the church was beginning to gain exclusive jurisdiction over marriage[39]) its view on marriage and its indissolvability was still not universally accepted,[40] since indissolvabililty could mitigate against the fluidity of marriages which could be disadvantageous to powerful families.

Régine Le Jan argues that the morning-gift declined because of the rise of the Germanic marriage portion or the *dos*[41] which was favoured over the morning-gift and 'promoted' by the church. The *dos* existed alongside the morning-gift in the Germanic laws,[42] and had been known of since the time of Tacitus.[43] In a system where the possessions of the wife became those of her husband's on marriage,[44] the appropriation of a portion of his estate for her seems "an equitable compensation for [her]",[45] although this cannot be the sole factor, since women who did not bring a marriage portion to the marriage would have had no right to it if this were so. The agreement for the *dos ex marito* was usually a public act, negotiated and agreed upon before the marriage, and given to the legal spouse, whereas the morning-gift, by contrast, was very much a private act, offered on the morning after the nuptials, and could arise in marriages made only by mutual consent of the parties (*Friedelehe*),[46] as well as those which also had the consent of the families of the parties. The *dos ex marito* facilitated a transparency of exchange between the two families and the relatively public nature of the negotiations meant that the church would favour it since it enabled it to have a closer control over the union.

The church may have played a part in the demise of the morning-gift but it had "failed to secure clear-cut control of matrimonial matters [between 600 and 900 AD]"[47] when the morning-gift was beginning to fade, although by the year 1000 AD, when the morning-gift was disappearing, its doctrines on sex were being converted into legal rules, and church officials were beginning to assert jurisdiction over marriage.[48] There was an attempt to harmonize the differences to marriage between the Germanic practice (in which consummation was an essential ingredient) and church discipline (in which consent was paramount and sex was viewed as unclean and incompatible with the ascetic values of the early Christian fathers) by influential writers such as Archbishop Hincmar of Reims in the ninth century. He said, "A true coupling in legitimate marriage between free persons of equal status occurs when a free woman, *properly endowed* [emphasis added], is joined to a free man with paternal consent in a public wedding [followed by] sexual intercourse."[49] The church, by insisting on an agreement for the endowment before the marriage could shift the emphasis of the marriage away from the carnal act which took place on the wedding night, to which the morning-gift was inextricably linked, to consent, endowment and spiritual union. In

33 Brissaud & Howell, *supra* note 31, at 754.
34 *See e.g.*, *Legs Burg*. 34 in Mon. Germ Hist Leges, *supra* note 27.
35 Brundage, *supra* note 12, at 131.
36 McNamara & Wemple, *supra* note 13, at 96.
37 *Id.*
38 Brundage, *supra* note 12, at 143.
39 *Id.*, at 137.
40 *Id.*, at 175.
41 R. Le Jan, Famille et Pouvoir Dans le Monde franc (VIIe – Xe siècle): Essai d'Anthropologie Sociale (1995, Paris, Publications de la Sorbonne), 88-89.
42 Christian Lauranson-Rosaz, Douaire et Sponsalicum Durant le Haut Moyen Âge in Veuves et Veuvages Dans le Haut Moyen Âge, ed. Michel Parisse, (1993, Paris), 101. Originally the *dos ex marito* was merely a gift of movables, but it is clear from the deeds and formulae that it became a gift that could include land.
43 Tacitus, Germania 18 www.fordham.edu/halsall/source/tacitus-germ-latin.html (accessed 10 July 2014) (circa 98 A.D.) ('*Dotem non uxor marito, sed uxori maritus offert*').
44 She may, for example, have received a gift from her father or have received a share of the inheritance before her father's death at the time of her marriage, *see* Brissaud & Howell, *supra* note 31, at 755; *see also* Diane Owen Hughes, *From Brideprice to Dowry in Mediterranean Europe*, 3 (1978) J. Fam. Hist. 272.
45 Brissaud & Howell, *supra* note 31, at 753.
46 This was a marriage which did not involve the transfer of the Mund. *See* Rainer Schulze, *Eherecht*, *in* Reallexikon der Germanischen Altertumskunde, ed. Johannes Hoops, (Berlin, 1986), 491.
47 Brundage, *supra* note 12, at 137.
48 McNamara & Wemple, *supra* note 13, at 106-7.
49 Hincmar of Reims, Epistolae 22, in PL 126: 137-138

continental Europe the morning-gift remained important only in relation to the marriage called the *Friedelehe.* It faded, fused with the Germanic marriage portion or *dos ex marito* and became rechristened dower.[50]

During this evolutionary stage woman's property rights were ill-defined; they varied in substance, although not usually in form, i.e., the method by which married women were financially provided was similar, although the detail and amount varied. The early idea of a husband's *mundium* over the wife affected the way in which rights to the property originated and developed. Originally the possessions of the husband and the wife comprised one patrimony, which the husband both administered and enjoyed,[51] and all property including any acquisitions made during the marriage belonged to him.[52] In most of the Germanic laws, when the husband died first, or the marriage was dissolved without cause, the widow would keep her morning-gift, any property given by her family and the marriage portion (over which she would sometimes have a usufruct, sometimes absolute ownership), but gradually we see her taking a portion of the property which had been jointly acquired during the marriage by the parties (see *post*).[53] Where the wife died first or the marriage was dissolved with cause, the morning-gift devolved to the widower as did the marriage portion, but it was usually subject to the children's rights; any portion given to the wife from her family on marriage usually devolved to the husband, although in some laws it was limited so that he was unable to dispose of it during his lifetime.[54]

The '*dos'* of the Germanic laws became the customary or legal dower of the later Middle Ages,[55] and it provided the mainstay by which a widow was financially provided on the death of her husband.[56] During the early Middle Ages however the amount of dower, the property to which it was attached and the nature of the right was still far from clear, and it varied from place to place.

IV. Developments in the Pays De Droit Coutumier

Dower survived until the time of the Revolution in France, when its use by the nobility heralded its demise. The Law of the 17th Nivôse, year II, Art. 61[57] and Art. 49 of the Décret of the 22 Ventôse of the same year abolished dower for the wife. In northern France in the early Middle Ages the form dower took varied both in amount,[58] and the property to which it attached - it could comprise of any of the following: (i) the property which was the husband's inheritance; and/ or (ii) the property which the husband possessed on the day of the marriage; and/ or, (iii) by certain customs, *acquêts*.[59] The nature and extent of dower should have become more settled after 1214 and the controversial ordinance of Philip Augustus in which legal dower was set at one-half of all that the man possessed on the day of his marriage, thus excluding *acquêts* from dower.[60] This was not universally accepted in northern France, however, which meant that variations arose.

The origin of community in the *pays de droit coutumier* is hazy and vague,[61] and it is difficult to point to a precise moment when it came into being – there is no 'singularity' as such. Important developments occurred from the seventh century when co-ownership of *acquêts* developed between the spouses,[62] and this evolved alongside dower of *acquêts,* so that a couple could choose to which system they wished to be subjected. There are a few early charters in which we see evidence of the joint ownership of *acquêts*, but these should not be taken as being representative of a standard regime in operation at the time.[63]

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50 Brissaud & Howell, *supra* note 31, at 755, 765.

51 *Id.*

52 Edictum Rothari 184, Laws of Liutprand 57

53 Brissaud & Howell, *supra* note 31, at 756ff. One-third among the Franks (Rib 37 and a Capitulary of 821) and one-half among the Westphalians according to the law of the Saxons (Sax 47, 48), and amongst the Visigoths the division of *acquêts* was made according to the fortunes of the spouses (Wis 4,2,15,16: 5,2,3 and 4).

54 *Id.*

55 *Id.*, at 770.

56 William Burge, Commentaries on colonial and foreign law generally, and in their conflict with each other and with the law of England, Vol 1 (London, Saunders and Benning, 1838), 391.

57 Although this did not apply in Normandy and customary law survived a little longer.

58 In the regions of Poitou, Touraine, Anjou, Maine and Brittany we find charters which suggest that dower amounted to one-third for nobles and one-half for others (*see* Auguste Bernard & Alexandre Bruel, Recueil des Chartes de l'Abbaye de Cluny Vol I (1876, Paris); Vol II (1880, Paris) [hereinafter Cluny]) – numbers 190, 496, 1211, 1331, 1412, 1777 and 2875).

59 In Amiens, the Artois, Brittany and Touraine-Anjou dower included a share in the *acquêts* (*Charter of Customs of Amiens (1190)* § 21 *in* 1 Recueil des Monuments Inédits de l'Histoire du Tiers Etat, ed. A. Thierry (1850,Paris); Coutumier d'Artois §§ 25, 32, ed. E. Tardif (1883, Artois); Coutumier de Bretagne § 30,41, ed. M. Planiol (1896, Rennes); Etablissements de Saint Louis, Book 1 § 15-8, 145, ed P. Viollet (1881-6, Paris)). In 1193 in the marriage agreement made between Baudouin, the Count of Flanders and the Count of Nevers espousing their son and daughter, dower over *acquêts* is seen (Lemaire, *supra* note 7, 603). Certain *coutumiers* show us that dower over *acquêts* existed in the regions of France where customary law operated. For example, in Normandy dower over *acquêts* was seen in the second part of the twelfth century (Lemaire, *supra* note 7, at 599; Très Ancien Coutumier de Normandie, ed. E.Tardif (1881, Paris), 79 [hereinafter referred to as TAC]. *See also* Très Ancienne Coutume de Bretagne, ed. M. Planiol (1896, Rennes), 30, 40. Dower over *acquêts* also appears in the charters of certain nobles in the later Middle Ages, so it never completely disappears – Lemaire, *supra* note 7.

60 *See* Brissaud, *supra* note 31, at 772.

61 In fact there was not merely one but several different community regimes. Community of movables and *acquêts* in the northern area of France in the land of the *Coutumiers* and in parts of Germany; partnership of *acquêts* found in parts of Spain and the south west of France; and absolute community found in parts of Germany.

62 Lemaire, *supra* note 7, at 610ff.

63 *See* E. de Rozière, Recueil Général des Formules Usitées Dans l'Empire des Francs du ve au Xe Siecle, Vol 2, (2012, Nabu Press (Reprint)), 129.

For example, in *Recueil de Marculf*, formula II, 7 a wife gives her husband, if she predeceases him, all her goods "*tam de hereditate parentum quam de conparatum, vel quod pariter laboravimus*".[64] Co-ownership of *acquêts* could be substituted for dower over *acquêts* as we can see in Formula 17 of the *Recueil de Marculf*.[65] In this formula we witness more of a true sharing of property since there is a joint will made by the husband and wife. In the first part the husband made various gifts and then recognised that the wife had a right over part of the *acquêts*, which pre-dated the termination of the marriage, and was not dependant on her survival. The wife, by making a disposal in favour of her husband, demonstrated that she had a right to the goods over which she made the disposal, even if she were to predecease him. Moreover, the idea of the wife having an interest in the property before the death of the husband is further reinforced by the phrase '*absque repetitione heredum meorum'*, whereby we see that the wife can exclude the heirs.[66] The formula is interesting since there is no question here of the wife receiving merely an interest for life after her husband's death, and we can see a much truer sharing of the property. Later charters also demonstrate that co-ownership of *acquêts* existed. For example a charter of Laon of 1128 c.13 speaks of what is tantamount to a 'community' of *acquêts* between the spouses;[67] and a charter of Amiens of 1190 c.35 says that if a man and woman jointly own *acquêts*, and one of them dies, the surviving spouse has one-half of the *acquêts* and the children the other half.

Although dower over *acquêts* was conceptually different from co-ownership of *acquêts*, their legal effect may have been *de facto* the same in their early development, in as much as a right (in favour of the wife) was attached to the *acquêt* in both cases from the moment it became part of the patrimony, and both achieved the object of providing for the widow on the decease of her husband. Until the end of the tenth century/ beginning of the eleventh century dower was usually (although not always) a right of full ownership of the property, although there is charter evidence which shows it could be a life interest.[68] Under the influence of the Roman theories of dower, and the rule that allowed the wife to dispose of her dower to the detriment of her children, [69] it was reduced to a life interest only. [70] Once full ownership of dower faded[71] it had less in common with co-ownership of *acquêts* and community of property.

In the early Middle Ages co-ownership of *acquêts* was not the same as community of property, since, there were no legal rules which subjected the *acquêts* to form an indivisible mass of property, which could be divided on the termination of the marriage, and it was very much a matter of custom and practice whether the parties chose to subject themselves to such a system. Moreover, in the case of a sale of an *acquêt* the husband would receive the purchase price, the wife's role being merely to consent to the alienation of the property.[72]

Acquêts could be 'jointly owned' by the spouses during their marriage and on the death of one of the spouses be divided between the surviving spouse and the heirs of the deceased spouse. In effect the protection afforded to them was not so great as that afforded to family property.[73] It is therefore unsurprising that it is in relation to *acquêts* and in particular the co-ownership of *acquêts* that we see 'community' of property developing, although it is not until the fourteenth century that such a term would be used to describe the system.[74] Writers like Tardif[75] and Ourliac and Malafosse,[76] who place community of property's emergence as earlier, are in error and this misconception is due to several factors. Firstly, as we have seen, there is difficulty in interpreting some of the early formulae (*infra*), so it can appear community arose much earlier. Concepts which are similar to community appear in some of the earlier formulae, but this does not mean to say that any formalised community regime was in operation. Secondly, the definition ascribed to community of property by some of the earlier writers is much wider than the one formulated at the beginning of this paper, with the result that community appears to arise earlier because of the broader definition. By the fourteenth century (but not before) there is evidence of a community of property regime in fifty-three of the *coutumiers*;[77] there are restrictions in relation to the testamentary disposition of the *acquêts* which are subject to

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[64] *Id.*

[65] Monumenta Germaniae Historica, Formulae Merowingici et Karolini aevi, ed. K. Zeumer (1882, Hannover). The most important parts of formula II 17 are as follows, '*…Ego ille et conjux mea illa…, testamentum nostrum condidimus…; villas vero illas et illas…, filius noster recipiat…, villas illas basilica illa … recipiat… Sed dum in villas aliquas, quas superius memoravimus, quas ad loca sanctorum, heredibus nostris deputavimus, quod pariter stante conjugio adquisivimus, prædicta conjux nostra tertiam inde habere potuerat, propter ipsam teriam villas nuncupantes illas… in integritate, si NOBIS SUBPRESTIS FUERIT in compensatione recipiat…* Itemque ego illa, aucilla tua, Domne et jugalis meus ille,in hoc testamentum… scribere… rogavi, ut, si TU NIHI SUBPRESTIS FUERIS, omni corpore facultate mea, quantumcumque, ex successione parentum habere videor, vel in tuo servitio pariter laboravimus, et quod in tertia mea accepi, in integrum, absque repetitione heredum meorum, quod tua decrevit voluntas, faciendi liberam habeas potestatem. Et post discessum vestrum, quod non fuerit dispensatum, ad legitimos nostros revertatur heredes.'

[66] *See e.g.*, *id.*, at *Recueil de Marculf*, formula II, 7.

[67] '*Si vir et mulier de mercimoniis quæstrum facientes, substantia fuerint ampliati et hæredes non habuerint altero eorum mortuo, alteri tota substantia remanebit.' See also*, for example, Cluny, *supra* note 59, at No. 476, No. 937 (where a wife gives her husband half of the jointly owned property) and No. 670.

[68] *See* Cluny, *supra* note 59, at 1412 of 975 A.D.

[69] O. Stobbe, Handbuch des Deutschen Privatrechts, IV, Besser'sche Buchhandlung 115 (1884, Berlin, W. Hertz.), 115.

[70] *See e.g.*, Cluny, *supra* note 59, at 1412, 1413, 2618, 2628, 2633, 2659, 2875.

[71] *See* R. Caillemer, L'Origine du Douaire des Enfants (2012, Nabu Press (Reprint)).

[72] Lemaire, *supra* note 7, at 626.

[73] The ordinance of Philip Augustus (infra) had excluded them from dower, although we still see examples of dower of *acquêts*.

[74] C. Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 (1979) Mich. L. Rev. 67.

[75] *Id.*

[76] Paul Ourliac and Jean de Malafosse, Histoire du Droit Privé (1968, Paris, Presses Universitaires de France).

[77] Adolphe Tardif, Des Origines de la Communauté de Biens Entre Époux (1850, Paris, A Durand), 33.

community of property; [78] and there are special rules which applied to *acquêts* with the result that half devolved to the surviving spouse and half to the heirs of the deceased spouse, i.e., the wife's 'share' of the *acquêts* did not depend on her survival. [79] Thirdly, in the thirteenth century the division between separation of property and community of property was blurred[80] since the wife's power to possess, enjoy and convey the property was suppressed in both regimes making it difficult to distinguish one from the other. The administration and ownership of the property in both systems was vested in the husband, and the wife given a set of rights to prevent the property being disposed of by her husband. In both community of property and separation of property the emphasis is upon the rights of the wife on the death of her husband,[81] although that is not to say that she does not have some rights in relation to the property during the husband's life.

The economic revival in Europe in the eleventh century[82] meant that movables became important, since wealth in the form of movables increased. In the burgeoning 'middle class' in France the role of the woman within the marriage became more outward looking, since she may well have directly contributed to the acquisition of the chattels. There is however little trace of chattels in texts before the thirteenth century.[83] When they do appear they were treated in the same way as *acquêts* on the dissolution of the marriage in that they were partitioned into halves,[84] although the husband had an unrestricted right to dispose of them *inter vivos*.[85] Movables and debts became incorporated into the community regime at some point during the fourteenth century.[86] In cases where the movables are acquired during the course of the marriage it would seem logical that they were treated in the same manner as *acquêts*, but this rule was extended to movables which one of the parties possessed on the day of the marriage. And this may have been due to the lack of an inventory of movables at the date of the marriage, and hence uncertainty as to whom they belonged. [87]

V. The English Position

The law codes and charters of the early Anglo-Saxon period demonstrate that the *weotuma* and the morning-gift co-existed,[88] and endured in England throughout the Anglo-Saxon period.[89] The laws of Cnut from the eleventh century, dealing with the remarriage of a woman within twelve months of the death of her first husband, makes a distinction between the morning-gift and that property which descended to the wife on the death of her husband;[90] and there are several charters and wills that demonstrate the morning-gift was still used in the eleventh century.[91]

The decline and ultimate disappearance of the morning-gift in England occurred sometime during the twelfth century, between 1115 and 1188, which is markedly later than in northern France. By the time Glanvill[92] was writing towards the end of the twelfth century no mention is made of the morning-gift in his discussion of the wife's property. This is in stark contrast to the references in the *Leges Henrici Primi* some seventy years earlier[93] to the morning gift.[94] There is no doubt that the *Leges* are 'incomplete and defective'[95] and it is difficult to evaluate

[78] A. Loysel, Institutes Coutumières (1971, Geneve, Slatkine Reprints, 1971), 121. Although under the Coutume de Lorraine II, 7 he was allowed to dispose of the community possessions by his last will and testament – Brissaud & Howell, *supra* note 31, at 835.

[79] There was however, still no consensus as to what property comprised of community property, with it differing between regions.

[80] Donahue, *supra* note 75, at fn 81.

[81] Li Livre de Jostice et de Plet, XII, ed. Rapetti & Chabaille (1950, Paris, Firmin Didot), 25, 5

[82] Egypt and the Byzantine Empire had started to trade with Europe again, and this in turn helped revive the Italian towns, and trade towns grew throughout Europe, especially in Flanders and Italy, but also in France and German principalities.

[83] Lemaire, *supra* note 7, at 634.

[84] Although this is not so in all customs. *See, for example*, in the west of France the division into thirds. J. Yver, *Les caratères orinaux du groupe des coutumes de l'Ouest de la France*, 30 (1952) Revue Historique de Droit Français et Etranger 18, 39-40.

[85] Brissaud & Howell, *supra* note 31, at 833.

[86] P. Petot, *Les meubles des époux au moyen âge d'aprés les coutumes françaises*, 3 (1949) Revue Internationale des Droits de l'antiquité, 213.

[87] Brissaud & Howell, *supra* note 31, at 827.

[88] In Æthelbirht §81 from around 600 AD (*see* Thorpe, *supra* note 24, at 10) we see the first mention of the morning-gift in a code and if we give credance to the Historia Brittonum ascribed to Nennius it is claimed that the seventh century King Æthelfrith gave a morning-gift of Bamburgh to his wife Bebbe (*see* Christine Fell, Women in Anglo-Saxon England (1984, Basil Blackwell) 56.

[89] The weotuma is seen in charters of the tenth and eleventh centuries. See the Wifmannes Beweddung or Kentish Betrothal of Edmund dating from the middle of the tenth century, "§ 3. Then … let the bridegroom declare what he will grant her if she chooses his will…", and the so-called 'Kentish Marriage Agreement' from about 1016AD, 'Here is declared by this writing the contract which Godwine wrought with Beorhtric when he married his daughter; that is, first, he gave her one pound's weight of gold for that she should choose his will…"

[90] *See* Thorpe, *supra* note 24, at 178; II Cnut 73a: "and if then, within the space of the year, she chooses a husband, she shall lose her morning-gift and all the property which she had from first husband, and his nearest relatives shall take the land and the property which she had held."

[91] *See for example*, the will of Wynflæd (from between 946-951) shows a wife granting her morning-gift to Eadmær, (K. 1290, *in* Anglo-Saxon Wills ed. Dorothy Whitelock ed. (2011, Cambridge (Reprint))); in the will of Ælfhelm (from between 975 and 1016) there is a declaration by Ælfhelm of the morning-gift he gave his wife (K.1329, *id.*, at 30 and 32); in the confirmation of Æthelric's will by King Ethelred (997 AD) there is a reference to the morning-gift of Æthelric's widow (K. 704, *id.*, at 44); in the will of Ælfflæd (1002 AD) there is a grant of an estate, which was Ælfflæd's morning-gift (K. 685, *id.*, at 40); and a charter from between 984-988 AD, entitled 'History of the Estate of Wouldham, Kent', speaks of the wife's morning-gift *see* A.J. Robertson, Anglo-Saxon Charters (2009, Cambridge) Charter XLI, History of the Estate of Wouldham, Kent.

[92] Glanvill, Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur ed. and trans. G. D. G. Hall (1965, London, Selden Society) [hereinafter Glanvill).

[93] Leges Henrici Primi ed. L.J. Downer (1972, Oxford).

[94] *See id.,* Leges c.11,13 and c. 70,22, the former being remarkably similar to the law of II Cnut 73a.

[95] *Id.*

to what extent they accurately reflect the law at that time.[96] Moreover whether the appearance of the morning-gift in the *Leges* means that it was in frequent use at the beginning of the twelfth century or not is difficult to determine. (See *post* for a further discussion).

A 'portions system' existed in Anglo-Saxon times as can be seen in the law codes and the charters, for example, the Kentish Betrothal, whereby the wife was entitled to take a portion of the husband's property on his death. In the early laws of Æthelberht, law §78 states "§ 78 If she [the wife] bears a live child let her have half the property if the husband die first"; and the Kentish Betrothal states, "§ 4. It be so agreed, then it is right that she shall be entitled to half the property, and to all, if they have children in common…". The Germanic nature of this 'portions system' can be demonstrated by examining Germanic codes, to which the laws of Æthelberht bear a remarkable resemblance. Chapter 10 of the mid-eighth-century Bavarian laws, for example, states that a childless widow was entitled to 'half the property' until she died or remarried.[97] The laws of Æthelberht and the Kentish Betrothal indicate that the right of the widow to a portion of the husband's property existed alongside the morning-gift and the weotuma, with the widow who had borne a child entitled to a greater portion than one who had not. It is unclear how extensive the portions system was in Anglo-Saxon times, since extant codes and charters from this early period are sparse, and the only references to the 'portions' entitlement of a wife are contained in Æthelberht and the Kentish Betrothal.[98]

The relationship between the morning-gift and the portions system is difficult to evaluate. Earlier writers, such a Young,[99] suggest that by the laws of Æthelberht the morning-gift is superseded in cases where the wife has produced a child and replaced by a portion of her husband's property. Modern writers, such as Klinck, believe that the 'portions system' and the morning-gift existed alongside one another,[100] and the charters do seem to indicate that a husband could make an express endowment of wealth to his wife by means of, for example, the morning-gift, and that such express endowments would operate independent of the legal portions system.

Several writers[101] have suggested that community of property was present during the Anglo-Saxon period. Young, accepting Schroeder's view of community of property in relation to the Westfalian Saxons,[102] states that the 'higher principles of community of property' replaced the morning-gift in cases where the wife had borne a child in Anglo-Saxon law. He said that the laws of Æthelberht demonstrate that community of property operated in early Anglo Saxon law in the case where the wife had borne a child. This it is suggested is a leap of logic by Young, and there does not appear to be any evidence upon which to base this assumption. Moreover, the evidence that is available illustrates that the morning-gift and the weotuma were both still in existence at the end of the Anglo-Saxon era, and both could be given to the wife by means of an express charter, which could in effect create its own endowment regime. Alongside this the legal 'portions system' operated. It is difficult to see how this demonstrates the existence of community of property, or even that England was on the road that would lead to a community of property regime. Moreover the morning-gift never faded in the way it did in northern France, making room for other devices to replace it; nor is there evidence for the mutation of the brideprice into the *dos ex marito*. The property interests of a married woman were evolving 'more rapidly' in northern France relative to England, which meant that there could be incremental shifts in the fundamental nature of a woman's property rights which provided the opportunity for developments to take place. Linked to this was the manner in which property was classified in northern France and the importance that a classification had on the ability of the owner to alienate such property. While the rules in relation to movables or chattels might have been somewhat vague on both sides of the channel, this was not the case in relation to immovable property. The classification of land in England was based on land tenure, with land being classified as book-land and folk-land. The former was granted by the kings (with the consent of the *witen* in the ninth and tenth century) in charters or books to bishops, lay nobles etc., and the right of alienation of book-land depended on the terms of the original grant.[103] Folk-land, by way of contrast, was not held by means of book or written title, but held by means of the customary law.[104] In northern France by contrast property was classified according to its origin. *Propres* was land that had devolved from the lineal family, so that the husband's (or wife's, if the property was from her family) power to alienate such land was tightly controlled in order to protect the interests of the heirs. Land that had been acquired by a person, other than by means of inheritance, during a person's lifetime was classed as an *acquêt*, or if acquired during the marriage a *conquêt*. (See *ante* fn 8 for a discussion of this point). This division facilitated the preservation of family land within the lineal family, with acquired land being available for the 'new' family which included the wife.

VI. The Position in Normandy

Until the end of the twelfth or the beginning of the thirteenth century, when Norman customary law was reduced to

[96] Liebermann, according to Downer, thought that the Leges were 'current and applicable in Henry's reign'. *Id.*, at 2.
[97] Laws of the Alamans and Bavarians ed. and trans. T. J. Rivers (1977, Philadelphia), 160.
[98] Although there are references in other laws to a portion (one-third) of the husband's chattels in the context of the property which the wife of a thief could retain *See* Ine 57 and Athelstan 1.1
[99] Young, *supra* note 17.
[100] Klinck, *Anglo-Saxon Women and the Law*, 8 (1982) Journal of Medieval History, 109-110.
[101] *See e.g.*, Young, *supra* note 17; Florence G. Buckstaff, *Married Women's Property in Anglo-Saxon and Anglo-Norman Law and the Origin of the Common Law Dower*, 4 (1893) Annals Am. Acad. 233.
[102] Young, *supra* note 17, at 175.
[103] F. Pollock & F.W. Maitland, The History of English Law Before The Time of Edward I, Vol I, (1895, Cambridge, Cambridge Uni. Press), 60.
[104] *Id.*, at 61.

writing in the TAC[105] and later the *Summa de Legibus Normandie in curia laïcali* or *Grand Coutumier de Normandie*[106] (hereinafter referred to as the *Grand Coutumier*), dower over *acquêts* existed in Normandy,[107] and there are several legal texts from the time that demonstrate this. Lemaire, for example, speaks of a case which was referred to the assembly at Lisieux, where a husband, whose marriage was annulled, refused to return to the wife "*sa dot et sa part des acquêts*".[108] Earlier evidence is difficult to find because of the paucity of written material; in fact no document survives from this area of northern France before the latter part of the tenth century.[109] Two documents from around this time, demonstrate the existence of dower in the region; the first records the dower land granted by Richard II of Normandy to his wife, Judith, and the second records dower granted by Richard III of Normandy to his wife, Adela.[110] In the eleventh century dower is recorded in a number of charters where the wife's consent to the alienation of the dower which had been given to her was required.[111] At this time dower took the form of an endowment of the wife with specific property, although later an alternative form of dower (customary dower) which comprised one-third of the husband's property developed.[112] Moreover, by the end of the second half of the eleventh century we see that the distinction between *acquêts* and *propres* was recognised in Normandy, although it is likely that it had developed before this.[113] At the beginning of the thirteenth century, there was a series of decisions in the Echiquier in which dower of *acquêts* was excluded:[114] it is conceivable that these decisions formed the basis for the later TAC, and as Yver states the result was to, '*fixant la droit normand dans cette attitude de défiance*'.[115] Certainly by the time the TAC was reduced to writing property that had been acquired by the husband during the marriage was expressly excluded from dower,[116] and the *Grand Coutumier* states that property which had been acquired by the parties during the marriage belonged to the husband.[117] Such a system would mitigate against the development of a community regime. Moreover, by the time the Norman coutumiers were redacted again in 1583 article 389 of the *Coutume de Normandie* expressly forbade community of property.[118] What is curious, however, is that there were local customs operating within Normandy which differed in their approach.[119] For example, in Caux, certainly at the time of Terrein, half of the *conquêts* were the wife's as her dower,[120] and in the bailliage of Gisors, the widow was given half the *conquêts* made during the marriage on the death of her husband.[121] Property held by means of burgage tenure was always treated differently, and in this respect Normandy followed the rest of the towns in northern France where property situated within towns and burroughs was treated as community property.[122] In Normandy if burgage property had been purchased by the husband during the marriage then half of it was the widow's on the death of the husband.[123] Nevertheless the general approach to marital property in Normandy, certainly amongst the higher classes, was the exclusion of dower over *acquêts* and of community of property, an approach that differed from most of the customs of the rest of northern France.

It is difficult to pinpoint the reasons for this difference in Normandy, but it may in part be due to the rapid and early crystallisation of the customary law compared to the rest of northern France, and this in turn did not give time for community to evolve before the customs were redacted.[124] This rapid crystallisation may have been the result of the Dukes' strategy to stabilise the duchy in the light of their relatively recent acquisition of Normandy, and to impose themselves as true sovereigns both on the population at large and on the Norman barons.[125] Moreover the influence of French law in Normandy

[105] Robert Besnier, La Coutume de Normandie (1935, Librairie du Recueil Sirey), 53-53 dating from 1200–1245. The dating of the TAC is approximate and based on references in the texts to datable events.
[106] *Id.*, at 105, dating from 1235–1258.
[107] Lemaire, *supra* note 7, at 599.
[108] *Id.*, at 600-601. This decretal is dated at somewhere between 1185 and 1187.
[109] E. Tabuteau, Transfers of Property in Eleventh-Century Norman Law (1988, University of North Carolina Press) 7.
[110] Recueil Des Actes Des Ducs de Normandie (911-1066), ed. M. Fauroux (1961, Caen) no 11 and no 58.
[111] Tabuteau, *supra* note 110, at 176-7.
[112] *Id.*, at 176.
[113] *Id.*, at 177.
[114] J. Yver, *Le douaire sur les conquêts en Normandie*, (1936) Revue Historique de droit Français et Etranger 827.
[115] *Id.*
[116] TAC, *supra* note 60, at 69; "*la femme ne peut pas demander douaire ès choses que son mari acquiert durant le mariage*".
[117] *Summa de Legibus Normanniae* 100, 9 *in* J. A. Everard *Le Grand Coutumier de Normand*, (2009, The Jersey & Guernsey Law Review), 436-437 which says that during her husband's lifetime a woman is unable to retain any *acquêts*, and she is unable to take any portion in any *acquêts* acquired by her husband, and Ord July 1219 I, 38 note which said that dower over *acquêts* was not permitted, although the extent to which this ordinance was followed has already been questioned.
[118] "*Les personnes conjointes par mariage ne sont communes en biens soit meubles ou conquets: ainsi les femmes n'y ont rien qu'après la mort de mari*". A decision in the Court at Caen on 6 August 1832 confirmed that the meaning that had been attributed to Article 389 was correct and that there could be no community between the spouses, but rather "*… une association qui assurait à la femme un droit dans les produits de la collaboration commune*." Journal des Notaires et des Avocats, Tome XLVII, 51 (1835, Paris,). The older texts are silent on this matter.
[119] These customs only appear in the later customs of 1583
[120] Yver, *supra* note 115.
[121] J.Yver, *La Communauté Conjugale en Normandie*, Revue Historique de droit Français et Etranger 810 (1935).
[122] It is thought that the reason for tenure by burgage being treated differently results from the fact that it would not be held by the aristocracy as such, but rather the up and coming middle classes. Rules were designed to promote the power and wealth of the aristocracy.
[123] *Summa*, *supra* note 118, at Ch. 31, 166-168.
[124] Yver, *supra* note 122, at 811.
[125] *See* J.F. Lemarignier, La France Médiévale, Institutions et Société (Paris, Armand Colin, 1981) 121ff.

'remained nearly non-existant'[126] This may be due to the political situation in Normandy, since the Dukes of Normandy asserted their independence as regards the Kings of France so that often the latter were their suzurain in theory only.[127] By the time of the forfeiture of John's continental fiefs in 1204 Norman customary law had formed so that the customs of the *Île-de-France* did not have a profound influence over Norman customary law. It was only at the edges of Normandy in Gisors and Caux, for example, that the custom of the *Île-de-France* had any influence, and this resulted in a different marital system from that in the rest of Normandy.

The law of Normandy which formed between the tenth and the twelfth centuries exhibited three key characteristics, which Besnier summarised as follows - it was a '*droit féodal, patrimonial et familial*'.[128] The Normans (like the rest of northern France) put the ancient value of lineage and the family above all else,[129] and in order to facilitate the devolution of property in accordance with these ideas there had to be strict rules in relation to matrimonial property interests and successorial inheritance. The aim of Norman law was to avoid the prospect of property, both the husband's and the wife's (which was her dowry), from passing by means of marriage into a different family line. As a result the wife's family's property was protected by the rule known as *l'inaliénabilité dotale*, and the husband's family's property, which was the widow's dower, was merely a usufructory right and subject to the control of the heirs. While it is obvious that a system which protects lineage and places the preservation of family property within the family at the forefront is going to produce rules that will protect *propres*, it is more difficult to see why dower and co-ownership over *acquêts* (and *conquêts*), and ultimately community of property, did not exist in Normandy. For *acquêts* and *conquêts* were not 'family property' as such, and there is evidence that dower over *acquêts* occurred in Normandy in the eleventh century (which was consistent with the Frankish usage elsewhere).[130] While *acquêts* and *conquêts* were not family property in the hands of the person who received the property, they had the *capability to be family land* in the hands of the donee of the property. What is meant by this is if a husband receives property as an *acquêt*, and the property devolves to his heir by means of inheritance, then in the heir's hands it is a *propre*. It is the *capability* of an *acquêt* or a *conquêt* to become a *propre* that may have resulted in *acquêts* and *conquêts* being excluded from dower.

VII. Women's Property Rights in England Post-Conquest

We have seen (*infra*) that at the end of the Anglo-Saxon period the wife and widow were provided for, either by means of the legal portions system, or by means of express endowment, in which the morning-gift and the weotuma formed a central part. By the time of Glanvill[131] (around 1188), the position of the wife and widow in relation to their marital property can be gleaned from his writings. The wife was entitled, by both the secular and ecclesiastical law, to an endowment (dower) at the time of the marriage,[132] whereby she was given the use of a portion of her husband's lands during her widowhood. The amount of dower could be chosen by the husband, or, in cases where he did not nominate property as dower, one-third of the whole of his free tenement of which he was seised at the time of the marriage was deemed to be dower.[133] Dower could be increased where the husband had little land at the date of his marriage, by including up to one-third of his later acquisitions.[134] In the 120 years between the Norman Conquest and Glanvill's writings the nature of a wife's property rights changed: the weotuma and the morning-gift had disappeared, and dower had become the mainstay of a wife's financial provision.[135]

Earlier writers suggested that 'Norman law [did] not exist in a portable, transplantable shape…', and that it had little influence on the pre-existing Anglo-Saxon rules. [136] While no Norman 'code' as such emerged until the end of the twelfth century, to say that there was no 'consciously perceived legal system' in Normandy by the end of the eleventh century would be wholly inaccurate;[137] modern day scholars believe that a legal system existed in the early period of Norman history, which was influenced primarily by Carolingian practice and custom.[138] We have seen that dower, the dowry and the division of property into *propres*,

[126] S. Poirey, *L'éspirit of Norman Customary Law*, *in* A Celebration of Autonomy 1204–2004 800 Years of Channel Islands' Law ed. P. Bailhache (Jersey Law Review, 2005), 20.
[127] *Id.*
[128] Besnier, *supra* note 106, at 16.
[129] *Id.*, at 16-19; Poirey, *supra* note 127, at 23ff. As Poirey says, lineage 'gave structure and cohesion to Norman society', and it enabled power to remain with the Norman aristocracy. Rules evolved so that family property was not 'lost' to persons outside the blood line, and hence power remained in the hands of the seigneurs. Community of property of even *acquêts* could threaten the interests of the Norman aristocracy.
[130] *See* Astoul, Ch., *La constitution et l'assiette du douaire en Normandie avant le Grand Coutumier*, (1911, Bulletin du Comité des Travaux Historiques, Sciences Économiques et Sociales), 132-137.
[131] Glanvill, *supra* note 93, at fn 108
[132] *Id.*, at Book VI I. There was an inherent distrust in English law of any death-bed endowments and death-bed marriages, with the result that the common law would only recognise dower which was made at the time of the marriage *see* T.F. Plunckett, A Concise History of the Common Law (2010, Liberty Fund Reprint) 566.
[133] *Id.*
[134] *Id.*, at Book VI 2.
[135] The *maritagium,* which was a gift to the woman from her family, also took root during this period: this was not a concept that was familiar to the Anglo-Saxons, although payments from the bride's family to the husband were not unknown in Anglo-Saxon England but they played a far less prominent and significant role than payments in the other direction, i.e., by the husband to the wife or her family. *See* Whitelock, *supra* note 92, at 24.
[136] Pollock & Maitland, *supra* note 102, at 57.
[137] Tabateau, *supra* note 110, at 2,
[138] *Id.*, at 2-6. There was some Scandinavian influence in certain areas.

acquêts and *conquêts* existed in Normandy at the time of the conquest. Did the Normans bring these ideas to England?

Traditional wisdom always held that William the Conqueror did not intend to sweep away the Anglo-Saxon laws: on the contrary, in Laws of William, Select Charters c.7 William said that all men were to have and hold the law of King Edward,[139] and so it has generally been accepted that both he and William II legislated on few matters. Nevertheless more recent scholarship suggests that this may not be so. Tabateau argues that the outlook and the orientation of both William I and William Rufus remained Norman through their reigns, that the barons of Normandy were the same men as the barons of England and their outlook too remained Norman. William Rufus, at the time that he held England, held Normandy in mortgage from Robert Curthose.[140] Moreover Hudson maintains that Anglo-Saxon and Norman practices, together with the impact of conquest and colonization all combined to form an important substantive and administrative basis for the common law, and that Norman innovation was clearly seen in relation to land-holding higher in society.[141] Thus the influence of Norman legal processes on English law seems more profound than previous scholars thought. The Domesday Book, the Coronation Charter of Henry I and the *Leges Henrici Primi*[142] provide us with an insight into marital property law post conquest. In the Domesday Book both the wife's dower and her *maritagium* are mentioned;[143] the Coronation Charter of Henry I §3 and §4[144] speaks of a widow's *dotem* and *maritagium*, and the *Leges Henrici Primi* Law 70 § 22, rather confusingly, combines Anglo-Saxon ideas with the Frankish *Lex Ribuaria*,[145] when it describes a widow's right to her *dos*, the morning-gift, one-third of the *acquêts* of the marriage and the *maritagium*. The widow's right to her *dotem* and the *maritagium* become embedded in England. Although the documentary evidence from Normandy at this time is scarce, we have already seen that Tabateau found charter evidence for the existence of dower and classification of property into inherited and acquired property (*infra*). Thus it is arguable that the Normans introduced or reinforced these concepts in England. It is likely that they would apply their own laws to their own disputes (i.e., disputes between members of the nobility), rather than adopt the laws of the conquered Anglo-Saxons. There is a 'mixing' of Anglo-Saxon (the morning-gift) and Norman ideas in these early documents, which suggests that Norman concepts were infiltrating, blending and usurping Anglo-Saxon ideas,[146] the later of which still held sway in the early post-conquest years, but only really amongst the Anglo-Saxons.

VIII. The Reasons for Lack of Community

We have seen in post-conquest England, northern France and Normandy that womans' property rights have common features. In most of northern France community of property evolved in a way that it did not in Normandy and England, and while we have touched upon some of the factors (for example, the classification of property and the relative lateness of the reduction to writing of most of the *coutumiers* of northern France) which may have influenced this dichotomy, these factors do not seem to give us the complete picture. Other issues too have contributed to this lack of community of property.

1. The fading of acquęts

The existence of *acquêts* was central to the development of community of property in most of northern France, although there were isolated areas where it developed only, for example, in relation to movables and debts.[147] *Acquêts* endured for a relatively short period of time in England,[148] and there is no doubt that without them the development of community would be stymied. By the time we get to Bracton[149] they have all but disappeared and as Holt said they were a mere 'passing phase'.[150] There is no doubt that *acquêts* played an important part in post-Conquest England. They were an integral feature of the customary succession of the French upper-classes, in the century following the Conquest, with the eldest son being *entitled* to family property, and the younger son the acquired land.[151] Moreover a man is more able to alienate his

[139] Laws of William, Select Charters c.7, *in* Thorpe, *supra* note 24, at 15.

[140] Tabateau, *supra* note 110, at 4.

[141] John Hudson, The Formation of the English Common Law (Longmans, 1996), 116-17.

[142] *See* Downer's commentary in Leges Henrici Primi, *supra* note 94, at 79 for a discussion of the general problems with it.

[143] *See e.g.*, Domesday Book: A Complete Translation (2003, Penguin) at i.138b '*dedit cum nepte sua in maritagio*'. *See also* 197 and 214b, and 218r where it is clear that Azelina widow of Ralf Taillebois, sheriff of Bedfordshire is holding lands *de maritagio* and *de dote*. The problem with the references to the *maritagium* in the Domesday Book is that they are rare and rather brief, and although they indicate the existence of the *maritagium*, they do not shed any light on its actual operation at this time.

[144] From 1100.

[145] *See* Anne Duggan, *Roman-Canonical Influences on Early English Law c1100–1200*, Early English Laws http://www.earlyenglishlaws.ac.uk/reference/essays/roman-canonical-influences-early-english-law-c1100/1200 (last visited June 5, 2013). Duggan attributes the hybrid character of the L.H.P. to the linking of the scholarly fraternity of Norman England with the Neustrian schools by the introduction of the Pseudo-Isidore by Archbishop Lanfranc. *See* Patrick Wormald, The Making of English Law: King Alfred to the Twelfth Century, Ch. 1: Legislation and its Limit (1999, Oxford).

[146] The morning-gift does not appear in the writings of Glanvill.

[147] For example, the Artois region.

[148] Although they did endure in the context of succession of manors until the fourteenth century.

[149] Henry de Bracton, De Legibus et Consuetudinibus Angliae ed. George E. Woodbine, trans. Samuel E. Thorne tra with revision and notes (1922, Yale University Press).

[150] J.C. Holt, *Politics and Property in Early Medieval England*, 57 (1972) Past & Present 3, 12.

[151] *See* J. Hudson, Land, Law and Lordship in Anglo-Norman England (1994, Oxford), 109 note 2. In fact on William's the Conqueror's death Normandy, his inherited lands, went to Robert Curthose, his eldest son, and England, his acquired land, went to William Rufus, with his third son taking the movable property. In the course of the twelfth and thirteenth centuries on the contintent this custom developed into a rule - Joseph Biancalana, *Widows at Common Law: The Development of Common Law Dower*,[1988] The Irish Jurist 271. Whether it became a rule in England during a later period is unclear, but there is evidence of younger sons often being made and answering claims to inheritance against their older brothers by saying that the father had granted them land out of purchased land. *See e.g.*, 1 Rotuli Regis Rolls (RCR) 438, 2 RCR 88-89; 1 Curis Regis Rolls (CRR) 45, 66-7; 1 CRR 310; 1 CRR 359; 2 CRR 248. *See also* R. Palmer, The Whilton Dispute 1264–1380: A Socio-Legal Study in Dispute Settlement in Medieval England (1992, Princeton University Press).

acquired property without the consent of his heirs and collaterals during the twelfth century than he was family property.[152] Glanvill demonstrates this point, when he draws the distinction between land that is inherited and land that is acquired;[153] if a man has only inherited land, he can give a certain part of it to any stranger he wishes. However, grants to a younger son without the heirs' consent were not allowed. If a man had only acquired land, and wished to make a gift of part of it, he could do so, but he should not disinherit a child by giving away all his acquisitions. In the absence of heirs or children a donor could give away his acquisitions to whomsoever he pleased. If a donor had both inherited land and acquisitions then he may give the acquired land to whomsoever he wished together with a 'reasonable part' of the inherited land. It is accepted that Glanvill does not necessarily lay down mandatory rules, but rather he discusses principles and "norms which generally or customarily hold true."[154] Moreover, the distinction between acquired and inherited property was important in that a potential donor's family would usually prefer inherited property to pass to the heir in order to keep family property within the family, whereas the lord may feel "a particular claim to control lands which the tenants recently acquired from them."[155]

With this in mind the demise of the distinction between acquired and inherited property may seem puzzling, and can probably be traced to several events.

(i) The division of land into inherited and acquired may not have been as clear-cut as at first it appears. This is due to the fact that a father's acquisition would become the inherited property of the heirs, and a practice developed of the heirs succeeding to both inherited and acquired land so that the distinction would only remain important for the duration of one generation.

(ii) Land acquired by means of marriage, even if it were the wife's inheritance, was treated as though it were an acquisition amongst the French upper class,[156] with the result that the division between acquired land and inherited land was blurred by this custom.

(iii) The rules in Glanvill, as we have said, were not prescriptive but merely 'cast in terms of what a donor may do'.[157] Gifts that could be made from inherited land were limited to a *rationabilis* part, and it was open to interpretation as to what was the 'reasonable' part. Milsom pointed out that these rules (of which the division into inherited land and acquired land were a part) "perished because they could not well be enforced in the king's courts".[158]

(iv) Charles Donahue[159] believes a further factor which 'obliterated the distinction' between acquired and inherited land was the rise of the warranty system. He said the heritability of land became established in the late twelfth century because the royal courts "forced lords and their heirs to honor the warranty to a man and his heirs implicit in taking homage. The rules designed to ensure that heritability also operated… unintentionally… to make land freely alienable *inter vivos* but not alienable at all by testament." And he continues "Another result, probably also unintended, was the obliteration of the distinction between family land and acquests."[160] What does he mean by this? Alienability of land at the beginning of the twelfth century depended upon whether the property was inherited or acquired, *and* upon a series of participations and consents of the heir and lord (in the case of a substitution).[161] From the 1160s the charters contain fewer and fewer references to participation, and homage and warranty became a bar to the lord or the heirs of the donor claiming the land from the donee of the land and his heirs. The heir's duty to maintain and warrant his ancestor's grants did not distinguish between grants of acquired land and inherited land, and this was a further factor in the demise of the distinction between acquired and inherited property.[162]

(v) The introduction of the writ of right and the assize of mort d'ancestor increased the importance of seisin for the heir, thereby diminishing the importance of the classification of land into acquired and inherited. While Simpson may be correct when he says that "[i]t is perhaps mistaken to conceive of Henry II's policy as a policy of protecting seisin… rather [he] is concerned to prevent disseisins,"[163] an inevitable consequence was to attribute a new importance to the concept of seisin. An heir could bring mort d'ancestor or a writ of right to recover both inherited and acquired lands[164] without any need to distinguish between the two.

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[152] Glanvill, *supra* note 93, at 94,VII,1.
[153] Holt, *supra* note 151 (established that the distinction existed in England before Glanvill's time).
[154] Hudson, *supra* note 152, at 183.
[155] *Id.*, at 101.
[156] For example Eleanor of Aquitaine's inheritance to Richard the Lionheart. For a more complete discussion on this point *see* Steven Runciman, History of the Crusades (1951, Cambridge).
[157] Stroud F.C. Milsom, The Legal Framework of English Feudalism (1976, Cambridge) 122.
[158] *Id.*
[159] Donahue, *supra* note 75.
[160] *Id.*
[161] Hudson, *supra* note 142, at 217.
[162] It is clear that in 1200 there is no *established* warranty system and acquisitions are still clearly in use at this time; this can be illustrated by a case in Select Civil Pleas (Selden Society, Select Civil Pleas, No. 56 (F.W. Maitland, ed.,)) in which Robert Fitz Nigel demanded land against his brother Richard Battle. Robert claimed the land as elder brother. 'Richard comes and says that their father… of his conquest gave him that land during his lifetime'. Hence Richard based his action on a claim to freedom of alienation only in relation to the conquests. Had the warranty system been firmly established at this time he could also have claimed that homage would have been given by himself to Robert, and this would have brought their relationship under the obligation of warranty.
[163] A.W.B. Simpson, An Introduction to the History of the Land Law, (1961, Oxford) 29.
[164] See Curia Regis Rolls (1922-) 1 CRR 45, 66-7; 1 CRR 202; 4 CRR 16; 5 CRR 33

2. Dower and the demise of acquisitions

The classification of land into acquired and inherited for the purpose of alienation was not the same as the distinction of land into acquisitions and inherited for the purpose of dower,[165] with the former distinction being important since it could determine the extent of a widow's dower. Glanvill said that every man is bound both by ecclesiastical and secular law to endow his spouse at the time of the espousals.[166] Thus either a man nominated certain lands as dower (the *dos nominata*), which could not exceed one-third of his lands, or failing this, the royal justices would deem that the husband had endowed his wife with one-third of land of which he was seised at the time of the marriage (*dos rationabilis*). Land acquired by the husband during the marriage could not be claimed as dower, unless the husband used words at the time the dower was assigned, by which the acquisitions would become encompassed into the dower.[167] Biancalana, however, argues that acquisitions could comprise of dower where the husband used words like " a third of all my lands" since this formula could be taken to mean lands at the time of the marriage and those acquired at a latter date.[168] At some point between the Assize of Northampton in 1176, in which chapter four instructed the justices that widowers were to have their dower,[169] and Magna Carta in 1217, in which there was added to chapter seven, "She is to be assigned as her dower one-third of all the land which was her husband's during his life, unless she was endowed with less at the church door";[170] dower became a single entitlement encompassing the husband's acquisitions and the property he had at the date of the marriage.[171] With the demise of the distinction between inherited and acquired lands for the purpose of the heir's rights the distinction for the purpose of dower would be difficult to maintain.

3. The role of chattels

The division of property into acquired and inherited property was instrumental in the development of community of property in France, and movables came to be incorporated into the community regime. Donahue[172] says that movables were not vital to the growth of community, and while this may be correct they were certainly a contributory factor in its early development. It is likely that the reason for their inclusion in a community regime in France was almost accidental: the old rule by which a husband could freely dispose of a wife's movables disappeared,[173] and the lack of an inventory of the movables on marriage meant that they were 'mixed' and therefore available to be included in community property. Debts of the marriage had also become part of the community of property, since they were initially paid from the movable portion of the property and if movables became part of community of property it was inevitable that debts themselves would become an integral feature of community.

The treatment of chattels in England made it difficult for them to form part of any putative community regime. From the end of the thirteenth century the common law made it clear that the effect of marriage on a woman's chattels was to make them the property of her husband,[174] and the common law came to look upon the husband as the guardian of his wife and thus entitled not only to the fruits of her lands, but also ownership of all chattels that she had or which came to her during the marriage.[175] Both Glanvill and Bracton[176] remark that a married woman could make a will of her chattels, provided she obtain the husband's consent consent,[177] and despite the support given to the making of wills by married women by ecclesiastical law[178] the common law pointed out that there was no customary right for her to do such a thing.

4. Unifying control of property in one person

With the benefit of hindsight it appears as though there was a conscious effort in England towards unifying control of land in one person and that the land devolve intact to a single person from the following generation.[179] Such a 'conscious effort' is illusory, although the law did evolve in such a way that the power of alienation was concentrated in the hands of a single living person who had seisin of the land and would pass it, usually, to a single male heir. There was a bias against partition of the land in English law, and there was a simplicity and certainty in a lord taking homage from one person, rather than a number,[180] and this was necessary since he would have been made to provide

[165] Biancalana, *supra* note 152, at 272.
[166] Glanvill, *supra* note 93, at VI, 1.
[167] This dual entitlement to inherited lands and acquisitions has been seen as one that originated in Frankish custom *see* Biancalana, *supra* note 152, at 258.
[168] *Id.*, 278.
[169] Select Charters and Other Illustrations of English Constitutional History 179-80 (W. Stubbs, 9th ed., as revised by H.W.C. Davies, 1921).
[170] *Id.*, at 341. Maitland believed this was meaningless when it was written (Frederick Pollock & Frederic W. Maitland, The History of English Law, Vol II (1895, Cambridge) 421) but Biancalana has cogently argued that this is incorrect, and Magna Carta is merely recording the state of the law at the time – Biancalana, *supra* note 152, at 282ff.
[171] *See* Selden Society, Pleas Roll for 1221, Rolls of the Justice in Eyre, Vol., 59 No 1080, Selden Society.
[172] Donahue, *supra* note 75.
[173] Brissaud & Howell, *supra* note 31, at 827.
[174] Britton I 227 (1901, John Byrne & Co).
[175] M. Sheehan, The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century 325 (1963, Toronto).
[176] Glanvill, *supra* note 93, at, VII 5; Bracton, *supra* note 150, at fol 60b.
[177] Sheehan, *supra* note 176, at 236.
[178] *See* the Lambeth Statutes of Archbishop Boniface (1261) C 21 as one of the earliest examples, where he said that those who impede the "just customary and free" making of a will by a married woman will be excommunicated. Other examples can be found in the Statutes of Archbishop of Stratford 1342 and Giles of Bridport, Bishop of Salisbury (1257–62). *See also* a synodal statement of the wife's testamentary capacity as customary (Lambeth 1261) *in* Sheehan, *supra* note 176, at 238-9.
[179] Donahue, *supra* note 75, at 81.
[180] Milsom, *supra* note 158.

escambium when the king's court made him give the land to the right man. These factors mitigated against the development of community of property.

IX. Conclusion

It is clear from the early Germanic codes in both continental Europe and Anglo-Saxon England that common ideas pertained in relation to women, marriage and property interests. In most of these laws, as tribal society disintegrated, the bride-price or the weotuma which had been paid to the wife's family, was paid directly to a woman (except in the case of the *Lex Saxonum*). The morning-gift, which was a payment for the virginity of the wife, was present on both sides of the channel, although it began to fade at an earlier time in the Frankish kingdom than in England. Nevertheless, there is no evidence in the extant codes, formulae and charters that any type of community of property regime existed during this early period. In northern France the morning-gift 'fused' with the Germanic portion and mutated into the *dos* or dower, that would accommodate a widow's property rights, yet at the same time protect family property of the higher classes until the time of the Revolution. Alongside dower, in most of northern France, co-ownership of property was developing and it was from this that community would spring. What was pivotal in this arrangement for the financial protection of the matrimonial unit was the manner in which property was classified. *Propres* received a higher degree of protection since it was important that they be preserved for the lineal family: *acquêts*, by contrast, seen to be less important to the lineal family, could be subject to co-ownership and ultimately community. A usufructory right of dower over *propres* and community of *acquêts* accomodated this need very well. Moreover the relative lateness of the redaction of the *coutumiers* (with the exception of Normandy in which community never developed in any case) compared to the writings of Glanvill in England meant that the former had time to evolve before being set down in writing. In England the morning-gift did not disappear until some time towards the end of the eleventh beginning of the twelfth century. We have demonstrated that endowment and the morning-gift are seen in the charters of the eleventh century, with the earlier codes echoing what was the customary framework for the devolution of property amongst the lower classes. There was no classification of property corresponding to that in northern France, until after the conquest, which facilitated the development of community. It has been shown that the classification of property into, what would be termed in England, acquired and inherited, was introduced by the Normans. Property may have been recognised as acquired and inherited pre-conquest, but this recognition lacked any legal significance. There was an almost complete replacement of the English aristocracy by 1086,[181] and this ensured that Norman customs were introduced into England, and in all likelihood 'mixed' with Anglo-Saxon customs. Endowment of a wife (by means of the morning-gift in part) was already a feature of Anglo-Saxon society, although the amount was at the discretion of the husband. Under the influence of the Normans this endowment became the dower of the thirteenth century. The widow's right of dower represented a temporary encumbrance on the land,[182] and enabled land to devolve to the next of kin: such a system no doubt favoured and was favoured by the nobility. Holdsworth said "… the common law [of England] made the law of the nobles the law of all.."[183] so that dower became the means by which all widows were financially provided. In France too dower was the means by which a widow received a degree of financial stability. Amongst the merchant classes who held land in burgage tenure, however, both in Normandy and most of northern France the customs of community of property was preferred.[184] In France, with the exception of Normandy, community was extended to the nobles. In England it was only in a small number of borough customs that customs such as gavelkind survived, and applied to the lower classes: law became more 'centralised' in England. The building blocks for the evolution of community were present in England at an early time, but the demise of the distinction of property into that which was inherited and that which was acquired cannot be overstated, and this together with the rise in the importance of seisin, the manner in which chattels were treated in England and the unification of control in one person mitigated against the evolution of community.

[181] Hudson, *supra* note 142.
[182] *Id.*
[183] W.S. Holdsworth, A History of English Law, Vol III (1909, Methuen, London) 408.
[184] J. Musset, Le Régime Des Biens Entre Époux en Droit Normand (1997, Presses Universitaires de Caen).

The 1963 Strasbourg Convention on Single Nationality Movement: The German Experience

*Low Choo Chin**

Abstract

The Council of Europe's Convention on Nationality affirmed the establishment of the international principle against multiple allegiances. Germany's convergence to the 1963 European standard is marked as an important phase in its citizenship legislation. Since then, the single nationality principle has been formally accepted in its legal and judicial institutions. This principle remains unchanged in Germany up to the twenty-first century, even though other European states are converging upon a new principle that is more tolerant on the issue of dual nationality. This article suggests that Germany's aversion to dual nationality is mainly shaped during the period between 1955 and 1974.

Key words: *European Convention on Nationality; Federal Republic of Germany; dual nationality; convergence.*

European Nationality Norms and Germany

Germany's opposition towards dual nationality started since its ratification of the 1963 Council of Europe's Convention on Nationality. Since then, it has become a norm adhered to by the FRG.[1] German official opinions referred the 1963 Convention as an argument against dual nationality. Even though Germany is not the only country in Europe that prohibits dual nationality, it is the only country that shows consistent resistance through its legal, judicial, and political institutions. Dual nationality has been prohibited in the Naturalization Guidelines of 1977, the Aliens Act of 1990, the Aliens Act (Amendment of 1993) and the German Nationality Act (StAG) of 1999.[2] The Constitutional Court in its famous '*Ubel doktrin*' argued against dual nationality on the basis of the German convergence in the single nationality movement. [3] In its 1974 decision, the Court declared that 'it is accurate to say that dual or multiple nationality is regarded, both domestically and internationally, as an evil that should be avoided or eliminated if possible.'[4]

The 1963 Strasbourg Convention was significant to German citizenship practices. It reinforces the national disfavour to multiple loyalties. Borrowing Checkel's term of 'institutionalised [German] myths,' I suggest an analytical investigation on the origins of these myths. [5] There has been little work on uncovering its origination. It is important to investigate the origin of such policy because it leaves long lasting consequences that continues until today. This article argues that the German continuous opposition to dual nationality has been shaped by its convergence to the 1963 single nationality movement. The 1963 Strasbourg Convention is a driver of German citizenship policy. The developments during period between 1955 and 1974 were the main causal of events that happen in the 1990s and 21st century.

The German convergence to the single nationality movement has a significant influence on German citizenship developments until today. Dual citizenship campaigns are blocked by the conservative parties based on grounds to safeguard Germany's interests and cultural identity. Protecting Germany's national interests became more important among the policy makers and public opinions in Germany. The theory of 'state interests' is still guiding the German practice compared to the 'individual interests' theory campaigned by the European re-

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1 Simon Green, 'Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany,' *International Migration Review* 39, no. 4 (2005), pp. 927–28.

2 Refer to *Einbürgerungsrichtlinie von 1997, Ausländergesetz von 1990, Ausländergesetz von 1993*, and *Staatsangehörigkeit (StAG).*

3 Kay Haibronner, 'Germany,' in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.) *Acquisition and Loss of Nationality: Policies and Trends in 15 European States.* Volume 1: Comparative Analyses (Amsterdam: Amsterdam University Press, 2006), p. 228.

4 As cited in Gerald L. Neuman, 'Nationality Law in the United States and Germany,' in Peter H. Schuck and Rainer Münz (eds.) *Paths to Inclusion: The Integration of Migrants in the United States and Germany* (New York: Berghahn Books, 1998), p. 277.

5 Jeffrey T. Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' *Comparative Political Studies* 36, no. 1–2 (2003), p. 98.

gime [6] The myth is further 'empowered' by societal pressure and elitist policymakers fearing such change would 'dilute their Germanness.'[7] This subject remains controversial in German citizenship historiography as it is increasingly linked to the highly politicised immigration policy and as a propaganda strategy in party competitions.[8] Since dual nationality debates are situated within the context of anti-immigrant xenophobia that was taking place across Europe, political parties thus are enticed to be more responsive to demands of the electorate.[9]

Attempts by the SPD/Green coalition in 1998 to modernise German Citizenship Law failed to create a miracle for hundreds of thousands of foreigners residing in the Federal Republic which included immigrants, asylum seekers and refugees. Most of them wished to remain in Germany as many foreigners had been 'waiting for a miracle.'[10] The expectation of miracles could not be rekindled as renewed citizenship reform campaigns met with failures. In March 2010, the *Bundesrat* rejected the course for any further reform.[11] In November 2011, a similar attempt to reform the nationality law in the Bundestag also failed.[12]

Despite the recent renewal in the scholarly research on German dual citizenship, one main aspect remained unexplored and that was the origin of the single nationality principle. This article contributes to this body of literature by examining the German participation in the convergence process that was taking place across Western European states. The author suggests that the developments taking place between 1955 and 1974 have sown the 'seed' of the German anti-dual nationality principle. The principle persisted well into the 1990s and the 21st century. During the German citizenship reform debates in the late 1990s, there was strong public and official opposition to dual nationality.

The article proceeds in five sections. The immediate post-war opposition to dual citizenship that took place in the West German Constitutional Committee is examined in the first section. Then, the *Bundestag's* initialisation towards citizenship modernisation in the 1950s is discussed by highlighting the various domestic concerns of the 1955 citizenship committee. The third section analyses Germany's deliberation in the Council of Europe's Convention of 1963. The fourth section offers an account of the changes in German nationality laws following the conclusion of the treaty. The final section will be the conclusion.

The Basic Law: Maintaining the Status Quo

Prior to the recent controversial debates, there had been significant German debates on the prevention of multiple nationalities in the 1950s. The debates included the questions of unlimited bestowal of nationality through *jus sanguinis*, of equal rights for men and women to transmit their German nationality by descent, an unconditional right to naturalisation (among ethnic Germans) without requiring the surrender of the previous nationality, and of dual nationality right for nationals of the European Commission (EC) member states.[13]

The question of whether multiple nationality should be tolerated lies in the hearts of the disagreements concerning Germany's debates over responsibility for the Nazi past. The policymakers were divided on several basic normative issues as whether the objective to prevent statelessness could justify an increase in cases of dual nationality. This issue was taken up by the West German Parliamentary Council, which was established in 1948 to prepare a new constitution for post-war Germany. The council was obliged to naturalise all former German nationals who had been deprived of their nationality by the Nazis. With this aim as the priority, the council considered the inclusion of a provision in the Constitution that would prevent any German national from being deprived of his or her nationality. This was a response to the withdrawal of German nationality from Jewish and other marginalised Germans during the Nazi era.[14]

Among the members of the council, Hans von Mangoldt argued that the committee should aim to prevent statelessness, a principle agreed on by international law, rather than preventing dual nationality. Another member of the council, Ludwig Bergsträsser, argued for limitations on dual nationality. There were concerns that the German nationality law should contain provisions for the deprivation of nationality, especially for cases of dual nationality. The opponents of dual nationality preferred the law to state explicitly that double nationality constituted grounds for the deprivation of German nationality, such as in the cases of German women who obtained foreign nationality through marriage, or Germans abroad who held foreign officers or foreign military positions. Their proponents believed that Germany had no interest in retaining those dual nationals who did not fulfil their obligations, sought to acquire a foreign nationality or entered foreign government service, including espionage.[15]

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6 Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' p. 98.

7 Ibid., p. 106.

8 Faist, Jürgen and Beate, 'Dual Citizenship as a Path-Dependent Process,' in Alejandro Portes and Josh DeWind (eds.), *Rethinking Migration: New Theoretical and Empirical Perspectives* (New York: Berghahn Books, 2008), p. 107.

9 Marc Morjé Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU,' *International Migration Review* 39, no. 3 (2005), p. 716.

10 Petra Bornhöft and Manfred Ertel, 'Staatsbürgerschaft: Warten auf ein Wunder.' *Der Spiegel,* 16 November 1998, available via http://www.spiegel.de/spiegel/print/d-8031544.html.

11 Ben Knight, 'German upper house says 'no' to dual citizenship.' *Deutsche Welle*, 26 March 26, available via http://www.dw-world.de/dw/article/0,,5401847,00.html.

12 *Hambürger Abendblatt,* 'Bundestag: Einführung doppelter Staatsbürgerschaft abgelehnt,' 10 November 2011, available via http://www.abendblatt.de/politik/deutschland/article2089564/Einfuehrung-doppelter-Staatsbuergerschaft-abgelehnt.html.

13 Bundesarchiv Koblenz (hereafter BAK) B106/73108, Referat IB2 über Herrn Unterabteilungsleiter IB und Herrn Abteilungsleiter I, Herrn Statssekretär 1. Zusammenstellung der Fragen, die der Kommission zur Vorbereitung eines neuen Staatsangehörigkeitsgesetzes vorgelegt werden sollen, 29 July 1955, pp. 1–2.

14 Eberhard Pikart and Wolfram Werner, *Der Parlamentarische Rat 1948–1949: Akten und Protokolle – Band 5/II Ausschuß für Grundsatzfragen* (Boppard am Rhein: Harald Boldt Verlag, 1993), pp. 715–16.

15 Ibid., pp. 714–15.

However, the post-war situation did not allow this dual nationality aversion to dominate the bargaining process during the framing of the Basic Law. In the end, the pressing need to prevent statelessness prevailed over the importance of preventing dual nationality. Guided by the objective to prevent statelessness, Article 16 (1) of the Basic Law, promulgated on 23rd May 1949, contained a provision preventing Germans from being deprived of their citizenship, i.e. their nationality.[16] As to further protect the rights of the displaced persons, Article 116 (2) provided the re-acquisition of German nationality for former German citizens whose German nationality had been revoked between 30 January 1933 and 8th May 1945 based on political, racial or religious grounds.[17] Refugees or expellees of German origin had the statutory right to a German nationality through naturalisation without having to renounce their previous nationality. Since they suffered discrimination based on their common ethnicity, the FRG reacted to ethnic-based deportation and expulsion by formulating the law based on ethnicity.[18]

Therefore, the restoration of the 1913 RuStAG (together with is ethnocultural tradition) in the Basic Law is a 'product' of Germany's divided past with the presence of the dispersed ethnic Germans. As the cold war dynamic unfolded and citizenship competition with East Germany intensified, the whole citizenship traditions remained as it was. Aleinikoff and Klusmeyer are right to point out that the search for an acceptable dual nationality policy is dependent on the 'particularity of state experiences and goals.'[19] The goal to uphold the prospect of unification and the concern about East Germans being 'German citizens' and the *Ausseidler* were more important than preventing multiple loyalties. The new element – of dual nationality prevention – failed to assert itself in the Basic Law. These concerns, however, did not seem to prevent the *Bundestag* from recognising the Council of Europe's initiative.

Towards the Internationalisation of German Nationality Law: Re-evaluation of Dual Nationality

Six years after the formulation of the Basic Law, the Federal Republic of Germany was ready to re-evaluate its dual nationality policy. Regional collaboration in the area of citizenship necessitated a change in the West German dual nationality principle. The prevention of multiple nationality was on the political agenda when the *Bundestag* decided to carry out a citizenship reform following the trends of European countries. As shown below, Germany had to face a major challenge in preserving the characteristics of "German-ness" while constructing a modern citizenship law based on individual equality that acts as a continuation task for the framers of the Basic Law.[20]

Beginning in 1955, a series of international developments influenced the Federal Republic to reconsider its citizenship policies. The path towards European unity and the preparation of international agreements, such as the United Nations Convention on the Nationality of Married Women, the 1954 United Nations Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, required some changes in the German nationality law. In West Germany, a new law was seen as necessary as there was a growing need to replace the outdated principles of the existing nationality law.[21] The Council of Europe's objective coincided with the domestic aspirations of the *Bundestag*.

On 10th October 1956, the German *Bundestag* decided on a new German nationality law. A working committee was then established under the Ministry of Interior on 30th October 1956, following the decision of the Committee of the *Bundestag.* A committee of experts was thus appointed to discuss and suggest solutions to a whole range of nationality problems, such as multiple nationality, equal rights of men and women, the relationship between federal and state citizenship, and immigration.[22] The Committee's task was to determine whether the new German nationality should in principle prohibit the possession of a foreign nationality among its nationals. So, should this position be described as outdated and hand German nationals the freedom to acquire as many nationalities as they like?[23]

During their sitting in Heidelberg, the Committee approved unanimously that dual nationality is undesirable. Placing limitations on cases of double nationality through unilateral German legislation was desirable, but it was not recognised as the top priority for the new German law.[24] Requiring the abandonment of foreign nationality when obtaining German nationality would result in difficulty and hardship for the refugees in the Eastern bloc countries. As to deal with these problems, it was suggested that there should be an exemption from the requirement to renounce foreign nationality under certain circumstances. Dual nationality was to be accepted if it would cause undue hardship for the individual to be released from his or her previous nationality.[25]

[16] Article 16 (1) of the Basic Law of the Federal Republic of Germany, 23 May 1949, Elmar M. Hucko, *The Democratic Tradition: Four German Constitutions* (New York: Berg, 1987)

[17] Article 116 (2) of the Basic Law.

[18] Klekowski, 'The Decline of Privilege: The Legal Background to the Migration of Ethnic Germans,' in David Rock and Stefan Wolff (eds.) *Coming Home to Germany? The Integration of Ethnic Germans from Central and Eastern Europe in the Federal Republic*, (New York: Berghahn Books, 2002), p. 105.

[19] Alexander Aleinikoff and Douglas Klusmeyer (eds) 'Plural nationality facing the future,' in *Citizenship Today: Global Persectives and Practices* (Washington: Brookings Institution Press, 2001), p. 78.

[20] Dieter Gosewinkel, 'Citizenship and Naturalization Politics in Germany in the Nineteenth and Twentieth Centuries,' in Daniel Lévy and Yfaat Weiss (eds.), *Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration* (New York: Berghahn Books, 2002), p. 73.

[21] BAK, B106/73108 Referat IB2 über Herrn Unterabteilungsleiter IB und Herrn Abteilungsleiter I, Herrn Statssekretär 1. Betr: Einberufung einer Sachverständigen-Kommission zur Beratung der Grundzüge eines neuen Staatsangehörigkeitsgesetzes, 29 July 1955.

[22] BAK, B106/73108 Der Innenminister des Landes Nordrheim-Westfalem an den Herrn Bundesminister des Innern 15 Nov 1956. Betr: Neuregelung des Staatsangehörigkeitsrechts.

[23] BAK, B106/73108 Zusammenstellung der Fragen, die der Kommission zur Vorbereitung eines neuen Staatsangehörigkeitsgesetzes vorgelegt werden sollen, 29 July 1955.

[24] BAK, B106/73109 Niederschrift über die Sitzung der Staatsangehorigkeitskommission in Heidelberg, 2 May 1957, p. 7.

[25] BAK, B106/73109 Niederschrift über die Sitzung der Staatsangehorigkeitskommission in Heidelberg, 11 July 1958, p. 15.

Members of the Committee regarded it as appropriate if certain restrictions were created for the avoidance of dual nationality.[26] As cases of dual nationality increased significantly, unlimited *jus sanguinis* could no longer be accepted. One of the underlying obstacles to the prevention of dual nationality was caused by the failure to modify the *jus sanguinis* principle which remained as the major cause of dual nationality. However, they were undecided on how to limit the application of *jus sanguinis*. There were also suggestions about the possibility of introducing a right of option for children, or imposing the obligation on spouses to choose between two nationalities, or making the loss of nationality dependent on prolonged residence abroad, or requiring the choice of the nationality at the registry office.[27]

During the deliberations, the committee members discussed whether the principle of descent should be retained even if it led to multiple citizenships. In the paper he submitted to the committee, Alexander N. Makarov argued for the restriction of the *jus sanguinis* principle. Dual nationality in Germany was mainly caused by the unlimited bestowal of nationality through *jus sangunis*. The pure *jus sanguinis* principle, as adopted by the 1913 RuStAG, was comparatively rare in laws governing foreign nationality. Most legal systems were based on a combination of the *jus sanguinis* and the *jus soli* principles. A general rule in the legislation of all countries on the transfer of nationality on the basis of *jus sanguinis* was that it was a subject to certain restrictions.[28] If the Committee decided on the approval of unlimited application of *jus sanguinis*, they would find that there are no equivalent provisions in foreign nationality laws. Since children made up an overwhelming majority of dual nationality cases, Makarov suggested that their parents choose a nationality on their behalf or that the children would be required to choose or reject German nationality after reaching the age of eighteen.[29]

Another means of preventing dual nationality through *jus sanguinis* was the registration of any child who was born abroad. However, this solution had its own limitations as it was difficult to register the growing number of overseas nationals, and there were many states which did not have diplomatic relations with the FRG. A child of an East German who had emigrated to China, for example, would lose his German nationality in circumstances where there was no option for registration.[30]

A restriction of the *jus sanguinis* principle for children born abroad would be inconsistent with Article 16(1) of the Basic Law. The problem of statelessness might arise if the birth took place in a state which did not recognise *jus soli*. A large number of ethnic Germans valued the possession of German nationality for themselves and their offspring, especially since the children in many cases would be stateless.[31] There was an assumption that Article 16 (1) which contained an absolute prohibition against deprivation of nationality, including dual nationalities, had been associated with the increased number of cases of dual nationality. It should be noted that Article 16(1) was drafted in response to the politically-motivated expatriation under National Socialism.[32] In the opinion of the committee, Article 16 should be interpreted to refer to statelessness and was not aimed at the creation or retention of dual nationality.[33] The Committee was reluctant to approve a proposal calling for the deprivation of a dual national's German nationality based on disloyalty to the state. Criminal punishment or the act of disloyalty to Germany should not be grounds for deprivation of nationality. The issue should not be politicised.[34]

Another factor which led to dual nationality was the acquisition of foreign nationality through residence abroad. The practice of giving official approval for the retention of German nationality would contradict the effort of the Council of Europe. The working committee was not sure if the Council would require them to abandon the retention approval. They acknowledged that in many states, applicants for naturalisation were likely to have lost any ties to the former home state. However, the retention approval could be a suitable means of protecting Germans in foreign countries.[35] It had been the practice under the RuStAG provision Article 25 (2) of allowing Germans abroad to request official retention approval. This situation had always created ill feeling in foreign countries as the continuous existence of German nationality had emotional significance. The committee agreed unanimously that the preservation of the nationality of Germans abroad was extremely important, even at the risk of intergovernmental trouble. Since no decision on this matter was reached, it was determined to consult the representatives of the Foreign Office.[36]

Since Germany was moving towards a greater degree of European integration, the next issue to be considered was whether dual nationality should be allowed for nationals of the member states. If dual nationality were rejected in principle, could it yet be allowed for nationals of European countries? For this category of person, the committee was considering the possibility of allowing dual nationality and giving preference for the acquisition of German nationality.[37]

[26] BAK, B106/73108 Niederschrift über die interne Sitzung der Staatsangehorigkeitskommission in Heidelberg, 12 July 1958, pp. 19 –20.
[27] Ibid., pp. 22–23.
[28] BAK, B106/73108 „Rechtsvergleichende Betrachtungen zu den Einschränkungen des reinen jus sanguinis Prinzips'von Makarov, 2 Dec 1958, pp. 1–2.
[29] Ibid., p. 10.
[30] BAK, B106/73108 Niederschrift über die interne Sitzung der Staatsangehörigkeitskommission, 9-10 Jan 1959 in Karlsruhe, pp. 7–8.
[31] BAK, B106/73108 Sitzung der Staatssangehörigkeits-Kommission in München, 1–2 February 1957, p. 3.
[32] BAK, B106/73108 Niederschrift über die Sitzung der Staatsangehorigkeitskommission in Heidelberg, 30 September 1957, pp. 6–7.
[33] BAK, B106/73108 Niederschrift über die interne Sitzung der Staatsangehorigkeitskommission in Heidelberg,12 July 1958, p. 27.
[34] Ibid., p. 28.
[35] BAK, B106/73108 Niederschrift über die konstituierende Sitzung der Sachverständigenkommission zur Vorbereitung einer Neuregelung des deutschen Staatsangehörigkeitsrechtes am 2 Nov 1956 im Bundesministerium des Innern, Anlage 2b: Ausführungen des BMI betreffend die Themen, die für die Staatsangehörigkeits-Kommission in Aussucht genommen worden sind, pp. 2–3.
[36] Ibid., pp. 4–6.
[37] Ibid.

At its second sitting in München, the Citizenship Committee came to the conclusion that multiple nationality was to be avoided, if possible.[38] The Committee welcomed the efforts of the United Nations and Council of Europe to prevent multiple nationality and statelessness. A new German nationality law would take the international principles into consideration. However, it was impossible for the law to take into account all conflicting foreign jurisdictions. Therefore it was proposed that Germany should pursue multi or bilateral agreements.[39] This then paved the way to Germany's participation in the 1963 Convention's deliberations.

Observation from the committee debates showed that ethnoculturalism did not explain Germany's aversion to dual nationality. Deliberations among the committee members showed that the targets of dual nationality prevention were none other than ethnic Germans themselves. Dual nationality among ethnic Germans was occasionally questioned during the committee debates. While there was evidence that the policy makers were guided by an orientation towards "German-ness", the consensus voiced was purely pragmatic and did not signal an adoption of *völkish* ideas. Therefore, it would be incorrect to interpret the anti-dual nationality policy as the embodiment of ethnocultural nationalism.

The question now remains, what then accounts for Germany's shift to single allegiance? As reiterated above, the shift was based on a consensus in both the *Bundestag* and the Council of Europe. Unlike the 'mismatch' between regional norms and German understandings of identity and citizenship in the 1990s as argued by Checkel, the 1963 convention perfectly matched the German ministerial aspiration.[40] Domestically, the *Bundestag,* motivated by European cooperation, deeply felt the need for modernisation of its law. Regionally, the member states of the Council were concerned with the increased possibility of war. The fact that the convention included clauses on military obligation further highlighted this intense worry.[41] The 1963 European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality reflects this international principle. Chapter I of the Convention is based on the idea that multiple nationality was undesirable and should be avoided as far as possible.[42]

German Participation in the Council of Europe's Nationality Convention

The Committee of Experts on Multiple Nationality appointed by the Council of Europe held four meetings between 8 January 1959 and 18 February 1961 in Strasbourg to prepare the draft on the 'Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality.' The underlying principle of the Convention was that the acquisition of the nationality of other contracting states should result in the automatic loss of the former nationality. [43] This was later enforced in the document as Article 1 (1) as follows:

> Nationals of the Contracting Parties who are of full age and who acquire of their own free will, by means of naturalisation, option or recovery, the nationality of another Party shall lose their former nationality. They shall not be authorised to retain their former nationality.[44]

In most Western European states, this provision was 'in accordance with the domestic citizenship laws.'[45] The Strasbourg principle was contradictory to German Basic Law. Automatic loss of German citizenship (on the acquisition of a foreign citizenship) was not compatible with Article 16 (1) which prohibited the deprivation of German citizenship.[46] This underlying principle of the convention also contradicted Article 116 (1) and Article 25 (2) of the German Basic Law. This section discusses the bargaining process by the FRG delegates to secure the Council of Europe's compliance.

West Germany was unable to agree to this principle. When negotiations in the Committee of Experts began, the Federal Republic persistently stated its view. There were concerns whether all Germans as in the sense of Article 116 (1) of the Basic Law were subject to the same principle of 'automatic loss of nationality.' If all Germans were treated equally with regard to the loss of nationality, then 'status Germans' would automatically lose their legal positions if they acquired foreign nationality. The legal status of the 'status Germans' was different from other German nationals as 'status Germans' were created by the Basic Law as a compensation for the *de facto* loss of the nationality of former Germans. Article 116 (1) could be ended by a simple statute as soon as the 'protection affiliation' was no longer needed. A need for protection against statelessness no longer existed, if such 'status Germans' voluntarily acquired another nationality. [47]

The Ministry of the Interior believed that the question regarding whether or not status Germans should be released from their legal status upon the acquisition of the nationality of a contracting state was part of inner German concern. This

[38] BAK, B106/73108 Zweite Sitzung der Staatsangehörigkeitskommission in München, 1–2 February 1957, p. 8.
[39] Ibid., pp. 1–2.
[40] Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' p. 97.
[41] Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU,' p. 703.
[42] Paragraph 6, *European Convention on Nationality*: *Explanatory Report, 6 November 1997,* Council of Europe, ETS no. 166, available via http://conventions.coe.int/Treaty/EN/Reports/Html/166.htm
[43] Politisches Arhiv des Auswärtigen Amts (hereafter PAAA) B82/590 Council of Europe, Report of the Committee of Experts on Multiple Nationality to the Committee of Ministers, Strasbourg, 23 February 1961, p. 1.
[44] Article 1 (1) of the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, 6 May 1963, Council of Europe, ETS no. 43, available via http://conventions.coe.int/Treaty/en/Treaties/Html/043.htm.
[45] Maarten P.Vink and Gerard-René de Groot, 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends,' *Journal of Ethnic and Migration Studies* 36, no. 5 (2010), p. 723.
[46] Kay Hailbronner, 'Germany's Citizenship Law under Immigration Pressure,' in Randell Hansen and Patrick Weil (eds.) *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (New York: Berghahn Books, 2002) p. 128.
[47] PAAA, B82/590 von der MdI an das Auswärtige Amt, Bonn. Betr: Entwurf einer Europäischen Konvention zur Verringerung von Mehrstaatigkeit, 10 Feb 1961, p. 6.

was because the legal position as 'status Germans' could not be granted but was only acquired by virtue of law (*ex lege*).[48] After the 1961 German census, 31,000 persons indicated that they had another nationality. This figure was rather low in the opinion of all the experts. A re-referral to the Federal Minister of the Interior, individual states and the Federal Statistical Office confirmed that the existing documents were not sufficient to estimate with any certainty the total number of dual citizens in the federal territory. There could well have been over 100,000 dual citizens, since the ethnic German refugees from Eastern and Southern still retained their old nationality.[49]

As pointed out by the FRG delegation in its report to the European Citizenship Committee, the automatic lost provision also contradicted Article 25 (2) of the RuStAG. The article required state approval for a German national to retain his German nationality if he obtained a foreign nationality abroad. However, the FRG delegation assured the Committee that the retention approval was an exceptional provision, and it would only be used in exceptional cases. The FRG itself was concerned, as were other members, with the prevention of multiple nationality.[50]

Since official German policy regarded multiple nationally as undesirable, permission for the retention of nationality was only justified by overriding reasons relating to the interests of the applicants or the interests of the state. A prerequisite for maintaining German nationality was attachment to the German *Volk* and its cultural life. Approval would also not be granted if the applicant was integrated into the life of his country of residence and only wanted to find a safe haven in Germany due to political instability in his second country. The same applied if the intention was to maintain pension rights or other personal benefits. If the loss of German nationality resulted in hardship for the applicant, such cases should be referred to the relevant social service agencies as they did not fall under the responsibilities of the nationality authorities.[51]

The delegation of the FRG had earlier reserved its position on that provision during the proceedings of the first meeting of the Committee.[52] In the second meeting of the Committee, the majority of the Committee members found it difficult to agree with the FRG's proposal for the possibility of continuing the practice provided the states concerned agreed with it.[53] In the third meeting of the Committee, the FRG delegation stated that they were unable to agree to Article 1 (1) if the retention of the former nationality was not permitted. As a result, a provision for such retention was provided in the appendix of the Convention, if the concerned states agreed with it.[54] As a result, a provision for such retention was provided in the annex of the Convention, if the concerned states agreed with it.[55] According to Annex 3, any Contracting Party may declare that it reserves the right to allow any of its nationals to retain his previous nationality if a Contracting Party for whose nationality he applies in the manner referred to in Article 1 gives its prior consent thereto.[56]

The German delegation believed that the reservation on that provision would not jeopardise the Convention's aim. The effects of allowing the retention of German nationality would not be significant compared to the provisions of some contracting states which allowed children to retain their nationality after acquiring another nationality. The automatic loss of the former nationality with the voluntary acquisition of the nationality of another contracting state did not apply to minors if the nationality laws of their home states did not have such a provision. Those states were not even required to introduce legislation to that effect according to Article 1 (2). The delegation of the FRG was of the opinion that the loss of nationality should also be applicable to minors as well. [57]

The deliberations of the Committee of Experts were completed on 18th February 1961. In its report to the Ministry of Foreign Affairs, the Federal Ministry of Interior (MDI) welcomed the objective of the Convention although there were some limitations of the provisions. In MDI opinions, allowing dual nationality among the largest group of dual nationals (minors) was not part of the Convention's aim. This regrettable provision, which was created with France's initiative, was detrimental to Germany as children of Franco-German couples would have difficulties divesting themselves of their French nationality. Another provision affecting the successful implementation of the Convention was also initiated by France which was the declaration of a reservation in which female spouses should not lose her nationality when she acquires her husband's nationality.[58] For the FRG, the Council of Europe should deny

[48] Ibid., p. 7.

[49] PAAA, B82/593 An Abteilung V, Bonn. Aufzeichnung Betr: Zahl der Doppelstaatler im Bundesgebiet, 14 April 1966.

[50] PAAA, B82/590 Comments by the Delegation of the FRG on the draft European Convention for the reduction of the number of cases of multiple nationality EXP/PN (59) 47, Strasbourg, 21 June 1960, p. 1.

[51] PAAA, B82/976 Der Bundesministerium des Innern an das Bayerische Staatsministerium des Innern. Betr: Beibehaltung der deutschen Staatsangehörigkeit im Falle den Erwerbs einer ausländischen Staatsangehörigkeit, 2 January 1969, p. 3.

[52] B82/363 Council of Europe, Memorandum by the Legal Department on the first Meeting of the Committee of Experts on Multiple Nationality in Strasbourg, 8 – 13 January 1959, 15.

[53] B82/363 Council of Europe, Memorandum by the Secretariat - General on the proceedings of the second Meeting of the Committee of Experts on Multiple Nationality in Strasbourg, 1 – 8 June 1959, p. 20.

[54] B82/590, Council of Europe, Memorandum by the Legal Department on the third Meeting of the Committee of Experts on Multiple Nationality in Strasbourg, 21- 28 June 1960, p. 18.

[55] PAAA, B82/590 Memorandum by the Legal Department on the third Meeting of the Committee of Experts on Multiple Nationality in Strasbourg, 21– 28 June 1960, p. 18.

[56] Annex 3 of the 1963 Convention.

[57] B82/590 Council of Europe, Comments by the Delegation of the Federal Republic of Germany on the draft European Convention for the reduction of the number of cases of multiple nationality EXP/PN (59) 47, Strasbourg, 21 June 1960, p. 2.

[58] PAAA, B82/590 von Dr. Schäfer, der MdI an das Auswärtige Amt, Bonn. Betr: Entwurf einer Europäischen Konvention zur Verringerung von Mehrstaatigkeit,14 April 1961, pp. 1–2.

such reservations, even though not all signatory states had the intention to exploit this opportunity.[59] In the end, the Council accepted the French suggestion. Annex 4 of the Convention stipulates that any Contracting Party reserves the right not to apply the provisions of Articles 1 and 2 when the wife of one of its nationals has acquired another nationality while her husband retains the nationality of such Party.[60]

The impact of this convention that concluded in Strasbourg on 6th May 1963 was not deemed significant. This is because firstly, only a few countries signed the agreement. The agreement was only ratified by nine countries: France, Austria, Denmark, Germany, Italy, Norway, Luxembourg, Sweden and the Netherlands. The United Kingdom, Ireland and Spain only agreed to the provisions of the Convention in regards to military obligations. The other shortfall of this convention was the act of undermining the Convention's treaty by some signatory states. The French have its own interpretation of the treaty which was avoiding multiple nationality only amongst the member states. In other words, renunciation of former nationality is not required for naturalisation if the applicants were from non-signatory states. Moreover, two other signatory states - the Netherlands and Italy – amended their nationality laws in the early 1990s to allow dual nationality.[61] The success of this convention was described as 'limited' by some scholars.[62]

This Council of Europe document did not reflect international consensus. The Strasbourg Convention, which aimed at limiting the cases of multiple nationalities, is one of the least successful Conventions out of the Council of Europe. It did not receive ratifications by the majority of the Council Members. It is a classic example of how a Convention can fail in International Law classes. The Committee of Experts on Multiple Nationality recognised the limitation of the Convention. It acknowledged that multiple nationality occurred in particular where a State, which was not a Party to its Chapter I, allowed multiple nationality.[63]

Germany ratified the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality in 29 September 1969. The official adoption of the single nationality principle created a considerable dilemma for the German legislators when they were amending the 1913 RuStAG to grant equal treatment for both gender groups. There were two noticeable inadequacies of the existing law which did not correspond to the principle of gender equality. Firstly, male foreign spouses were not entitled to claim German nationality and secondly German women were not allowed to transmit their German nationality. In both citizenship amendments, equal treatment between women and men was institutionalised without departing from the spirit of the 1963 convention.

Prevention of Multiple Nationality in post - 1963 Strasbourg Convention

Although there was a general consensus among European states that multiple nationality should be avoided, cases of multiple citizenship continued to increase after 1963. One of the main reasons was the liberalising trend towards ensuring the equal treatment of men and women in respects to the transmission of citizenship. The two issues related with mixed marriages are privileged acquisition of nationality by spouses and the extension of nationality though the matrilineal line. These two issues have generated debates on the applicability of a single nationality principle.[64] Women's movements ensure that the transmission of citizenship was not restricted by patrilineal attribution and women could also transmit their citizenship to their children. By allowing matrilineal attribution of citizenship, states which prohibited dual nationality would witness an increased number of children receiving the citizenship of both parents.[65]

In this regards, Knop is right to point out that the 1963 Convention has not sufficiently contemplated the problems concerning multiple nationality. [66] Since the 1960s, guaranteeing gender equality in citizenship practices has become a norm across the Western European region.[67] In order to reconcile the discrepancy between the desirability to avoid multiple nationality and the demand for equal treatment in citizenship laws, several countries were witnessing the opening of a new chapter of political debates.[68] In this matter, the German *Bundestag* responded swiftly to the reality of migration and mixed marriages by approving two important citizenship amendments in 1969 and 1974 respectively. These changes did reconfigure German national citizenship in European directions.

In terms of acquisition of nationality by spouses, it had been a practice that a wife would acquire her husband's nationality either automatically or through the naturalisation procedure. This practice was based on the belief that the foreign wife would stay in her husband's state. The mechanism was not available for a foreign husband. A foreign husband could not acquire the citizenship of his wife.[69]

[59] Ibid., p. 3

[60] Annex 4 of the 1963 Convention.

[61] Rey Koslowski, 'European Migration Regimes: Emerging, Enlarging and Deteriorating,' *Journal of Ethnic and Migration Studies* 24, no. 4 (1998), pp. 742–43.

[62] Ruth Rubio-Marin, *Immigration as a Democratic Challenge, Citizenship and Inclusion in Germany and the United States* (Cambridge: Cambridge University Press, 2000), p. 127; Koslowski, 'European Migration Regimes,' p. 742.

[63] The Committee of Experts on Multiple Nationality was later renamed the Committee of Experts on Nationality. Paragraph 6, Explanatory Report of the European Convention on Nationality, 6 November 1997.

[64] De Groot, 'The European Convention on Nationality,' p. 118; Vink and de Groot, 'Citizenship Attribution in Western Europe,' p. 723.

[65] Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU,' p. 703.

[66] Kopp, 'Relational Nationality,' p. 89.

[67] Christian Joppke, *Citizenship and Immigration*, (Cambridge: Polity Press, 2010), p. 48.

[68] Vink and de Groot, 'Citizenship Attribution in Western Europe,' p. 723.

[69] Karen Kopp, 'Relational nationality: on gender and nationality in international law,' in T. Alexander Aleinikoff and Douglas Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices* (Washington: *Carnegie Endowment for International Peace*, 2001), pp. 101–102.

Before the 1969 amendment was introduced, only foreign wives of German nationals were entitled to naturalisation under the 1913 RuStAG. This unequal treatment appeared questionable in the view of Article 3 of the Basic Law, which guaranteed equal treatment for both gender groups. From the view of constitutional equality, no plausible reason could explain why foreign female spouses of German nationals not residing in the FRG would have a claim to citizenship, while foreign husbands of German wives residing in the federal territory would have no claim to citizenship. In the face of increasing public criticism, the SPD (Social Democratic Party of Germany) parliamentary group initiated a bill on 13 March 1968 to grant naturalisation rights to male foreigners. The SPD believed that the naturalisation of foreign spouses could not be denied on any reasonable grounds. Under the proposed revision to paragraph 6 of the RuStAG, foreign spouses of German nationals would be granted naturalisation regardless of their gender. [70]

The Ministry of Interior, on the other hand, strongly opposed the extension of paragraph 6 to foreign husbands of German women as it would lead to a substantial impairment of the efforts to avoid dual nationality. Such consequences, however, were not compatible with the principles of German naturalisation policy and with the modern international efforts to avoid dual nationality.[71] Though the SPD succeeded to thread the legislation through *Bundestag,* it failed to secure the right to dual nationality.

The 1969 *Gesetz zur Änderung des Reichs- und Staatsangehörigkeitsgesetzes* was of significant consequence because it introduced a right of naturalisation to male spouses with a stringent condition that they were to renounce their former nationality.[72] This then, formally enshrined the single nationality principle in cases of naturalisation of spouses. Facilitating the privileged acquisition of nationality by male spouses was not extensive enough in protecting family relationships. By enforcing the renunciation of former citizenship as a requirement of spouses' naturalization, foreign spouses had to 'sacrifice' their own nationality. Renouncing one's former nationality meant losing the right to transmit their nationality to their children. The non-recognition of dual nationality created difficulty for families with spouses of different citizenship.[73]

Dual Nationality for German Children?

Five years after abolishing the matrilineal policy in the naturalisation of German spouses, the Federal Government initiated another citizenship amendment to abolish the patrilineal principle in transmitting citizenship. Again, the ministerial and legislative debates witnessed fierce argumentation against dual nationality on whether children of German women should be able to maintain their father's nationality upon inheriting German nationality from their mother. The lack of consensus on this issue, illustrates the fact that even children of German origins were not excluded from the anti-dual nationality rules, which had been deeply institutionalised since the 1960s. This section analyses divergence of opinion between the German *Länder*, the Federal government and the CDU/CSU.

The 1974 citizenship amendment was initiated when the issue of equal treatment for men and women had been called into question in 1973, since the existing nationality law denied the right of German women to transmit their nationality to their children. According to the RuStAG (amendment of 19th December 1963) legitimate children of a German woman could only acquire German nationality, 'if they would otherwise be stateless.' [74] The Federal government was aware of the problem and acknowledged the inappropriateness of the current rules. Therefore, it sought to amend the existing Article 4 (1) of the RuStAG, even though this approach would lead to increased cases of dual nationality.[75]

The amendment was necessary as a result of the sharp increase in the number of foreigners who were working or training in the FRG. The number of marriages between foreigners and German women had risen sharply. In the majority of cases, the children of these unions acquired the nationality of the foreign father but not German nationality. For the children this brought an increasing legal disadvantage during their stay in Germany. The constitutionality of this law had been called into question in two preliminary decisions of the Federal Administrative Court and the Federal Supreme Court. The disadvantages of the current state of the law could no longer be tolerated even given the concern of avoiding dual nationality.[76]

In its proposed nationality bill, the Federal government maintained the traditional principle of *jus sanguinis*. The government was aware that dual nationality through automatic acquisition by birth could not be prevented. It could only be prevented through a voluntary change in nationality after birth.[77] Therefore, it appeared appropriate to facilitate the renunciation of nationality for multiple nationals. The existing RuStAG contained no special provisions for the loss of German nationality for dual nationals. When the Council of Europe's Convention on the Reduction of Multiple Nationality entered into force on 18th December 1969, multiple nationals could give up one of

[70] BAK, B106/42492 Antrag der Fraktion der SPD: Entwurf eines Gesetzes zur Änderung des Reichs-und Staatsangehörigkeitsgesetzes, Deutscher Bundestag 5 Wahlperiode (Druchsache V/2676) 13 March 1968.

[71] BAK, B141/59337 Bundesministerium der Justiz. Entwurf der BMI an den Vorsitzenden des Innenausschusses, November 1967. Betr: § 6 RuStAG und Rechtsstellung ausländischer Ehemänner deutscher Frauen im Staatsangehörigkeitsrecht, p. 8.

[72] Artikel 1, *Gesetz zur Änderung des Reichs-und Staatsangehörigkeitsgesetzes vom 8 September 1969*, Bundesgesetzblatt Teil 1. Nr. 93 Vom 10.09.1969, available via http://www.bgbl.de.

[73] Kopp, 'Relational Nationality,' pp. 106-107.

[74] BAK, B106/94294 Bundesministerium des Innern, Entwurf eines Gesetzes zur Änderung des Reichs- und Staatsangehörigkeitsgesetz 10 Apr 1973, p. 1.

[75] Ibid., p. 2.

[76] B82/1135 Gesetzentwurf der Fraktion der CDU/CSU, Entwurf eines Zweiten Gesetzes zur Änderung des Reichs-und Staatsangehörigkeitsgesetzes (Drucksache 7/1880) 23 March 1974.

[77] BAK, B106/94296 Bundesrat: Gesetzwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Reichs-und Staatsangehörigkeitsgesetzes (RuStAÄndG 1974) (Drucksache 249/74) 29 March 1974, p. 7.

their nationalities when the nationality which was abandoned was approved by the contracting state. The approval was always granted to multiple nationals according to Article 2 of the convention in connection with paragraph 22 of the RuStAG.[78]

A complete elimination of multiple nationality could be achieved by obliging multiple nationals to choose one of their nationalities. This consideration led to the introduction of the renunciation option (paragraph 26), which recognised the free will of multiple nationals to renounce their German nationality. The bill offered the possibility of renunciation for multinationals of three types; those who possessed the nationality of a state that was not a party to the 1969 Convention, those who were hindered by their host country from renouncing German nationality, and those who on the grounds of paragraph 22 of the RuStAG previously could not be dismissed, such as individuals who stayed more than 10 years continuously abroad or performed military service in one of their home states.[79]

In accordance with the *Gesetz zur Änderung des Reichs- und Staatsangehörigkeitsgesetzes* of 20 December 1974, the legitimate children of a German (father or mother) automatically acquired German nationality by birth beginning 1st January 1975.[80] The amendment introduced a new legal institution, namely the renunciation option. The existing law was amended so that '**a German can renounce his nationality if he possessed multiple nationality**.'[81] Children who were previously excluded from the acquisition of nationality (i.e., those born during the period between 31st March 1953 and 1st January 1975) could acquire German nationality by a simple declaration to the competent national authority.[82]

With the 1974 amendment of Citizenship Law, the Federal Republic realised the equal treatment between men and women with regard to the transmission of citizenship. In the late 1970s, Denmark, Norway, and Sweden also instituted this gender equality while Portugal, Spain, Iceland, Austria, Italy, the United Kingdom, Finland, Greece, Belgium, Netherlands, Switzerland, and Luxembourg made matrilineal citizenship available in the 1980s.[83] The European states have come to realise that strict avoidance of multiple nationality is problematic. The main principle of Article 1 was finally amended in 1993 to take into consideration of cases of mixed marriages. According to the Second Protocol to the 1963 Convention, dual nationality is to be tolerated for spouses of different nationalities and children born of mixed marriages. Each of the spouses in a mixed marriage should have the right to acquire the nationality of the other without losing his or her former nationality. Children born of mixed marriages should also be entitled to the nationality of both their parents.[84]

More than three decades after the conclusion of the 1963 Strasbourg Convention, the international principle on multiple nationality has changed. The Council of Europe initiated a new European Convention on Nationality in 1997 which adopts a 'neutral' approach to multiple nationality.[85] The European nationality norms have changed, but the German single citizenship principle remained unchanged. In contemporary Germany, citizenship policies and practices have undergone dramatic and expansionist changes. Germany has witnessed a proliferation of citizenship reforms ranging from the introduction of jus soli, liberalising naturalisation provisions, promoting gender equality to transmit nationality, preventing statelessness and offering foreigners the right to naturalisation.[86] Despite of all these reforms, one tradition remained unchanged and that is the single nationality principle.[87]

Conclusion: Full or Partial Convergence

The German convergence to the 1963 movement was not comprehensive because the movement did not undermine the national distinctiveness in Germany. Despite converging upon a European norm, the German dual citizenship policy maintains some important national differences.[88] As pointed out by de Hart and van Oers, the 1963 Convention 'leaves room for national policies and allows for reservations in order to retain national policies.'[89] These national differences explain why Germany is regarded as practicing a 'double standard' in its dual nationality practice based on the ethnic origin of the individual, as persuasively shown by Green.[90] As cases of dual nationality was prevalent among the *Aüssiedler*, the descendants of ethnic Germans abroad and children of mixed marriages, a deviation existed between theory and practice. As contended by Koslowski,

78 Ibid., p. 8.
79 Ibid., p. 9.
80 Article 1 (1), *Gesetz zur Änderung des Reichs-und Staatsangehörigkeitsgesetzes* (RustAÄndG 1974), Bundesgesetzblatt Teil 1. Nr. 143 Vom 31.12.1974, available via http://www.bgbl.de.
81 Article 1 (4), RustAÄndG 1974.
82 Article 3, RustAÄndG 1974.
83 Vink and Groot, 'Citizenship Attribution in Western Europe,' 717.
84 Germany (2001), Sweden (2001) and Belgium (2007) decided not to ratify the Second Protocol and they denounced the 1963 Convention. Vink and Groot, 'Citizenship Attribution in Western Europe,' pp. 723-24.
85 Paragraph 97, *European Convention on Nationality*: *Explanatory Report, 6 November 1997*.
86 Miriam Feldblum, 'Reconfiguring Citizenship in Western Europe,' in Christian Joppke (ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (New York: Oxford University Press, 1998), p. 231.
87 When we consider the changes that have been taking place at the beginning of the twenty-first century, it is evident that Germany is gradually moving towards liberalisation of its citizenship law. At the time of writing, the German government is considering abolishing the option model. A draft law lifting the dual nationality ban has been approved by the German Cabinet on 8 April 2014. The draft law is yet to be approved by parliament.
88 There are variations in dual citizenship policies in the countries of the European Union, even though they show tendencies toward relative convergence in the contemporary period (and also in the 1963 treaty period). Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU,' p. 714.
89 Betty de hart and Ricky van Oers, 'European trends in nationality law,' in R. Bauböck, E. Ersbøll, K. Groenendijk and H. Waldrauch (eds.) *Acquisition and Loss of Nationality: Policies and Trends in 15 European States.* Volume 1: Comparative Analyses (Amsterdam: Amsterdam University Press, 2006), p. 347.
90 Green, 'Between Ideology and Pragmatism,' p. 947.

Germany is 'violating the spirit, if not the letter of the Council of Europe 1963 Convention.'[91]

The contradiction between theory and practice is explained by many scholars by referring to Brubaker's thesis that 'the politics of citizenship today is first and foremost a politics of nationhood.'[92] Following Brubaker's 'cultural idiom' argument, German *Volk* versus French citizen orientations caused Germany to restrict the breadth of allowable citizenship and hence restrict dual nationality (to the exclusive right of the German *Volk*). Since political disputes mainly revolve around the dual nationality status of foreigners, Germany's opposition to dual nationality is explained by the *völkisch* understandings of the nation.[93]

In explaining whether ethnocultural orientation to preserve Germanness impacted German rejection of dual nationality, one has to examine the deliberation on citizenship amendments since the conclusion of the 1963 Strasbourg Convention. Based on the comprehensive examinations of three debates on citizenship reforms, namely the 1956 citizenship committee, 1969 parliamentary debate and 1974 legislative debate, there is evidence showing the policy makers' tendencies for an inward orientation in preserving Germanness.

Inward orientation of preserving Germanness exists in the period in question in the face of the Cold War struggle with Germany at the cutting edge of capitalism and communism. With the division of Germany and the dispersed memberships which consist of *Aussiedler*, refugees, and asylum seekers with and beyond Germany, preservation of German-ness took a strong hold in the post-war period.[94] In other words, ideology plays a more important role than ethnicity in shaping German citizenship. Agreeing with Faist, Nathans, and Klekowski von Koppenfels, the article suggests that the development of citizenship in divided Germany is ideologically motivated.[95] The German citizenship law was created in reaction to the deportation and expulsion of ethnic Germans after the Second World War and the growing ideological conflict of the Cold War, which resulted in ethnically based discrimination towards ethnic Germans in the Eastern bloc.[96] This explains why the German convergence to the 1963 single nationality movement was not comprehensive. As in the discussion above, the Federal Republic placed great emphasis in upholding the spirit of the 1963 Convention but the Cold War struggle necessitated the Federal Republic to distinguish between ethnic Germans and non-ethnic Germans.

[91] Koslowski, 'European Migration Regimes,' 744.

[92] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (London: Harvard University Press, 1992), p. 182.

[93] Patricia Hogwood, 'Citizenship Controversies in Germany: The Twin Legacy of Völkisch Nationalism and the Alleinvertretungsanspruch,' *German Politics* 9, no. 3 (2000), p. 125.

[94] Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999), p. 63.

[95] Thomas Faist, 'Multiple Citizenship in a Globalising World: The Politics of Dual Citizenship in Comparative Perspective,' Willy Brandt Series of Working Papers in International Migration and Ethnic Relations (Sweden: School of International Migration and Ethnic Relations, Malmö University, 2004); Eli Nathans, *The Politics of Citizenship in Germany: Ethnicity, Utility and Nationalism* (Oxford: Berg, 2004); Amanda Klekowski von Koppenfels, 'The Decline of Privilege: The Legal Background to the Migration of Ethnic Germans,' in David Rock and Stefan Wolff (eds.) *Coming Home to Germany? The Integration of Ethnic Germans from Central and Eastern Europe in the Federal Republic* (New York: Berghahn Books, 2002).

[96] Klekowski von Koppenfels, 'The Decline of Privilege,' pp. 103–104.

A History of Economic Cross-border Agreements in Europe

*Melle Bakker**

Abstract

This article examines the history of economic thought and cross-border agreements in Europe. The work of early scholars such as Adam Smith and David Ricardo provides an insight into the benefits of trade. Additionally, David Hume's description of fundamental laws shows the necessity of cross-border economic agreements. The first cross-border agreements on economic issues mainly relate to trade. Early cross-border agreements failed to establish economic cooperation between the countries of Europe. In contrast to the pre-Second World War agreements that failed to maintain peace, the post-Second World War cross-border agreements established peace, perhaps through this economic cooperation and interdependence.

Key words: *Economic thought; History of Europe; Cross-border agreements; Trade; Economic laws; Classical economics; Enlightenment; Fundamental laws; International treaties.*

1. Introduction

'In ten years 80 per cent of the legislation related to economics, maybe also to taxes and social affairs, will be of Community origin.' [1]
Jacques Delors

When Delors made this statement while addressing the European parliament in 1988, he was clearly looking into the future of Europe. Now 25 years later, it is still widely debated what percentage of economic legislation is of 'Community', now Union origin.[2] It is however clear that European economic legislation nowadays largely influences national legislation in many ways. Hence, from a historical context, it is interesting to see where European economic legislation originated. Starting from the Roman Empire, this article examines the economic cross-border legislation that was created or proposed before the Second World War. These early cross-border discussions on economic issues mainly relate to trade.

It is first necessary to look at the use of economics in a cross-border context. The work of early scholars such as Adam Smith and David Ricardo are therefore discussed. Additionally this article tries to establish a definition of economic legislation by examining the work of David Hume. From there this article shows the economic agreements between the countries of Europe until the Second World War. Failure to achieve economic interdependency is often said to be the one of the reasons for the European wars. In contrast to the pre-Second World War agreements that failed to maintain peace, the post-Second World War cross-border agreements established peace, perhaps through economic cooperation and interdependence.

2. History of Thought

To understand the historical context of cross-border economic legislation in Europe, it is important to first define what the meaning of 'economic' is. Economic(s), however, is not simple to define. This is easily shown by the great amount of writers, which have tried to define economics for different purposes and under different circumstances.[3]

The first writings on economic questions were by ancient Greeks such as Aristotle, Hesiod and Xenophon. The poet, Hesiod is often thought to be the first economist and in his book *Works and Days* (≈700 BC), Hesiod offers his brother, Perses, advice on how he should live his life. Hesiod's explanation that

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The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any affiliated institution.

1 DELORS, Jacques, *Debates of the European Parliament*, July 6 1988.

2 KÖNIG, Thomas & MÄDER, Lars, *The Myth of 80% and the Impact of Europeanisation on German Legislation*, Mannheimer Zentrum für Europäische Sozialforschung, 2009; BROUARD, Sylvain, COSTA, Olivier & KÖNIG, Thomas, *The Europeanization of Domestic Legislatures*, Springer, 2012; Also for a clear explanation of the complexities when determining the level of legislation that comes from Europe, see: MILLER, Vaughne, *How Much Legislation Comes from Europe?*, House of Commons Library, 2010.

3 BACKHOUSE, Roger E, *The Penguin History of Economics*, Penguin Books, 2002.

men work for the pursuit of needs and desires is often thought to describe the economic problem of scarce resources. He shows that time, labour and goods must be efficiently allocated, due to the problem of scarcity.[4]

British economists, Alfred Marshall (1842–1924) and Lionel Robbins (1898–1984) gave the accepted current definition of the subject.[5] According to Marshall, economics is a study of man in the ordinary business of life. Economics would enquire how men get their income and how they use it.[6] Similarly, Robbins defined economics as a science, which studies a relationship between ends (ultimate goods) and scarce means (resources).[7] Consequently, we look at the word 'economic', perhaps narrow, but for the purpose of this article, as the allocation of scarcities by amongst others, production and exchange.

2.1 Economic Trade

'If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.'[8]
Adam Smith

In *The Spirit of the Laws*, Montesquieu (1689 – 1755) explained a cross-border perspective of this allocation of scarcities. In his treatise, Montesquieu said that trade in Europe was carried between the north and south. According to him, climate differences were one of the reasons why countries were able to profit from trade.[9] This description of an economic advantage is often thought to be first introduced by the Indian philosopher Kautilya (≈400 BC). He said that countries could gain from exporting some goods while importing others.[10]

While Montesquieu attributed cross-border advantages to the environment, Adam Smith (1723 – 1790) in his *An Inquiry into the Nature and Causes of the Wealth of Nations*, attributed it to advantages in the division of labour. He said; 'the tailor does not attempt to make his own shoes, but buys them from the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor.'[11] In that case, it is in the interest for both the tailor and shoemaker to produce the product in which they have an advantage, and accordingly trade it with their neighbours. Likewise, Smith said that if a foreign country could supply a commodity cheaper than a domestic country, it is better to buy that commodity with some part of the domestically produced products. Countries could therefore employ their production in a way that they have an advantage. This concept is called an 'absolute advantage' since one country can produce a certain good using fewer resources than another.[12]

However, in order to have a 'comparative advantage' countries do not need an absolute advantage in a certain product. David Ricardo (1772 – 1823) gave a cross-border example of this type of situation in *The Principles of Political Economy and Taxation*. In this simple example, Portugal could produce both wine and cloth with less labour (resources) than England (see table 1).

Labour (Resources) Required		
	Cloth	Wine
Portugal	90	*80
England	*100	120

Table 1: David Ricardo's example of cloth and wine
*** Comparative advantage**

Wine production in Portugal required less labour than it did for cloth, while England could produce cloth with less labour than they would need to produce wine. Therefore, Portugal had a comparative advantage in wine, while England had a comparative advantage in cloth. It was more efficient for Portugal to produce wine and trade it for cloth with England. In that case the same quantities of cloth and wine could be produced for fewer resources, as shown below in table 2. [13]

Labour Required		
	Cloth	Wine
Portugal	0	160
England	200	0

Table 2: David Ricardo's example when countries specialise

The work of Montesquieu, Smith and Ricardo showed that countries could gain from cross-border trade for economic reasons. Academics from the same period also had views on how laws could foster an efficient allocation of scarce resources.

2.2 Economic Laws

'When civil government has been established over the greatest part of mankind, and different societies have been formed contiguous to each other, there arises a new set of duties among the neighbouring states, suitable to the nature of that commerce, which they carry on with each other.' [14]
David Hume

4 EVELYN-WHITE, Hugh Gerard, *Hesiod*, Harvard University Press, 1998.
5 BACKHOUSE, Roger E & MEDEMA, Steven, Retrospectives: On the Definition of Economics, *Journal of Economic Perspectives*, 2009, v. 23, n. 1, p. 221-233
6 MARSHALL, Alfred, *Principles of Economics*, Macmillan, 1890, ed. 8.
7 ROBBINS, Lionel, *An Essay on the Nature and Significance of Economic Science*, Macmillan, 1932.
8 SMITH, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*, W. Strahan and T. Cadell, 1776, p. 422.
9 MONTESQUIEU, Charles-Louis de, *De l'esprit des lois*, Crowder, Ware and Payne, Translated by NUGENT, Thomas, 1773.
10 WALDAUER, Charles, Kautilya's Arthashastra: A Neglected Precursor to Classical Economics, *Indian Economic Review*, v. 31, n. 1, 1996, p. 101-108; BOESCHE, Roger, *The First Great Political Realist: Kautilya and His Arthashastra*, Lexington Books, 2002.
11 SMITH, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*, W. Strahan and T. Cadell, 1776, v. I, b. IV, ch. II, p. 422.
12 REINERT, Kenneth & RAJAN, Ramkishen, *The Princeton Encyclopedia of the World Economy*, Pinceton University Press, 2009, p. 1 & 198-201.
13 RICARDO, David, *Principles of Political Economy and Taxation*, Batoche Books, 2001 (original 1821), ed. III, ch. VII, p. 90-97.
14 HUME, David, *A Treatise of Human Nature*, Oxford, 1739, b. III, pt. II, p. 567.

Trade unites countries, and thereby also joins different laws together. This was said by Bartolome de Albornoz (≈16th Century), who observed that 'if exchange between countries would not be possible, some countries would lack goods that others have in abundance and they would not be able to trade goods they have in excess with countries where they are scarce.'[15] Even if exchange would be 'possible', Adam Smith adds that a nation will be most likely to buy cheap when free trade exists. For the same reason a nation will be most likely to sell high when it has a greatest number of buyers. Adam Smith therefore favoured free trade and an abolishment of trade restraints such as high duties.[16]

To define the scope of laws in an economic context, it is most interesting to read David Hume (1711 – 1776). In his *A Treatise of Human Nature*, Hume points out three fundamental laws: (1) the stability of possession, (2) its transference by consent, and; (3) the performance of promises. Hume gives two main reasons why these laws are necessary: (1) the scarcity of goods, and; (2) men are always more concerned about the present life than the future.[17] The legislator should therefore, not only make laws that make transfer possible; the law should also secure possession and ensure performance. Given the fact that these two reasons relate to general economic principles, the 'economic' laws described by Hume, if made by a legislator can be called 'economic legislation'.

Hume's description of fundamental laws somewhat defines cross-border economic legislation in the meaning of Jacques Delors' statement before the European Parliament. This definition of economic legislation is however very broad. It is almost impossible, especially nowadays to briefly discuss all European cross-border legislation that covers these three broad fundamentals. However, the first cross-border legislation, mainly related to trade, and as the foundations of the European Union rest on economic principles, it is not strange to give such a broad definition of economic legislation.

3. History of Cross-border Agreements

'The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.' [18]
Woodrow Wilson

When geographically looking at free trade throughout the European continent, it is almost impossible to miss the Roman Empire. The first emperor of Rome, Augustus (63 BC – 14 AD) was largely in favour free trade. Perhaps a Roman predecessor of competition law, were the Roman sanctions against pricing agreements, which were already introduced by Julius Caesar (100 BC – 44 BC) around 50 BC.[19] Within Rome, peace brought trade and commerce as Augustus abolished tax farming and the regularised taxation. However, although free trade ruled throughout the European continent, this was not as a result of cross-border legislation between countries.

Probably the first real cross-border economic agreement in Europe was included in the Treaty of Westphalia (1648). The Holy Roman Emperor, Spain, France, Sweden, the Dutch republic and German princes signed this Treaty at Münster and Osnabruck. It was intended to end the Thirty Years' and Eighty Years' Wars. Besides the goal to bring peace, which would obviously help economies, the Treaty of Westphalia also included two economic agreements. Article 70 states that there shall be a full 'liberty of commerce.' Besides a secure passage by sea and land, merchants were now allowed to go wherever they wanted to go. Article 89 also included that the Rhine was to be free, and none of the parties were to hinder boats. Moreover, it was not permitted to impose tolls, customs or taxes upon the Rhine, except for the ones that were already paid before the wars. The perhaps main goal of the Treaty of Westphalia was included in Article 1, 'that there shall be a Christian and universal peace'.[20] Since all around Europe, wars continued, the Treaty of Westphalia might be seen as a failure in that sense. However, the Treaty of Westphalia was more successful in recognising the existence of separate states and building a model for future negotiations, since for future conferences, the model of Westphalia set the precedent. [21] During the following conferences, mediators were appointed and further rules were established.[22]

After the Treaty of Westphalia, numerous wars continued to rein the European continent. Many Treaties were signed in order to end these wars, such as the Treaty of Utrecht (1713) that ended the Spanish succession and the Treaty of Paris (1763) that ended the seven years of war between the big powers of the time.[23] Although all these Treaties stimulated trade by bringing peace, they did not include any significant economic agreements to which a majority of the European nations were party.

Additionally, during the Napoleonic wars, France tried to close Europe for British good in order to destroy Britain by destroying its trade. The loss of British trade was economically damaging to many European states.[24] The Final Act of the Congress of Vienna (1815) followed the end of the Napoleonic Wars. As Napoleon was already defeated, these talks were rath-

[15] ALBORNOZ, Barolome de, *El Arte de los Contratos*, Mises Institute, Translated by PTAK, Justin, 1573, ch. 7, p. 29.
[16] SMITH, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*, W. Strahan and T. Cadell, 1776, v. I, b. IV, ch. II, p. 429
[17] HUME, David, *A Treatise of Human Nature*, Oxford, 1739, b. III, pt. II.
[18] WILSON, Woodrow, *President Woodrow Wilson's Fourteen Points*, 8 January 1918; SNELL, John L, Wilson on Germany and the Fourteen Points, *Journal of Modern History*, 1954, v. 26, n. 4, p 364–369.
[19] EWING, Ky, *Competition Rules for the 21st Century: Principles from America's Experience*, Kluwer, 2006, ed. 2.
[20] The Treaty of Westphalia, *Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies*, October 24 1648.
[21] MARTIN, Laurence W, *Diplomacy in Modern European History*, MacMillan, 1966, p. 4.
[22] CROXTON, Derek, *Westphalia: The Last Christian Peace*, MacMillan, 2013, p. 331-334.
[23] REDDAWAY, William Fiddian, *A History of Europe from 1715 to 1814*, Methuen, 1936, p. 199-236; REDDAWAY, William Fiddian, *A History of Europe from 1610 to 1715*, Methuen, 1959, p. 439-441.
[24] INGRAM, Philip, *Napoleon and Europe*, Stanley Thornes, 1998.

er on territorial questions.[25] The provisions included no great punishments for France, and France was represented mainly to prevent feelings of revenge. The 39 German states that replaced the Holy Roman Empire were consolidated in a German Confederation.[26] A big problem was that each German state had its own laws, which was a problem for cross-border trade within the German Confederation.[27]

The Congress of Vienna is often criticized since it restored the old monarchs, whereby it failed to listen to rising liberalism and nationalism. Following the French Revolution (1789), Napoleon had spread these views across Europe, while conservatives wanted to defeat those ideologies. The work of Hume, as discussed before, shows that liberalism and conservatism are not always in conflict with one another.[28] Besides the abolition of slave trade, the Congress of Vienna did not include any trade agreements. As discussed before, any more laissez-faire views of intellectuals such as Ricardo and Smith, where thereby also not included in the Congress of Vienna.[29] Therefore in terms of significant economic cross-border agreements we can perhaps almost neglect the Congress of Vienna.

After the Congress of Vienna many nationalistic revolts occurred throughout the European continent. Notably were those in Greece (1821), Italy (1830), Belgium (1830), Poland (1831), France (1848), the German states (1848), Hungary (1848), the Italian states (1848), Poland (1863) and Ireland (1867). Further wars took place, such as the Franco-Prussian and Russo-Turkish wars that engendered unifications and independences. As a result the treaties around this time mainly included territorial provisions.[30]

Eventually the assassination of Franz Ferdinand by a Serbian nationalist Serbian would trigger the First World War. After this war, the Treaty of Versailles (1919) was signed.[31] This Treaty is often criticized for its severe punishment of Germany. The negotiations started with the United States president Woodrow Wilson's famous speech in which he proposed his famous Fourteen Points and the establishment of the League of Nations. Since Wilson was concerned with rebuilding Europe's economy, he proposed an economic input.[32] His third point proposed; 'the removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.'[33] This proposal that was to be incorporated into the Treaty of Versailles and the League of Nations, was based on the assumption that free trade would help maintain peace. This would later be one of the core assumptions underlying the formation of the European Community and United Nations.[34]

The Treaty of Versailles did not include such an economic clause and president Wilson was not able to convince his senate to join the League of Nations. Instead the Treaty of Versailles only dealt with economic questions in its sanctions against Germany. Article 281 shows how Germany was condemned; 'If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty.' The rights of German private individuals were also limited since under Article 122, other European countries were allowed to set conditions upon which German persons shall, or shall not, be allowed to reside, hold property, trade or exercise a profession in their countries.[35] The Treaty of Versailles thereby failed to follow Wilson's plan to establish economic cooperation between European countries. Perhaps even worse, the Treaty of Versailles deteriorated economic relations and created feelings of revenge.[36]

4. Conclusion

> *'The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.'* [37]
>
> Robert Schuman

It is often said that although the Treaty of Versailles aimed to establish peace, it did not follow Wilson's suggestions. Mainly because of German feelings of revenge, Versailles paved the way for a second, more devastating world war.[38]

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[25] LEPAGE, Jean-Denis, *French Fortifications, 1715–1815: An Illustrated History*, McFarland, 2010, p. 241-242.
[26] MARRIOT, John Arthur Ransome, *A History of Europe: From 1815 to 1939*, Methuen, 1952, p. 16-18.
[27] See the work of THIBAUT, Anton Friedrich Justus, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland*, Keip Verlag, 1997 (original 1814).
[28] WOLIN, Sheldon, Hume and Conservatism, *The American Political Science Review*, 1954, v. 48, n. 4.
[29] MARRIOT, John Arthur Ransome, *A History of Europe: From 1815 to 1939*, Methuen, 1952, p. 16-18; MCKAY, John P, *A History of World Societies*, Houghton Mifflin, 1995, p. 758-759.
[30] MARRIOT, John Arthur Ransome, *A History of Europe: From 1815 to 1939*, Methuen, 1952, p. 304-307; BUTLER, Arthur John, *Bismarck: The Man and the Statesman*, Cosimo Classics, 2007, v. 2, p. 58
[31] ANONYMOUS, *World War Traded to Serbian Colonel*, New York Times, 22 July 1923, p. 1; TAYLOR, Alan John Percivale, *The First World War and its aftermath*, Folio Society, 1998, p. 80-93.
[32] BOEMEKE, Manfred F, FELDMAN Gerald D & GLASER, Elisabeth, *The Treaty of Versailles: A Reassessment After 75 Years*, Cambridge University Press, 2006, p. 39-43 & 371-372.
[33] JESSOP, Thomas Edmund, *The Treaty of Versailles: Was it Just?*, Nelson and Sons, 1942, p. 155.
[34] TOYE, John & TOYE, Richard, *The UN and Global Political Economy: Trade, Finance and Development*, Indiana University Press, 2004.
[35] The Versailles Treaty, *Peace Treaty of Versailles: Economic Clauses*, June 28 1919.
[36] KEYNES, John Maynard, *The Economic Consequences of the Peace*, Macmillan, 1919; GATHORNE-HARDY, Geoffrey Malcolm, *The fourteen points and the treaty of Versailles*, Farrar Rinehart, 1939, p. 40; JESSOP, Thomas Edmund, *The Treaty of Versailles: Was it Just?*, Nelson and Sons, 1942, p. 112-159; BOUGHTON, James M, The IMF and the Force of History: Ten Events and Ten Ideas That Have Shaped the Institution, *IMF Working Paper*, 2004, n. 75, p. 3.
[37] SCHUMAN, Robert, *The Schuman Declaration*, 9 May 1950.
[38] LU, Catherine, Justice and Moral Regeneration: Lessons from the Treaty of Versailles, *International Studies Review*, 2002, v. 4, n. 3, p. 3–25.

Europe was economically torn apart after the Second World War. There was an intention to build on European cooperation and preserve peace by building reconciliation between France and Germany. Winston Churchill called for a 'United States of Europe', a federation of states with economic co-operation.[39, 40] This was supported by the plan of US Secretary of State, George C. Marshall who supported rebuilding the European economies.

Schuman presented a plan to pool the production of coal and steel, which would 'make war not merely unthinkable, but materially impossible'.[41] Schuman thereby laid down the foundations for economic unification. The integration consisted of Belgium, France, Germany, Italy, Luxembourg and the Netherlands who formed the European Coal and Steel Community in 1951. [42] The famous Treaty of Paris (1951) also created European institutions, which operated on a supranational level. Jean Monnet was the President of the High Authority and helped European integration forward to the Treaty of Rome, which established a European Economic Community with a common market, customs union, and agriculture policy.[43] In contrast to the pre-Second World War agreements that failed to maintain peace, the post-Second World War cross-border agreements established peace, perhaps through economic cooperation and interdependence.

[39] CHURCHILL, Winston, Speech to the academic youth, Zürich, 19 September 1946.

[40] LÉNÁRT, Levente, Sir Winston Spencer Churchill and the Movement of the Unification of Europe, *European Integration Studies*, 2003, v. 2, n. 2., p. 17-28

[41] SCHUMAN, Robert, *The Schuman Declaration*, 9 May 1950; SCHUMAN, Robert, *Pour l'Europe*, Paris, 1963.

[42] VAYSSIÈRE, Bertrand, *Du Plan Schuman à la Communauté politique européenne: quand l'Europe s'annonçait fédéraliste (1950–1954). L'histoire d'un malentendu*, In: DEVAUX, Sandrine, LEBOUTTE, René & POIRIER, Philippe, *Le Traité de Rome: histoires pluridisciplinaires*, Peter Lang, 2009.

[43] MONNET, Jean, *Speech at the first meeting of the Consultative Committee*, Luxembourg, 26 January 1953. See Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 UNTS 140 and Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11. Also; KAISER, Wolfram & VARSORI, Antonio, *European Union History*, Palgrave Macmillan, 2010, p. 21-22.

The Castilian Resistance to the Imperial Ideal (1520–1522). Factum and Iure in the first Globalization[1]

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Abstract

The Comunero Revolution of 1520 in Castile, was the most dangerous upheaval in the Habsburg states until then, it was a strike to the Burgundian way of government that King Charles had introduced and it was the last time Castile and Leon saw a general uprising against Royal supremacy. Afterwards, in the Iberian Peninsula Absolutism will not be questioned until the revolt of Catalonia and Portugal in 1640–1641. How did it happen and why? Which were the claims of the Junta of Castile, and who were its opponents? We will try to answer briefly these and other questions, as well as the ideological support of the Comuneros against the Empire and their justified fears of joining the Imperial project of the House of Habsburg. The plunder of the Castilian treasury by the foreign courtiers, the King's lack of interest to adapt to the costumes of the land and the fear that Charles would rule from Germany were some of the reasons that justified the uprising. Also the legitimate monarch, Queen Juana, Charles mother, was alive and the King had shown little interest to visit her and hear her voice. And last but not least the King had shown several times his wish to dismantle the domains of Castilian Crown. The discovery of the Aztec Empire partially changed such attitude but what is clear is that many of the Comunero demands were attended after the rebellion of 1520.

Key words: *Absolutism; Castile; Empire; Habsburg dynasty; Emperor Charles V; King Fernando II of Aragon; Cortes of Aragon; Cortes de Castilla; Pactism; Ley paccionada; rebellion; Indies; Conquest of Mexico; Hernan Cortes; Royal Council of Castile; Comunero Revolution; tyranny; uprising; Board of Trade of Seville; African slave trade; Cortes of Santiago de Compostela; Justinian; Spanish Royal Succesion; Navarre; Italian Signorias; Spanish Crown; Toledo; Junta; treason; liberty; flamencos; Junta; Ley Perpetua; Comunidades de Castilla.*

This research lies on doctrinal sources and documents that offer us a glimpse of the social and political reality of the time and of the development of the Imperial ideal in the kingdoms of Castile and Leon. Because of the dynastic change that introduced the House of Habsburg, Castile suffered an upheaval provoked by the new style of government – Absolutism. The conquest of New Spain (1519–1521), by Hernan Cortes, became an important deterrent to the Burgundian ideal of Empire and was a reason for its adaptation to a Spanish interpretation of universal rule, which was called by the Spaniards *"La Monarquía Hispana"*. But such process can only be understood after following the political events and the political thought of the *Comunero* Revolution (1520–1522). Until the arrival of King Charles in 1517, the Kingdoms of Aragon and Castile had followed in different ways the policy of Pactism, an agreement between the Crown and the ruling powers of the cities and towns. In the case of Castile it remained a fragile agreement that led to the *Comunero* uprising of 1520, after the celebration of the *Cortes* of Santiago de Compostela and Coruña, previous to the depart of the king for his Imperial coronation in Aachen.

Pactism in the Castilian Tradition of the Late Middle Ages

Spanish Pactism has its origin in the mythical *Fuero de Sobrarbe* dated in the XIth century, in Aragon. The influence of such political ideology, that preached that the Crown was limited by the nobility and the representative institutions of the kingdom, was evident in the strained XVth century Castilian history. The rulers that governed giving their back to the community and its laws and institutions were considered *"tiranos"*, that is tyrants. And absolute power was just a wish of the princes based in the Roman Law, far away from reality. Even if Justinian was revered in the universities of Salamanca and Valladolid it was clear for all that the Crown had limits to its "absolute" rule. Aristotelism was in vogue in Salamanca and the perception that the King could become a tyrant betraying himself and his people was developed by Fernando de Roa.[2] The fruits of

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1 This research is based in a paper presented in the Leeds International Medieval Congress, celebrated in Leeds University from the 7th -10th July 2014.

2 CASTILLO VEGAS, Jesús, *Política y clases medias. El siglo XV y el maestro salmantino Fernando de Roa.* Servicio de Publicaciones de la Universidad de Valladolid, Valladolid. 1987.

his lessons led way to the reasoning of the jurists that assisted the Junta in 1520.

During the turbulent reigns of Juan II and Enrique IV, the cities and the nobles constantly confronted the Crown limiting its power. Even Queen Isabella, when she was Princess of Asturias used conspiracy and the language of Pactism with her half brother the King in the *Pacto de los Toros de Guisando* of 1469. In the *Cortes* de Ocaña of 1468 the Members of Parliament, or *Procuradores a Cortes*, expressed that the Royal Institution had its origin in a *"contrato callado"* with the Community. This "silent contract" was synonymous of Pactism. In the *Cortes* de Valladolid of 1518 the Castilian *Procuradores* repeated the formula registered in the Cortes of 1468. The time of the great revolt against absolute power was near.[3]

The Difficulties of the Habsburg Dynasty to Assume the Spanish Inheritance

In 1504 Ysabelle, the Catholic Queen, died in her palace in the main square of Medina del Campo, leaving her domains to her eldest living daughter Juana known as *The Insane*. Her will demanded that the kingdom should accept a co-reign with her husband King Fernando II of Aragon, Juana's father. The dying Queen repeated a formula written in the will of the Queen of Navarre, Blanche, who was married to Ysabel's father in law Juan of Aragon. The Navarrian Queen, who died in Santa María de Nieva, near Segovia in Castile, where Juan was an important landlord, settled in her last will that Don Carlos, Prince of Viana, her heir, had to respect his father's office as ruler of the Kingdom meanwhile he lived. Such chapter enabled Juan and his son Fernando, of his second marriage with the Castilian Juana Enriquez, to incorporate Navarre to their Royal Crown. This option distabilized the political life of Navarre for decades. It was the little trust the royal marriage shared respect their son in law Philip the Handsome[4] – Juana's husband – that moved Queen Ysabella to include her husband, King Fernando, in her last will of Medina, as co-ruler of Castile assisting her daughter Juana, who was to inherit the Kingdom. Doña Juana would be the natural Queen – *"Reina propietaria"*- but at her side would stay Fernando and no one else, sharing the government of her states. The Catholic Queen died in November 26, 1504, in her palace of the *Plaza Mayor* of Medina del Campo. The months previous to her death had been marked by the clash between the foreign policy of the Catholic Monarchs, who were at war with France, and that of Philip of Habsburg. Defying his father, Emperor Maximilian, who also was at war against France and his father in law, King Fernando, he entered in negotiations with King Louis XII. In December 1502 the Archduke left Spain for Brussels crossing France while Spain was in war with France. Previously Philip had demanded the Catholic King for powers of negotiation which were at last granted but instead were handed to fray Bernardo Boyl[5], a friend from childhood days of King Ferdinand the Catholic who had the mission of keeping them secret and to only unveil them when he received express authorization from Spain. In April 5, 1503 Philip signed a treaty with King Louis of France in such unfriendly terms for his parents –in –law, that could be understood as treason. Part of the agreement was the future marriage of Charles of Habsburg, who was three years old, with Claude of France. Two weeks later (April 28), the victory of the Spaniards in Cerignola made the King of Aragon master of Italy. Meanwhile, Princess Juana had given birth in the Palace of Cisneros in Alcala, a boy in absence of Philip. The child was named Ferdinand in honour of his grandfather, and had been born in March 10, 1503. The future King of Hungary and Bohemia was the last joy in the life of the Catholic Queen. Queen Ysabella's death made Philip of Habsburg return to demand the Crown. His short reign was marked by his antagonism with King Ferdinand, and his desire to plunder the Castilian Treasury. As the Catholic King was still alive he had to content himself with Castile.[6] The same blunders that happened in the early reign of Charles years later, had happened then. Philip disregarded his obligations with the vassals of his wife only coveting resources for him and his foreign courtiers. Philip, Duke of Burgundy, died in Burgos in September 25, 1506, leaving his insane wife in despair and the dynastic succession in uncertainty. [7]

Cardinal Cisneros, the Archbishop of Toledo, a Franciscan close to Queen Ysabella, was left Governor of the Kingdom meanwhile King Ferdinand returned from Italy where he had travelled after his last meeting with his son –in –law the Archduke Philip in the village Renedo, close to Valladolid, when the Habsburg made it clear that there was no place for two Kings in Castile. King Fernando died in 1516. He had made a will leaving Aragon to his grandson Ferdinand of Habsburg, who had been born in Castile in 1503 and who had been educated as a Spaniard. King Fernando thought him better suited for the Spanish Crown than his eldest brother Charles, born in Flanders in 1500. It was this reason that justified the embassy sent by Archduchess Margaret and presided by Adrian of Utrecht, who demanded that law should be respected and that as the *Siete Partidas* ordered the successor to the throne of Castile had to be Juana's eldest son. The fear that the abuses seen during the short reign of Philip of Habsburg in Castile would be repeated

[3] GARCÍA-GALLO, Alfonso, "El Pactismo en el Reino de Castilla y su proyección en América", *El Pactismo en la Historia de España.* Instituto de España, Madrid. 1980, pp. 151-158.

[4] Also known as Philip the Fair, son of Emperor Maximilian of Austria and Mary of Burgundy.

[5] Boyl had participated in Columbus' Second Voyage with powers from Pope Alexander VI for the conversion of the Orient. [SZÁSZDI, István, "Después de las Inter caetera, ruptura y cambio en la política indiana de Alejandro VI", in *Memoria del X Congreso del Instituto Internacional de Historia del Derecho Indiano.* II, Escuela Libre de Derecho - Universidad Nacional Autónoma de México. México, 1995. pp. 1577–1629.]

[6] SUÁREZ FERNÁNDEZ, Luis, "Las relaciones de los Reyes Católicos con la Casa de Habsburgo", in *Hispania-Austria. Die Katholischen Koningen, Maximilian I, und die anffänge der Casa de Austria in Spanien.* Herausgegeben von Alfred Kohler und Friedrich Edelmayer. Verlag für Geschichte und Politik, Oldenbourg Verlag, München, 1993, pp. 48-49.

[7] Since olden times rumours that Philip had been poisoned has been taken for granted by Flemish historiography. His cook warned him that he was going to be murdered by poison few weeks before his sudden death. Nevertheless it has never been confirmed. Philip's body was desecrated by the French during the Spanish Napoleonic invasion, his coffin in the Royal Crypt in Granada lays empty, making any attempt to examine his remains impossible.

by the arrival of a foreign king who lacked of knowledge of the kingdom, and who had been brought up like a Burgundian Duke, led the Catholic King to sign his first will in favour of his beloved grandson Ferdinand of Habsburg.[8] This document was signed in Burgos, May 2, 1512. In its contents King Fernando ordered that his grandson Ferdinand should be recognized as Governor of Castile and Aragon after his death. As Pérez has noticed the Catholic King thought Charles would never care to travel to Spain to take his inheritance.[9] News of his indolence and lack of decision had made its way to the Spanish Court. The King thought that the grandson that bore his name was gifted for ruling and that he was so similar to him that he had inherited his own defects too. But in his deathbed the 23d of January 1516 in the small town of Madrigalejo, near Guadalupe in Extremadura, the members of the Royal Council and the Archbishop of Toledo, Cisneros, convinced him to change his will if he wished to save Spain from a civil war and his grandson Ferdinand from an uncertain future in the hands of his brother Charles. In the new will he left the government of Aragon to his son the Archbishop of Zaragoza, Don Alonso de Aragon, while Castile was given to Jimenez de Cisneros, the Archbishop of Toledo, until Charles arrived from Flanders, while he left to his grandson Ferdinand the title of Grand Master of the Spanish Military Orders of Alcantara, Santiago and Calatrava. Cisneros was concerned of the entourage of Prince Ferdinand from the first place. The most important member of the House of the *Infante* was Don Pedro Nuñez de Guzman, of the Military Order of Calatrava. He belonged to the most prominent family of Leon and he was appreciated personally by King Fernando. As the head of the Spanish Church Cisneros took measures to secure the throne for Don Carlos, Charles' name in Spanish. From January 1516, in Guadalupe, Cisneros put the *Infante*, Ferdinand of Habsburg, under his surveillance, but he did not dare to dissolve his House. Although he wrote to Flanders complaining against Don Pedro Nuñez de Guzman he limited himself to suggest the change of the members of Ferdinand's house naming the Palatine Prince as a good candidate for Majordomo and Adrian of Utrecht to occupy Don Pedro's place.[10] It was evident that Ferdinand's cause was a very popular one in Spain, and that Charles' crown was in peril. In early September 1517, following instructions sent by the Habsburg King, the Archbishop of Toledo appointed Monsieur Laxao and Don Diego de Guevara to take charge of the House of the *Infante* in the night, taking Ferdinand out of bed in Aranda del Duero.[11] Cardinal Cisneros died in Roa, waiting for the arrival of King Charles in November 8, 1517, in the Douro valley. Charles treated Ferdinand's friends as plotters and kept his brother in house prison. The Guzman, Osorio and other prominent families felt disgraced and waited for revenge. Public opinion in Castile and in the Indies grew favourable to the *Infante* while the King showed inconsistent in governing the Kingdom.[12] Charles decided to send his brother away to Flanders in 1518, freeing himself of a dangerous competitor.

The Conquista that Led to the Comunero Revolution

In February 1517 Francisco Hernandez de Cordoba led an expedition composed of three ships with 117 men that parted from Havana to explore the western coast of the Gulf of Mexico. It was then when the Spaniards encountered the Mayas for the first time, and when they discovered the first city with stone buildings in the New World, near Cape Catoche. They marvelled so much with its order that they called it New Cairo, strenghtening the idea that its inhabitants were heathen but with great riches. They considered that the temples were "mosques". When Hernandez returned to Cuba he discovered that the Governor had given command to Grijalva in order to revisit the coast he had discovered, dying shortly afterwards in the village of Sancti Spiritus because of the wounds that the Maya of Champoton had inflicted him.

In 1518 Juan de Grijalva explored the Mexican shore following the sea route of Hernandez de Cordoba, with authorization of Governor Velazquez. Returning to Cuba he reported the existence of a high civilization unknown until then in the New World. He brought back with him some gold and other precious goods traded with the Maya and the Tabascan Indians. Grijalva's expedition followed the coast of the Gulf of Mexico starting from Yucatan to the Tabasco region. They were aware that they were dealing with developed nations but that practiced human sacrifices and idolatry. Those Indians found wore clothes and were far distant from the naked and primitive Arawak Indians that they had encountered in the Antilles. Juan de Grijalva was Castilian, he had been born in Cuellar in 1490, the same town of origin of Cuba's Governor, Diego Velazquez. Cuellar belonged to the Duke of Albuquerque and was wealthy because of its vast forest lands close to Segovia. Velazquez ordered a new expedition to the Gulf of Mexico,

[8] SZÁSZDI, István, "Juan Ponce y el infante. Clientela y gobierno en el 1500 antillano." *Jahrbuch für Geschichte Lateinamerikas.* 41, Böhlau Verlag. Köln, 2004. pp. 19-37. It is interesting to notice how important were the ideas of Philip the Fair in the measures of state taken by his son Charles in his first years of reign. It was as if Philip was alive.

[9] PÉREZ, Joseph, *Cisneros, el Cardenal de España.* Taurus-Fundación Juan March, Madrid. 2014. pp. 69-70.

[10] *Ibid.* pp. 70-71. Don Pedro died in prison in the Monastery of San Benito of Valladolid, while his brother Ramiro headed the *Comunero* Revolution in León in 1520. His son Martin de Guzman followed the *Infante* to Austria. Martin had served Ferdinand of Habsburg in Spain; he was part of his original household like Don Pedro, his uncle. Martin remained one of the closest lifelong friends of Emperor Ferdinand. Martin de Guzman married Anna von Schonburg in 1538, she was lady- in- waiting of Queen Anna; the whole royal family was present in the wedding. King Ferdinand (King of Hungary and Bohemia) wrote to Doña Maria de Quiñones, Martin's mother, a letter describing the marriage ceremony. It took a while to Ferdinand in order to convince his brother Charles to order Martin as Knight of the Order of Santiago. He became in time *Comendador* of Hinojosa. Charles V kept a particular hatred to the Guzman family of Leon for participating actively in the Revolution of the *Comunidades.* Martin de Guzman returned to Spain in 1561, dying in 1576. He was buried with his ancestors in the church of the Convent of Santo Domingo in Leon. [MUR RAURELL, Ana, "Rex Hispaniis Sequuti. La Corte de Fernando I y las Ordenes Militares Españolas", in *Fernando I, un Infante español Emperador.* Universidad de Valladolid – Vicerrectorado de Extensión Universitaria – Museo Universidad de Valladollid. 2003, pp. 96-97.]

[11] DÍAZ –JIMÉNEZ Y MOLLEDA, Eloy, *Historia de los comuneros de León y de su influencia en el movimiento general de Castilla*. Madrid, 1916, pp. 74-78.

[12] SZÁSZDI, István, *Juan Ponce de León y su época. Estudios institucionales de la Conquista.* Diputación de Valladolid, Valladolid, 2011. pp. 21-23.

and immediately sent information to the Spanish Court of the new territories that seemed to be Mainland because of its extension. The good signs and omens of its prosperity were reasons that prevailed to back a new exploration with the blessings of Bishop Juan Rodriguez de Fonseca, who was in charge of the Board of Trade of Seville, *Casa de la Contratación*. Fonseca's family held the dominion of Coca, in the so called *Extremadura Castellana*, land south of the Douro River and in the same region of Cuellar and Segovia. The Fonsecas knew well of the relentless opposition held by the Castilian cities each time that the upper nobility tried to intervene in local politics or cut away liberties in their favour. Castilian Feudalism had not developed because of historical reasons that have their origin in the *Reconquista.* So when Cortes founded the city of Villa Rica de la Veracruz in the Mexican coast in July 10, 1519, without the consent of the Governor of Cuba, and transformed his garrison into *Vecinos*, inhabitants, he let the settlers elect a Cabildo or municipal government which took him oath as Captain General ignoring the Cuban Governor. Fonseca knew that Cortes and the Christians of New Spain were following the old practices and customs of the Reconquest to boycott his protegé. While rebelling against the establishment Hernan Cortes and his men insisted that they were using their liberties in behalf of the King's interest. King Charles accepted Cortes' gifts and political reasoning when the riches of the Aztec Empire were evident.[13] The King's greed prevailed and saved Hernan Cortes from punishment. But this was a lesson in Castile, it was possible to legitimize a rebellion in the name of Commonwealth. Such idea was not only based in Saint Thomas Aquinas but also in the works of master Fernando de Roa, teacher in Salamanca in the XVth century.[14] It was a bitter stroke for the Bishop of Burgos, Juan Rodriguez de Fonseca. Fonseca was an influential ecclesiastic in the Spanish Court, he was Bishop of Burgos since 1514 and President of the *Junta de Indias* (the precedent of the Council of Indies) since 1511.

Happily the conquest of Mexico was what frustrated one of the famous scandals at the time motivated by the favouritism of Charles of Habsburg with his gallant courtiers from Flanders. The King who was sixteen when he inherited the Kingdoms of Castile and Aragon, and who could not say a word in Spanish, was surrounded by a clique of nobles coming from Burgundy, Savoy and Flanders, known in Castile as the *Flamencos.*[15] The story is in the *Historia* of fray Bartolome de las Casas and it is well documented through the Royal Register of Seal kept in the National Archive of Simancas. In 1518, just after news had arrived to Spain of the discovery of advanced nations in the Mexican shore, King Charles gave away the land that was called the Island of Cozumel to the Admiral of Flanders Laurent Gorrevod, a Savoyard close to Margaret of Habsburg. Margaret was the ruler's aunt who had educated him in Malines and had married for the first time with the Crown Prince of Spain Don Juan.[16] Margaret married twice, the second time with the Duke of Savoy, she had no descent, her nephew Charles was the closest to a son for her. Las Casas says that the King granted him Mexico (the said Island of Cozumel) in fief, for him and his descendants. As well he gave Gorrevod the Government of Cuba for his lifetime.[17] King Charles had made him a very powerful man following the precedent of Christopher Columbus, Admiral of the Ocean Sea. But the first reaction against such Laws and privileges came from the Flemish clique itself, and it was Guillaume de Croy, Lord Chièvres, who was the King's Chamberlain, and who had the last word in relation with the King's honours in the Indies, warned the King that the grace of Gorrevod, the new foundland of Yucatan – what they called the *Isla de Cozumel* –, could happen to be of importance and its loss for the Crown would be lamented in the future.

El Padre las Casas observed:

> "Monsior de Xevres, que era el consultor principal de las mercedes, lo que éstas Indias eran y lo que al Rey le importaban, mayormente tierra nuevamente descubierta, que debiera considerar poder ser alguna cosa grande y de que después de haberla concedido podía mucho al Rey pesarle".[18]

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[13] Albrecht Durer saw the Mexican treasures in the Imperial Court in Flanders in late 1520, leaving a very interesting account and description in his Diaries.

[14] CASTILLO VEGAS, *Op. cit.* (n. 2). Roa suggested that any tyrannical Prince should be deposed by the people in defense of the *res publica*.

[15] SZÁSZDI LEÓN-BORJA, István, "La merced de la isla de Cozumel al Almirante de Flandes por parte del Rey don Carlos: las gobernaciones de Cuba y de Yucatán en 1518.", *Anuario de Estudios Americanos,* LVIII-1. Escuela de Estudios Hispano-Americanos - CSIC. Sevilla, 2001. pp. 13-32.

[16] Gorrevod was a Counselor of Archduchess Margaret, he was buried close to her in the Abbey of Brou. Gorrevod had entered the service of the Habsburgs at the same time when Mercurino Gattinara, when Margaret was Duchess of Savoy, when she widowed she took her counsellors away with her to Flanders, where her father Emperor Maximilian had named her Governor General of Flanders. His *Cursus Honorum* started as Governor of Bresse. He belonged to the Privy Council of Margaret, and was responsable for her finances from 1510. While he was at her service he started to work for her nephew Charles who named him his Chamberlain, in the records of 1515 he figured as second Chamberlain, the main one was Chièvres. Two years later he joined Charles of Habsburg in his trip to Spain. Gorrevod was in charge of the diplomatic negotiations with France from 1518 to 1519. It was then when he received the collar of the Golden Fleece, and the title of Count of Pont de Vaux in 1521. In this period he became member of the Secret council of Emperor Charles, which from 1522 was known as the Council of State, or *Consejo de Estado*. Chièvres and Gattinara were his closest friends. He was one of the diplomats that negotiated the Treaty of Madrid in March 1526, that pretended the recovery of Burgundy. [FERNÁNDEZ CONTI, Santiago, *s.v.* `GORREVOD, Laurent'. *La Corte de Carlos V, Segunda Parte. Los Consejeros de Carlos V*. III. José Martínez Millán (Dir.). Sociedad Estatal para la Conmemoración de los Centenarios de Felipe II y Carlos V. Madrid. 2000, pp. 193-194. CHAGNY, André, *Correspondance Politique et Administrative de Laurent de Gorrevod, Conseiller de Marguerite D'Autriche et Governeur de Bresse (1507–1520)*, Faculté des Lettres de l'Université de Dijon. Macon, 1913.] Bataillon confused the identity of Gorrevod with Albert de Veere, a relative of the King. [BATAILLON, MARCEL, *Estudios sobre Bartolomé de las Casas*, Barcelona. 1976, p. 142.] Laurent Gorrevod's coat of arms can be seen on top of his seat in the stalls where the Chapter of the Golden Fleece took place in the Cathedral of Barcelona in 1519.

[17] CASAS, Bartolomé de las, *Historia de las Indias* II, Ed. by Juan Pérez de Tudela and Emilio López Otto. Obras escogidas de fray Bartolomé de las Casas. Biblioteca de Autores Españoles, Madrid. 1961, pp. 413-414. Anghiera wrote in those days that it was apparent that the Admiral of Flanders would receive Cuba from King Charles.

[18] *Ibid*. I was lucky to find the original *Provisiones Reales* granting Yucatan to Gorrevod, as well as the government of Cuba for his lifetime in the *Registro General del Sello*, Archivo General de Simancas. See SZÁSZDI, "La merced… ", *Op. cit*. (n. 15).

So the King decided not to confirm such potentially dangerous privilege. Instead he exchanged Yucatan and Cuba for a sale licence of 4000 black slaves in the New World, with destiny to Hispaniola Island, Cuba, Puerto Rico and Jamaica, in behalf of the Admiral of Flanders, Laurent Gorrevod. It was the first important slave license given by King Charles, it was signed in Zaragoza in August 10, 1518. The license banned the sale of new black slaves in the next eight years in the Caribbean.[19] We have proved the link between the royal grace of Yucatan to Gorrevod and the exchange for the negro slave license finding the original Royal Decree in the Archive of Simancas. It was the start of the slave trade in America.

The Governor of Bresse and Admiral of Flanders entered in contact with the traders of Seville, as his operation was tax free and the Board of Trade had received instructions in that sense, the slave licenses promised high benefits. It was a rich reward from King Charles for Gorrevod's services to the House of Austria. Laurent Gorrevod resold his rights to Genoese merchants in order to trade slaves in America, gaining 25.000 ducados.[20]

The number of cases of corruption and the extraordinary greed of the Flemish clique, scandalized the Castilians. They felt that their laws had been stepped and that the King worried little for the good of the Kingdom *"el bien comun"*. Charles of Habsburg was an idle teenager who disregarded the customs of the land. He neglected learning its laws and he was uninterested in learning Spanish. The King felt that it was sufficient to speak in French to his noblemen, for it was his mother tongue. The Burgundian protocol isolated the King from his Spanish vassals in the hands of his Chamberlain and all sorts of rumours were spread in the sense that in little time the King would leave Spain for good. Charles was an untalented young man that feared the political figure of his brother Ferdinand and that relayed completely in his relative Guillaume de Croy. In November 1517 Charles naturalized a nephew of Lord Chièvres also called Guillaume, seventeen years old, who was already Bishop of Cambray and made him Archbishop of Toledo, the highest ecclesiastical dignity in Castile, from 1517 to 1521.[21] He never occupied his See, and the Castilians never forgave such offense, for Chièvres had occupied the place of Archbishop Francisco Ximenez de Cisneros, the talented Regent of the Kingdom. There were also an infinity of posts and privileges that the Flamencos coveted and relished from the Castilians. Another case was that of Juan de Witte Hoos (called Ubite by the Spaniards), a Flemish Dominican friar close to King Charles who was named Bishop of Santiago de Cuba, in February 11th 1517. De Witte never occupied his see. He was Cuba's first Bishop, and he died in Bruges in 1540.[22] This abusive behaviour had a precedent in the short but traumatic reign of Philip the Handsome, Maximilian of Habsburg's son married to Queen Juana of Castile. By a *Real Provision* or Law dated in December 18, 1506, the Queen revoked all the graces or *"mercedes"* that her dead husband had made against the Crown's patrimony. Specially royal revenues were affected, as well as bonds and state jurisdictions, which lacked of the Queen's consent and knowledge: *"en mucho perjuyzio e demynuçion de mi patrimonio real e bien publico destos dichos mis Reynos"*. [23]

The sense that the noble foreigners were looting the country under the command of Lord Chièvres, and his insatiable greed is reflected in a popular rhyme dated before 1521, year of De Croix's death:

"Salveos Dios
doblón de a dos, que Monsieur de Xevres
no topó con vos"[24]

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[19] OTTE, Enrique, „Die Negersklavenlizenz des Laurent de Gorrevod", en *Spanische forschungen der Görresgesellschaft.* 22 band, Münster. 1965.] SZÁSZDI, "La merced… ", *Op. cit*. (n. 15), p. 25.

[20] BRAU, Salvador, *La colonización de Puerto Rico. Desde el descubrimiento de la Isla hasta la reversión a la corona española de los privilegios de Colón.* Quinta edición anotada por Isabel Gutiérrez del Arroyo. Instituto de Cultura Puertorriqueña, San Juan de Puerto Rico, 1981. p. 292. VILA VILAR, Enriqueta, *Hispano-América y el comercio de esclavos. Los asientos portugueses.* Escuela de Estudios Hispanoamericanos – CSIC. Sevilla, 1977. p. 23.

[21] We must take into account that ecclesiastical dignities were conferred by the King of Spain since the reign of the Catholic Monarchs, Charles V Spanish grandparents, privilege called in Spanish *Real Patronato* granted by Julius II in 1508, and previously by Pope Alexander VI in relation to the West Indies. It was such a public offense that the Comuneros included the case in their last demands to the King, in the charter called *Ley Perpetua* that fray Prudencio de Sandoval published in his biography of emperor Charles. There can be read: *"Item porque la provision del Arzobispado de Toledo hizo su Majestad antes de que fuera recebido y jurado por Rey en las Cortes de Valladolid, que su Alteza presente de nuevo o haga proveer el dicho arzobispado en persona que sea natural y vecino de estos Reinos de Castilla, que sea persona que lo merezca, de letras y de conciencia, Teólogo o Jurista. Porque de se haber proveído a su sobrino de M. de Xevres contra las leyes de estos Reinos, se ha seguido y sigue mucho daño a estos reinos, y a la dicha dignidad, por ser menor de edad y estar ausente. Que aunque fuera natural de estos reinos no fuera justo de se le dar: y porque se sacan las Rentas de la dicha dignidad, como se ha hecho en los años pasados; y porque siendo natural y residiendo en la dicha dignidad, se sostendrá en la casa del dicho arzobispo muchos nobles y Caballeros, como lo solían hacer. Y si su Alteza fuere servido de gratificarle al dicho sobrino de M. Xevres de rentas en otras partes, de donde es natural, se podría muy bien hacer."* [MALDONADO, Juan, *La Revolución Comunera*. Edición preparada por Valentina F. Vargas. Editora Nacional, Madrid. 1975. pp. 327-328.] The Spanish Primate was the Archbishop of Toledo, and this is why the Bishop of Zamora, the *Comunero* Acuña, coveted such dignity pressing the Toletan canonry for his recognition.

[22] LEBROC MARTÍNEZ, Reynerio, *Episcopologio Cubano, Juan de Witte Primer Obispo de Cuba. 1517–1525.* Caracas, 2001. p. 145. De Witte deserves a more solid biography.

[23] ARAM, Bethany, *La reina Juana, gobierno, piedad y dinastía.* Marcial Pons, Ediciones de Historia SA. Madrid. 2001, pp. 159-160. The corruption of the administration was sensed by Cardinal Cisneros who wrote in 1517 in a *Memorial* that something had to be done to stop the excessive liberty of the officials of the *Contaduría*, or tax administration. The Cardinal of Spain also worried for the generosity of the Royal Council's decisions with the nobility and for the enrichment of the Royal officers. The custom of appointing persons that later named subagents to attend their public responsibilities caused him regret, specially because it was a way of gaining rents. And these concerns grew worse with Charles' tendency of pleasing his courtiers satisfying their demands, which started before the arrival of the King in Tazones, a small port in the Spanish Bay of Biscay. As González has said these abuses triggered the *Comunidades de Castilla*.[GONZÁLEZ ALONSO, Benjamín, *Sobre el Estado y la administración de la Corona de Castilla en el Antiguo Régimen.* Siglo XXI Editores, Paracuellos del Jarama (Madrid), 1981. p. 47.

[24] SZÁSZDI LEÓN-BORJA, István, "Los conversos: un grupo heterogéneo y cosmopolita en el escenario de las Comunidades de Castilla. Imperiales, Comuneros y republicanos": *Estudios en Homenaje al Dr. Joseph Pérez*. István Szászdi and María Jesús Galende (Ed). Lex Artis, Valladolid. 2014. p. 306.

Verses that we can translate freely as:

"Lucky you
Piece of eight, that Monsieur de Chièvres
did not cross in your way"

There was no mock but fear and pity in such saying. Rumours flowed that the King was considering to give away the Eastern Indies, to bribe the Electors of the Empire or to increase the wealth of his courtiers. The sense that the King was an alien who was willing to leave for good Castile and quench the thirst of his noblemen with the blood and possessions of his Spanish vassals was based in many inadequate royal acts between his arrival in the Iberian Peninsula in 1517 and his depart to Flanders in the Spring of 1520. Charles attitude as sole law maker, above all rulings and custom, was determinant to the Castilian uprising of 1520, or *Comunero* Revolution. The fear of the rupture of Castile, against the last will of Queen Isabella the Catholic, was a constant phantom of King Charles' reign. He signed a Law dated in Barcelona, September 14, 1519 where he ensured that the Indies would always be together with Castile. The Castilian Royal Council signed another similar Law in the name of the King with his mother Queen Juana in Valladolid, in July 9, 1520.[25] And by a *Real Provision* of October 22, 1523, signed in Pamplona, a year after the defeat of the Castilian rebels, the Emperor ensured and promised that he would never segregate New Spain from the Crown.[26] Almost twenty five years later, in Monzon, the Emperor and the Prince promised to keep the Indies once again.

So for the Castilians, the Imperial Crown meant for them expenses, new taxes, *"servicios"* or economic demands from the Crown, like it had happened centuries before with King Alfonso X. It was the submission to the Empire which had been unknown to them and it also meant the depart for good of the King as well as the possible dismemberment of the Kingdom. In the *Siete Partidas*, the King of Castile, like the King of France, were not under the authority of the Emperor. The bitter experience of the so called *Fecho del Imperio*, the quest for the Imperial Crown by King Alfonso of Castile in the XIII was in all minds.

The Cortes of Santiago De Compostela

The Emperor had called for a meeting of the Castilian *Cortes* – the Spanish word for Parliament – in February 1520. Charles V addressed his vassals justifying the meeting because of his depart to Aachen in terms that he had received the Imperial Crown by the lectors.[27] All the main cities and towns of the kingdom had to send their *"procuradores"*.

Charles spent Holy Week in Santiago de Compostela and met the *Cortes* in the Monastery of Saint Francis, in its gothic Chapter House. Many representatives of the towns and cities of Castile were badly received provoking complaints.

The challenge to convince the Spaniards to participate in the Imperial adventure was given to the Bishop of Badajoz, Dr. Pedro Ruiz de la Mota, who had to speak to the members of the Castilian Parliament before King Charles embarked in Coruña after the Easter of 1520. His speech of inauguration of the *Cortes* was a call for unity and a desperate intellectual pose in the line that the Empire was the best for the Fatherland, in order to keep the Kingdom in peace during the absence of the Emperor.

The message of the Bishop of Badajoz was inspired in the Roman ideal of Ruler, as Augustus, Saint Augustine and Justinian The Great had envisioned.[28] Following Menéndez Pidal and in the same line of thought H. Pietschmann has analized this famous speech[29].

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[25] *Recopilación de las Leyes de los Reynos de las Indias.* Libro III, título I. Ley Primera. T. II. Madrid, 1681.

[26] *"Promete Su Magestad no enajenar de la Corona Real perpetuamente la Nueva España ni parte della, i sea ninguna toda donacion hecha por S.M. o sus succesores a qualquier persona. Que da esta Provision mandando tenga fuerza de lei i Pragmatica Sancion como si fuera hecha i promulgada en Cortes Generales, para satisfacion de los conquistadores i pobladores, no haviendo dello necesidad pues estava obligado por el juramento que hiso al ser recibido a la Corona de Castilla, i por la Bula de donacion de las Indias"* [*Catálogo de la Colección de don Juan Bautista Muñoz.* Introduction of Antonio Ballesteros Beretta. I, Real Academia de la Historia, Madrid. 1964, p. 348.] This Law was signed in the back by the Royal Secretary Francisco de los Cobos. The Law can be found today in the Colección Muñoz, Biblioteca de la Real Academia de la Historia of Madrid, A/103, folios 294r-294v. The worry for the future of New Spain was, like the possibility of moving the Casa de la Contratación from Seville to Antwerp, one of the main causes that triggered the *Comunero* Revolution. [SZÁSZDI LEÓN-BORJA, István, "El Imperio y las Cortes de Santiago de Compostela de 1520, la base ideológica del Absolutismo español", *Estudios de Historia de España,* Nº 10, 2008, pp. 165-200.] That it was likely that Emperor Charles could had given away New Spain is clearly understood if we study his policy respect the Kingdom of Navarre. Between 1521 and 1523 King Francis of France helped his future brother in law Henry of Navarre, who tried to reconquer his lost kingdom from Emperor Charles. But after the battle of Pavia in 1525, Charles lost interest in preserving under his rule Ultrapuertos, the land of Navarre in the northern fringe of the Pyrenees. His grandfather King Fernando The Catholic had occupied the whole kingdom years before, and had been recognized King by the *Cortes* of Navarre, but as Floristán has commented (*"Pero aquellas tierras fueron, también, abandonadas porque el emperador no puso el empeño que Fernando en conserver íntegro el reino…"*) the Emperor was not interested in keeping the integrity of the Kingdom of Navarre as his Spanish grandfather had worried in the past. [FLORISTÁN, ALFREDO, *El reino de Navarra y la conformación política de España (1512–1841*). Ediciones Akal, Madrid, 2014. pp. 94-95.] In 1530 the Emperor gave Mexico City seat in the *Cortes* of Castile, and he did the same to Cuzco in 1540 la ciudad de Cuzco, like García-Gallo commented *"como cabezas de dos reinos que formaban parte inquebrantable de la Corona Castellano-Leonesa"* Charles V considered doing so because the two cities were capitals of two kingdoms integrated for good in the Castilian Crown. [GARCÍA-GALLO, *Op. cit*. (n. 3), pp. 158-159.] One heraldic effect of the *Comunero* Revolution was that the King decided to add to his coat of arms the two columns of Hercules with the inscription *Plus Vltra.* Such decision was taken to quiet those that feared that Charles could strip the Indies from Castile. The two columns, was probably an idea of Pietro Martire de Anghiera that referred to the New World, meant that after the Gibraltar Strait – were Hercules marked the end of the world raising two columns, one in each shore – there were islands and a Mainland that belonged to Spain.

[27] Ramón MENÉNDEZ PIDAL: *La idea imperial de Carlos V.* Colección Austral, Espasa-Calpe SA. Madrid, 1ª ed. 1940, 6ª ed. 1972.

[28] *Ibid.*, p. 13.

[29] *„Los inicios de Carlos en sus reinos peninsulares... presentan bastantes alusiones y vínculos con el humanismo político, como por ejemplo se puede observar el discurso famoso que pronunció el obispo Mota en nombre de Carlos en las Cortes de la Coruña en 1519, poco antes de partir para Alemania a coronarse Rey de Romanos y Emperador electo, en el cual Carlos se pone en la tradición de los Emperadores romanos que desde España llegaban a dominar el Imperio y sugiere a los españoles -sus „súbditos" - que*

The Spanish fear that the Emperor would leave Spain for good and would govern the Kingdom through foreigners, Viceroys or Lieutenants, motivated the Law, or Real Provision of September 1519 dealing with the order of Charles' titles. In its text could be read that by no way the title of Emperor that preceded King of Spain would be detrimental to the liberties and privileges of the Kingdom:

> *"por anteponer el título de Emperador al de Rey de España, no se entendiese que perjudicaba a la libertad y exenciones del Reino"*[30].

Bishop Mota read his speech in the Convent of Saint Francis the 31st of March 1520. He addressed the Parliament in name of the Emperor. Mota explained that Charles' Christian Empire was universal and that with the help of God he would be the instrument to vanquish the infidels, the enemies of the Catholic Faith.

> *"él [el emperador Carlos] sólo en la tierra es Rey de Reyes... ahora vino el Imperio a buscar el Emperador a España, y nuestro Rey de España es hecho, por la gracia de Dios, Rey de Romanos y Emperador del mundo... la empresa contra los infieles enemigos de nuestra Santa Fe Católica, en la cual entiende con la ayuda de Dios, emplear su Real persona... este Reino [de Castilla] es fortaleza, defensa y muro y amparo y seguridad cierta de todos los otros nuestros reinos y señoríos".*[31]

Dr. Mota said that the King promised to be away from the Peninsula no more than three years and afterwards he would take seat in Spain:

> *"los de la tierra de Flandes ovieron por bien su venida acá, sin esperança jamas de volver a ella, no hayais vosotros a mal su ida allá con certinydad de volver acá, que queriendo sufrir con paciencia la ausencia de S.M., a lo mas tres años, le haceis el mas glorioso Principe del mundo. Despues de estos tres años, el huerto de sus placeres, la fortaleza para defensa, la fuerza para ofender, su tesoro, su espada, su caballo e su silla de reposo y asiento ha de ser España".*[32]

The Bishop tried to calm down the general unease of Charles' Spanish vassals who feared for the *"conservación de los Reinos"*, that is the commonwealth of the Kingdom, giving them assurances that the circumstances for gaining the Imperial Crown were different from those lived by King Alfonso The Wise in his quest for the Empire. The *"Fecho del Imperio"* would be nevermore.[33] This was his reference to Alfonso's adventure in his address of Santiago:

> *"El Rey Don Alonso siendo el Reyno de Granada y mucha parte del Andalucía de moros, salió del Reyno a rescebir el Inperio, que estaba en contienda, y no sin contradicción como agora...".*[34]

The speech of Ruiz de Mota in Santiago is also a masterpiece of rhetoric and early Reinassance political thought. He remembered how in Antiquity Hispania gave birth to famous emperors and that in his times it was the Empire which sought for rulers in Spain.

With great enthusiasm he preached:

> *"Agora es vuelta a España la gloria de España que... [* en muchos] años pasados estuvo adormida. Dicen los que escribieron en loor de ella que, cuando las otras naciones enviaban tributos a Roma, España enviaba emperadores: envió a Trajano, a Adriano y Teodosio de quien subcedieron Arcadio y Onorio; y agora vino el Inperio a buscar el emperador a España, y nuestro Rey de España es fecho por la gracia de Dios Rey de Romanos y Emperador del mundo".*[35]

I believe that these words were circumstantial and moved by political opportunism. The idea was to drive the hearts of the presents. Surprisingly, the political project of Bishop Mota was adopted by the Emperor only after the *Comunero* Revolt happened to give remedy to the demands of the Spanish people. It was the fear of loosing Castile – and probably the good advise of Adrian of Utrecht – which made Charles take the decision between March of 1526, when he married his Portuguese cousin in Seville, and Autumn of 1529 to reside in Spain.[36]

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a través de él se convertirán en los protectores de la Cristiandad. Paralelamente se autodenomina en reales provisiones con alusión a la antigüedad romana „Don Carlos... Rey de Castilla, Aragón, etc. domador de las gentes bárbaras" al hablar de América, intitulación utilizada, por cierto, sólo durante poco tiempo." [PIETSCHMANN, Horst, „Los problemas políticos indianos, el humanismo político y la autoridad imperial." *Carlos V y la quiebra del humanismo político en Europa (1530–1558).* Coordinador general José Martínez Millán, IV. Sociedad Estatal para la conmemoración de los centenarios de Felipe II y Carlos V. Madrid, 2001. p. 58. PIETSCHMANN, Horst, „Imperiale Konzepte im Spanien Karl V." *Aspectos históricos y culturales bajo Carlos V.* Editado por Christoph Strosetzki. Studia Hispanica 9, Vervuert-Iberoamericana, Frankfurt am Main, 2000. pp. 397-398.]

30 JOVER, José María, *Carlos V y los españoles.* Ediciones Rialp SA. Madrid, 1963. p. 51.

31 MENÉNDEZ PIDAL, *Op. cit*., (n. 27), pp. 14-15. MENÉNDEZ PIDAL, Ramón, „Formación del fundamental pensamiento político de Carlos V." *Karl V. Der Kaiser und seine zeit.* Herausgegeben von Peter Rassow und Fritz Schalk. Kölner Colloquium, 26-29. November 1958. Böhlau Verlag, Colonia. 1960. p. 153. FERNÁNDEZ ÁLVAREZ, Manuel y DÍAZ MEDINA, A., *Los Austrias Mayores y la culminación del Imperio (1516–1598). Historia de España*, 8. Editorial Gredos SA. Madrid, 1987. p. 216.

32 *Cortes de los antiguos reinos de León y de Castilla.* IV, Real Academia de la Historia. Madrid, 1882. p. 296.

33 JOVER, *Op. cit*. (n. 30), pp. 50-51.

34 BALLESTEROS GAIBROIS, Manuel, „Acotaciones a una Historia de Carlos V". *Hidalguía*, 280-281. Madrid, p. 758. Discurso de la Corona, *Cortes de Castilla y León, Op. cit*. (n. 32), p. 296.

35 MENÉNDEZ PIDAL, *Op. cit*. (n. 31) [1958] p. 153. Discurso de la Corona, *Cortes de Castilla y León,* Op. cit. (n. 29), p. 295. Pérez-Prendes says that the *Cortes de Santiago* were suspended in April 5, because of the feast of Holy Thursday, until April 22 when they continued in La Coruña. It was in this last period, between April 22 and 25, when Pérez-Prendes believes that Ruiz de Mota intensified his speech to the most sceptic members of parliament. [PÉREZ-PRENDES MUÑOZ-ARRACO, José Manuel, "Notas sobre las Cortes carolinas de Santiago y de La Coruña en 1520", en *Aproximaciones al reinado de Carlos V*, La Coruña, 2002, p. 121.]

36 JOVER, *Op. cit.*, (n. 29), p. 52. One of the members of the Cortes who present when the Bishop of Badajoz read his famous address was his brother the Comendador García Ruiz de la Mota, from Burgos, who answered back cleverly in behalf of his companion Juan Pérez de Cartagena and himself: *"Y como esta bienaventurada venida a estos Reynos fuere sin ningun temor ni recelo que Vuestra Magestad jamas habia de salir dellos, antes teniamos por cierto que de aqui habia de regir, y mandar y gobernar todos los otros Reynos y señorios de su patrimonio Real, como de la mayor e mejor fuerza de todos, no se maraville V.M. si nos es estraño, aspero y duro oir e saber que tiene determinado partirse, pues es tan apartado de lo que esperabamos e deseabamos. Y bien vemos que la mayor cosa del mundo es el Inperio, y no lo negamos, poderoso Señor, y muy buen acuerdo tomó V.M. en dar orden como esto no cayese en otra parte, por el gran daño que pudiera venir en la Cristiandad, y sabeis quel mayor bien que un Reyno puede tener es con la grandeza de su Rey e señor, pero no quisieramos que tanta gloria y dinydad nos aguardara Dios con privarnos de vuestra presencia por sola una hora, quanto mas por tres años. La causa de vuestra partida es muy justa, que vaya a recibir lo que Dios le dio, pero tambien nuestro dolor es justo, que sintamos la ausencia de nuestro Rey e señor."* [*Cortes de Castilla y León, Op. cit.* (n. 32), pp. 298-299.]

Just after the Imperial election in June 18, 1519, the Great Chancellor, Mercurino Arbóreo Gattinara, had written his vision of the new Empire that was unfolding in the hands of Charles:

"¡Sire! Ya que Dios, el Creador, os ha concedido la gracia de elevar Vuestra dignidad por encima de todos los reyes y príncipes de la Cristiandad al convertiros en el mayor emperador y rey desde la partición del imperio de Carlomagno, Vuestro predecesor, y Os ha indicado el camino hacia la justa monarquía universal a fin de poner al orbe entero bajo un único pastor, es justo y necesario que Vuestra Imperial Majestad se proteja del pecado de desagradecimiento y reconozca al Creador como dador de todos los bienes. A él ha de ofrecer Su Majestad el correspondiente agradecimiento, las debidas alabanzas y dejar a sus espaldas toda vanidad y gloria pasajera, por la cual el enemigo de la naturaleza humana busca confundir y pervertir a aquellos que son ensalzados en grandes dignidades... Ya que Dios os ha otorgado el título de Emperador, y legislador, y como a Vos unicamente corresponde declarar las leyes imperiales, interpretarlas, modificarlas, salvaguardarlas, es sin duda justo y razonable que Su Imperial Majestad siga las huellas del buen emperador Justiniano y elija a su debido tiempo a los más grandes sabios en leyes que puedan encontrarse para deliberar sobre la reforma de las citadas leyes imperiales, dilucidar todos los medios imaginables para el acortamiento de los procedimientos judiciales, y elaborar leyes tan claras que todo el mundo se sirva gustoso de ellas, y que pueda decirse con razón que se cuenta con un Emperador y una ley válida para todos... Dios quiere daros fuerza para ostentar este cargo de soberano dispuesto por Dios: ***im convertendo populos in unum et reges ut serviant domino****".*[37]

His references to Dante's *De Monarchia* are very evident. And we see the importance given to Italy (*"el mejor fundamento para este Imperio"*) in the Imperial project for Christianity and the new order that Emperor Charles wanted to develop. Gattinara said:

"Dios os ha mostrado tal gracia y os ha dispensado tan alta suerte que habéis alcanzado a tan temprana edad tantos reinos y heredades por legítimo derecho de sucesión y sin oposición que os tienen por el Rey más poderoso de la Cristiandad entera. A ello se añade ahora la excelsa dignidad imperial que llega a vuestras manos por rigurosa elección unánime, y jamás ha habido un emperador cristiano al que se le haya regalado un comienzo con mejores auspicios. Ni siquiera Carlomagno tuvo tan buen comienzo, ni poseyó jamás tantos dominios y reinos como Vos llamáis ahora vuestros. Por eso debéis estar en guardia de no dejar pasar esta fortuna, y no os apartéis de ella. Y como Italia es el mejor fundamento que podréis obtener de este imperio para preservarlo y multiplicarlo, para ganar en prestigio y veros ensalzado en todos vuestros asuntos y libre de la coacción de todas las circunstancias, es razonable meditar primero los asuntos de Italia antes de volcarse en alguna otra empresa más difícil, con la que es patente que os veríais abocados a una nueva coacción: en lugar de gobernar como Emperador os enredaríais en dependencia de vuestros súbditos, perdiendo con ello vuestro honor y vuestra reputación. Sea quien fuese quien os aconseje dejar a un lado Italia para emprender otra cosa en otro lugar, no haría sino aconsejaros para vuestra perdición, amén de vergüenza y oprobio."[38]

Gattinara's thought has been described as Neo – Ghibelline by Ballesteros Gaibrois. For Maravall his report of July 1519 is founded in the old doctrine of the *"translatio imperii"*.[39] Thus Charles's Empire could be traced back to Charlemagne and Rome. The Emperor's model had to be Justinian, making justice and surrounding himself with the best suited jurists of his time to create laws and interpret them.

The influence of Gattinara in the political thought of the Spanish Court can not be denied. As the Venetian ambassador Nicoló Tiepolo observed to his Senate in a report in 1532, there were three stages or periods in the way of understanding State affairs in the Emperor's political life:

"Quanto al governo …. S.M., ebbe in principio Chièvres, ch'era in tanto rispetto di lui, per essere stato quello che dall'infanzia sua l'aveva educato, che faceva esso il tutto. A lui successe Monsignor di Gattinara… il quale, benché non facesse così il tutto, era nondimeno di tale autorità… che Cesare si remetteva molto alli consigli ed opinión sue, ed a lui solo si referivano tutte le cose che s'avevano cosi a concedere altrui, come a delibirare di molti, le quali esso, senza che chi demandava ne parlasse altrimenti all'Imperatore, pigliava il carico d'espedire ed espedida egli stesso. Con lui solo s'indirizzavano tutti li ambasciatori e negoziavano le cose loro… Esso morto, l'Imperatore non ha voluto far più gran cancelliere alcuno a cui s'abbiano ad indirizzare tutte le cose, ma ha partiti li incarichi… e niuna cosa s'espedisce al presente… que Sua Maestá non la voglia conoceré et intendere e dire il voler sui".[40]

So it is clear that the Emperor did owe to Gattinara his solid vision of the Empire as Brandi and Rassow suggested. Gattinara's *cursus honorum* can not be despised nor silenced. In 1501, at the age of thirty five he was serving Archduchess Margaret of Habsburg, Charles'aunt, as a juridical consultant. In 1507, when Margaret became tutor of her nephew Charles, after the death of her brother Philip the Fair, she appointed Mercurino Gattinara as President of the Parliament of Burgundy. Gattinara clashed with the Burgundian nobility who forced him to resign in 1517, although he was back in service a few months afterwards. In 1519 King Charles named him his Great Chancellor. Until his death which happened in Innsbruck in the 5th of June 1543, Gattinara was the closest minister to the Emperor. His loss was a blow to Charles V of which he never fully recovered, because Gattinara was far more than a loyal minister. He was a brilliant public servant who proved to be the best adviser that Charles ever had in state affairs.[41] He believed in a Universal Christian Empire under the House of Habsburg. He had a clear

[37] KOHLER, Alfred, *Carlos V (1500–1558). Una biografía.* Marcial Pons Historia. Madrid, 2000. pp. 69-70.

[38] *Ibid.*, p. 71.

[39] BALLESTEROS GAIBROIS, *Op. cit.* (n. 34). MARAVALL, José Antonio, "Las etapas del pensamiento político de Carlos V", in *Revista de estudios políticos*, Madrid, August 1958. p. 110.

[40] *Relazioni degli Ambasciatori Veneti al Senato…* raccolte da E. Albera, Serie I, vol. 1º, p. 31, quoted by Mario PENNA, "Las ideas imperiales de Carlos V", in *Estudios Carolinos. Curso de conferencias (octubre-diciembre 1958)*, Universidad de Barcelona, Barcelona. 1959, pp. 98-99.

[41] In a secret letter with political advises to his son Philip, the Emperor wrote from Palamós, in May 6, 1543: *"Para los negocios de Estado e información de los tocantes a los reinos de la Corona, Italia, Flandes, Alemania, para Francia e Inglaterra y otros reyes y potentados y gobiernos de ellos, yo estoy cierto que no hay persona que mejor los entienda ni más generalmente y particularmente los haya tratado que Granvela, y él me ha muy bien servido y sirve en ellos. Él tiene sus pasioncillas, principalmente en lo de Borgoña, y gran gana de dejar sus hijos ricos; y aunque le he hecho mercedes él gasta y algunas veces sobre ello le toman unas cóleras y reciuras. Él es fiel y no pienso engañarme... "* [BALL, Rachel and PARKER,Geoffrey, *Cómo ser Rey. Instrucciones del Emperador Carlos V a su hijo Felipe. Mayo de 1543. Edición Crítica*. The Hispanic Society of America – Centro de Estudios Europa Hispánica – Center for Spain in America, Ediciones El Viso, Madrid, 2014. pp. 129-130.]

vision that the enemy in the West was France and in the East the Turkish Empire. Against the public opinion of others, after the victory of Pavia in 1525, Gattinara suggested to mistrust King Francis and to apply a severe policy in relation to France.[42] How could the Emperor trust an enemy of Christianity? Francis had demanded help from the Sultan and had offered his ports to the Turkish fleet.

The Emperor left the Cardinal of Tortosa, Adrian of Utrecht, in charge as Governor of Castile, he shared his powers with the Constable of Castile and the Admiral of Castile. Because of his labour in pacifying Spain and his loyalty and devotion to the Crown's interests he was backed by the Emperor for the Papal tiara. The future Roman Pontiff observed to the Emperor that many of the complaints of the Castilians were justified and that if someone was responsible it was the nobility to take guilt.[43]

During his short reign Adrian VI was loyal to his old master the King of Spain and Duke of Burgundy.

"Non placet Hispania", is a remark of Erasmus in a letter to Sir Thomas More, his dear friend, dated July 10th, 1517. Spain was a country of unfaithful, of mistrustful converts, of *"marranos"*, the false Christians that were the Jews converted in 1492. This prejudice - a common ground in foreign opinion – was also used to justify the *Comunero* rebellion against their natural Prince, Emperor Charles.[44] This anti-Semitic concern of blaming the Spanish Converts for the uprising in Castile was another burden that the Comuneros had to endure, thus, they were heretics, unfaithful to their natural lord and to God.[45]

The *Ley Perpetua*

As Suárez Varela has expressed recently, the corporative government of the rebels, the *"Santa Junta"*, added to its functions that were those of the *"Consejo Real"*, such of exclusive law making power. And that is why the *Ley Perpetua* was drafted in its reunions.[46]

Ley Perpetua means Perpetual Law, translated into English. It was the last effort of the *Junta de Tordesillas* in 1521 to make a deal with the Emperor. They sent a Dominican friar as ambassador to Flanders, but Charles did not receive him for he was against negotiating with the rebels. The persecution that followed after the battle of Villalar against the rebels was harsh. The Emperor took spoils even of Maria de Pacheco's personal jewels. Charles V showed no generosity and his remissions were limited.

Years later he showed the same intransigence with his native town, Gent. His relentless desire to punish the rebels led to plan the destruction of the city itself.[47] To negotiate a Magna Carta was a sign of weakness, he never believed in Pactism but in defeating his foes, he was an Absolute Monarch. This was another difference with his brother Ferdinand, who had been born and brought up in Spain and who never suffered pains for making negotiations with his adversaries.

Maravall and lately José Joaquín Jerez have understood the *Ley Perpetua* as a juridical instrument between the Kingdom and the Crown, that should enter the category of a Fundamental Law, ensuring the political stability of Castile.[48] I am of opinion, using juridical terminology of the time, that the *Ley Perpetua* followed the tradition of the *Leyes paccionadas* of Aragon, laws approved by the King and the three arms of the *Cortes*.[49]

This document seems to have been written in the Summer of 1520, probably in the early September when the Junta was in Martín Muñoz de las Posadas, as Joseph Pérez claims. Recently Martínez Sicluna concluded that the text proclaimed that political power was mergered in the Junta, which became a permanent institution and an exclusive representation of the cities of the Kingdom. Royal power was limited. The King had to return to Castile and live in its boundaries. The King's Officials had to be native born Castilians. This meant that the policy of naturalizing aliens to hold Castilian administrative posts or enjoy privileges was illegitimate. The King had to govern following the model of his grandparents the Catholic Monarchs. José Joaquín Jerez believes that the authors of this Charter were Dr. Olmedilla and Dr. Bernaldino following references of Pietro Martire de Anghiera.[50]

Also they demanded that the King should keep the *Casa de la Contratacion* or Board of Trade in Seville[51] and not to transfer it to Flanders. Another American subject in the *Ley Perpetua* was

[42] PENNA, *Op. cit.* (n. 40), p. 98-99.

[43] FAGEL, Raymond, "Adriano de Utrecht y la rebelión de las Comunidades de Castilla", in *Imperio y Tiranía.* in *Imperio y Tiranía. La dimensión europea de las Comunidades de Castilla.* István Szászdi León-Borja and María Jesús Galende Ruiz (Editors), Ediciones Universidad de Valladolid, 2013. pp. 259- 275.

[44] Cardinal Cisneros had invited Erasmus to visit Spain and to participate in his Project of the Polyglote Bible of Alcala. [Joseph PÉREZ, *Breve historia de la Inquisición en España.* Austral, Editorial Crítica, Barcelona. 2009. pp. 50-51. SZÁSZDI, István, "Las élites de los cristianos nuevos: alianzas y vasallaje en la expansión atlántica (1485–1520)", *Jahrbuch für Geschichte Lateinamerikas*, 36. Böhlau Verlag Köln/Weimar/Wien, 1999. pp. 19-22. Joseph PÉREZ, *Historia de una tragedia. La expulsión de los judíos de España*, Barcelona. 1993. p. 111. BATAILLON, Marcel, *Erasmo y España. Estudios sobre la historia espiritual del siglo XVI.* Fondo de Cultura Económica, 6th reed. México, 1998. pp. 22-61. Luis SUÁREZ FERNÁNDEZ, *Documentos acerca de la expulsión de los judíos.* Valladolid, 1964, pp. 13-14, 108-109.]

[45] SZÁSZDI, *Op. cit.* (n. 24).

[46] SUÁREZ VARELA, Antonio, "Alonso de Saravia, mandatario converso de Valladolid", *Estudios en Homenaje al profesor Joseph Pérez*. István Szászdi and María Jesús Galende Ruiz. (Ed.), Lex Artis. Valladolid, 2014. p. 251.

[47] VERMEER, René, "¿Amo o criado? Carlos V y la sublevación de Gante. 1537–1539", in *Imperio y Tiranía. La dimensión europea de las Comunidades de Castilla.* István Szászdi León-Borja and María Jesús Galende Ruiz (Editors), Ediciones Universidad de Valladolid, 2013, pp. 250-258.

[48] JEREZ, José Joaquín, *Pensamiento político y reforma institucional durante la guerra de las Comunidades de Castilla (1520–1521)*. Marcial Pons, Madrid. 2007. p. 108.

[49] VALLET DE GOYTISOLO, Juan, "Valor jurídico de las leyes paccionadas en Cataluña", *El Pactismo en la Historia de España.* Instituto de España, Madrid. 1980, pp. 84-94.

[50] JEREZ, *Op. cit.* (n. 46), pp. 103-198. MARTÍNEZ SICLUNA, Consuelo, "La Ley Perpetua: le y fundamental del Reino en la revuelta comunera", *Estudios en Homenaje al profesor Joseph Pérez*. István Szászdi and María Jesús Galende Ruiz. (Ed.), Lex Artis. Valladolid, 2014. pp. 364-365.

[51] This institution was created by the Crown in 1503 to centralize and control trade with the New World and the Canary Islands following a Portuguese model the *Casa da Mina e de Guinea*.

that no more *Encomiendas* should be given away. The *Encomienda* was the institution by which Indian labour was assigned to the Spanish settlers in the New World. The Comuneros declared that the Indians were free men and they should not be treated as slaves.[52] In this statement we can sense the academic influence of the Dominican friars of Valladolid.

What is evident is that the authors of the *Ley Perpetua* were jurists educated in the *ius commune*. Which is note worthy taking into account that the Castilians demanded limited powers to the Crown, instead of the absolute power that the followers of Roman Law preached for the Roman Catholic Emperor. This had been a common place of Spanish jurists since the *Ordenamiento de Alcalá* of 1348. The King had been settled as the only Law maker or legislator, and the highest Justice of the Kingdom.

The official account written by the Constable of Castile (Don Iñigo Fernández de Velasco) to the city of Burgos of the battle of Villalar, which meant the defeat of the *Comuneros*, reads as follows:

"Magníficos Señores: por no tener espacio no os escribí con mi sobrino Francisco Sarmiento la buena nueva de la batalla con el favor de esa leal ciudad se desbarató el martes veinte y tres del presente mes, día del Señor San Jorge… A Dios sean dadas gracias, a ello se despachó como vosotros lo deseáis y fueron presos Juan de Padilla y Juan Bravo y Francisco Maldonado y ayer miércoles se degollaron y hoy vine aquí a Simancas donde se asentó el Real; lo que sucediera os haré saber. Guarde Dios Señor e acreciente vuestras magníficas personas y estado. Del Real de Simancas a 25 de abril. De la suerte de Juan Bravo me ha pesado cuanto se puede decir, así por él como prencipalmente por su madre e hermanos, a todos perdone Dios. A lo que Señores mandades. El Condestable".[53]

Don Iñigo was one of the Governors that King Charles named when he left for Germany. He, Cardinal Adrian and the Admiral of Castile were responsible for the victory of the Emperor. As his report expresses he felt pity for the three captains of the Revolution that were beheaded in his presence, the three were nobles although he show more mercy for Bravo, whose mother belonged to the Mendoza family (relative of Maria Pacheco), who had married the rich *Converso* Maria Coronel.

After Villalar, when the widow of the Toletan captain Juan de Padilla, Doña Maria Pacheco took power she backed the idea of transforming the cities of Castile into Republics just like in Italy the *Signorias* existed.[54] The Bishop of Zamora, who pretended to be the Archbishop of Toledo, was the last captain in arms. He was taken prisoner while he travelled in disguise near Logroño. The last *Comuneros* tried to receive help from Francis, King of France, but the war in Navarre was won by the Emperor.[55] Many fled to Portugal,[56] others looked for protection in Austria, in the court of Ferdinand of Habsburg, the Spanish prince who would succeed his brother in the Imperial Crown.

In the Aftermath of the Comunero War

When Charles V returned to Spain in July 1522 he was aware that he had an awesome task in Castile after the repression of the *Comunidades* and that he had to take measures of clemency - like Cardinal Adrian had suggested him - to recover the lost love and respect of his vassals. The Emperor signed an amnesty in October 28th, 1522 sparing many outlaws of the *Comunero* Revolution, but with the exception of 300 men that were named in the Charter. Charles ordered a scaffold in the *Plaza Mayor* (main square) of Valladolid, raised in front of the main gate of the monastery of Saint Francis. There his General Pardon was read in his presence, in November 1st, surrounded by the Duke of Bejar, his Chief Justice, the Archbishop of Granada, the President of the Royal Council, and all the members of his Council. The Royal Secretary Francisco de los Cobos read out loud the Royal disposition, which was voiced word by word by the Kings of Arms named Castile and Navarre.[57]

In the Archivio di Stato in Vercelli, in the Collection of Gattinara's papers there is a *"Memorial de cosas para sacar dinero sin escandalo"*, certainly dated in 1523, in Chapter XVIII the Treasurer General advised Gattinara:

"También se deurían pedir los mesmos daños a otros legos que fueron muy comuneros, especialmente a los diputados alcaldes, alguaziles y capitanes y a los que fueron a la guerra contra los gobernadores o enviaron gente, y a los capitosos que sostuuieron los juntas ansy general como particulares, porque de aquí se hauria una buena parte suma de composición de los de

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[52] The chapter of the *Ley Perpetua* dedicated to the American Indians read: *"Item, que no se hagan ni puedan hacer perpetuamente mercedes algunas a ninguna persona, de cualquier calidad que sea, de indios algunos, para que caven y saquen oro, ni para otra cosa alguna. Y que revoquen las Mercedes de ellos hechas hasta aquí. Porque en se haber hecho merced de los dichos indios, se ha servido antes daño que provecho al Patrimonio Real de sus Majestades, por el mucho oro que se pudiera haber de ellos, demás que siendo como son cristianos, son tratados como infieles y esclavos."* [MALDONADO, *Op. cit*. (n. 21), pp. 322-323.]

[53] FERNÁNDEZ DE VELASCO Y SFORZA, José, DUQUE DE FRÍAS, *El Condestable Don Iñigo Fernández de Velasco Gobernador de los Reinos y su Mujer Doña María de Tovar. Discurso leído en el acto de recepción pública…* Real Academia de la Historia, Madrid. 1975, pp. 42-43.

[54] Her father was the Count of Tendilla, ambassador of his Catholic Majesties in Rome, a man of the Renaissance and the Governor of the Alhambra. It was he who had brought to Spain the Milanese humanist Pietro Martire d'Anghiera. Maria Pacheco herself was cultivated and had been born in the Royal Palace of Granada. [SZÁSZDI LEÓN-BORJA, "Los conversos… ", *Op. cit*. (n. 24), pp. 295-297.]

[55] GALÁN LORDA, Mercedes, "El gobierno de Navarra en la época de las Comunidades", in *Imperio y Tiranía. La dimensión europea de las Comunidades de Castilla.* István Szászdi León-Borja and María Jesús Galende Ruiz (Editors), Ediciones Universidad de Valladolid, 2013, pp. 337-358.

[56] This was the case of Maria Pacheco, the last leader of the Revolution in Toledo. The hatred and persecution of the Emperor towards the widow of Padilla followed her to Portugal, where Charles' ambassadors pressed King D. Joâo III for her extradition invoking the treaties between the two Kingdoms. King D. Joâo and Queen D. Catalina (Emperor Charles' youngest sister) kept their protection to the exiled until her death in Porto. Maria Pacheco was condemned in absence for high treason and all her properties were taken away from her. Her own house in Toledo was ordered to be demolished and her name became *damnatio memoriae*. [MENDONÇA, Manuela, "Uma mulher no exilio Maria de Padilla e Portugal", in *Monarquía y Revolución. En torno a las Comunidades de Castilla. I Simposio Internacional de Historia Comunera. Actas.* István Szászdi and María Jesús Galende (Editors), Fundación Villalar, Valladolid, 2009. pp. 263-275. PÉREZ-PRENDES Y MUÑOZ-ARRACO, José Manuel, "María Pacheco. Comunera por otro entusiasmo.", in *Imperio y Tiranía. La dimensión europea de las Comunidades de Castilla*. Istvan Szászdi and María Jesús Galende (Ed.), Ediciones de la Universidad de Valladolid, Valladolid. 2013, pp. 404-409.]

[57] ARRIBA ARRANZ, Filemón, "Años de Carlos V y Felipe II en Valladolid", *Hispania*, XXV.1, Consejo Superior de Investigaciones Científicas, Madrid. p. 10.

Toledo e Zamora, Toro, Salamanca y Ávila, y esto se podría muy bien hazer syn perjudicar al perdón y también lo del capítulo precedente."

Gattinara wisely wrote in the margin: *"A los del Consejo, pero ojo"*, which means: "To be sent to the Royal Council, but watch out and care."[58]

But the issues that the *Comuneros* had fought for remained as tasks to be attended.

The insistence of the *Comuneros* in their demands of no more taxes, nor *"servicios"*, was based in the general knowledge that the price of the Imperial Crown was high, and to keep the Empire was even worse. They were well informed that the previous Emperor, Maximilian of Habsburg, King Charles' grandfather, was the poorest of the German princes[59] and that his greed and aim for political marriages was due to pursue new economic resources for his ventures. Charles inherited the same problems of his grandfather; the difference was that he not only possessed Flanders but mainly because he was King of Spain. His revenue as King of Castile could afford an Imperial Crown. Did the Emperor learn from the *Comunidades* Revolution? Yes and no. When the city of Gant, where he was born, rebelled in 1537 Charles V ordered a repression that is still remembered.[60] The cruelty and humiliation suffered by its people makes us conclude that the *Comunidades* made his character harsh and less disposed for clemency when he confronted a rebellion in his states. The positive result was that he made his the goals and political traditions of his Hispanic forefathers. The Western Indies had much to say and justify his hispanisation, because of its resources. The influence of his Portuguese wife[61], who he loved sincerely, helped him to understand the ill treated requests of the Comuneros.

[58] DE CARLOS, Carlos Javier, *Carlos V y el crédito de Castilla. El tesorero general Francisco de Vargas y la Hacienda Real entre 1516 y 1524.* Sociedad Estatal para la Conmemoración de los Centenarios de Felipe II y Carlos V. Madrid, 2000. p. 108.

[59] Ambassador Fuensalida, who was in the Imperial court, wrote to King Fernando and Queen Ysabella in such context during his mission in Germany the year of 1498. [DUQUE de BERWICK y de ALBA, *El Embajador Fuensalida en las Cortes de Maximiliano, Doña Juana La Loca y Catalina de Aragón.* Madrid, 1907. pp. 68-69.]

[60] VERMEIR, René, *Op. cit*. (n. 46), pp. 247-257.

[61] Empress Isabel was cousin of Charles V, she was daughter of King D. Manuel and Queen Dª. María of Aragón. The *Reina Regente* was a clever ruler in the absence of her husband. Jover has studied her participation in matters of State. [JOVER, *Op. cit.* (n. 30).]

Responses in Hungarian Constitutional Theory to the so-called anti-Jewish Laws (1938–1943)

*Gábor Schweitzer**

Abstract

During the discussion of anti-Jewish laws in Hungary after 1938, relevant in terms of constitutional law, were raised. These included the interpretation of the legal equality of citizens, racist attitudes seeping into Hungarian law, and the question of constitutionality of anti-Jewish laws. Representatives of Hungarian constitutional theory were divided over the ant-Jewish laws. Kálmán Molnár and Ödön Polner were firmly against anti-Jewish legislation because they regarded the limitation of the legal equality of citizens as unacceptable. Vilmos Szontagh and Albert Kaas, on the other hand, went practically as far as accepting discriminative constitutional legitimation, in as much as they harmonized anti-Jewish laws with the changed of view of constitution and they regarded the limitation of legal equality as acceptable with reference to the public good.

Key words: *Jewish question; anti-Jewish legislation; discrimination; Hungary 1938–1943; World War II; legal equality of citizens; constitutional theory.*

I. More than half a million Hungarian Jews fell victim to the Holocaust during World War II. The physical extermination of Jews was preceded by their economic and social marginalization and their ostracism from intellectual and public life. The overture of the process was Act no. XXV of 1920 and its executive decree, which introduced the *numerus clausus* – 'closed number' – regulation, limiting the proportion of Jews admitted to universities and colleges of higher education to the proportion of Jews within the general population.[1] The legislator justified the constraints, which constituted severe infringements of the principle of legal equality and the freedom of education, by claiming that at certain faculties, such as medical school, law school and the faculty of political science, the proportion of Jewish students was too high. The limitations were aimed at reducing the proportion of Jews in certain professions. Although during the period of political consolidation, from the end of the 1920's, the numerus clausus rules were less stringently applied at universities and colleges, from the second half of the 1930's, political antisemitism gathered new impetus in Hungary, and as a result, government measures were introduced to exclude the country's Jewish population from much wider areas than just higher education. In what follows, I shall review the reflections of the scholars of constitutional theory to these measures curtailing and corroding fundamental constitutional rights, in particular the legal equality of citizens, particularly the so-called first and second anti-Jewish laws, adopted in 1938 and 1939.

II. The Hungarian legislature began to adopt the so-called anti-Jewish laws, which demolished the equality of citizens before the law and incorporated racist, discriminative rules, from 1938.[2] The first antisemitic law of the period was Act no. XV of 1938, on the more effective assurance of balance in social and economic life.[3] Its adoption did not come as a surprise to Hungarian society; the speech given by Prime Minister Kálmán Darányi on 18 April 1937, at the general assembly of the governing National Unity Party had already foreshadowed the necessity of resolving the so-called Jewish question and the governmental level. The prime minister considered the Jewish question to be primarily an economic problem: he claimed that while Hungary had a large proportion of Jews in the general population, they were significantly overrepresented even relative to that ratio in business. Hungarian society – as he put it – was "*irritated*" by the alleged "*instinctive commercial greed*" of the "*Galician*" infiltrating

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1 According to the 1920 census, 473,764 citizens of the Isrealite denomination were living in Hungary, representing 5.9% of the total population. For the numerus clausus, see Kovács, M. Mária: A numerus clausus Magyarországon: 1919–1945. (The Numerus Clausus in Hungary, 1919–1945) In: Jogfosztás – 90 éve. Tanulmányok a numerus claususról, ed.: Molnár, Judit, Budapest, Nonprofit Társadalomkutató Egyesület 2010, pp. 29-59.

2 During the period 1938–44, the Hungarian legislature passed 21 anti-Jewish laws, while the number of such decrees is in the hundreds. Karsai, László: A magyarországi zsidótörvények és rendeletek 1920–1944. (Anti-Jewish Laws and Decrees in Hungary, 1920–1944), Századok, 2004/6 issue, pp. 1285–1304.

3 Ladányi, Andor: Az első zsidótörvény megszületése. (The Inception of the First anti-Jewish Law in Hungary) Múlt és Jövő, 2010/2 issue, pp. 102-121.

it from the East, and the government was going to apply strict measures in order to put a stop to that infiltration.[4] As the report of the German embassy emphasized at the time, the plans announced by Kálmán Darányi, such as the tax reform, the increase in corporate tax, the involvement of business and finance in eliminating white-collar unemployment were primarily going to be harmful to affluent Jews, and as such, in their effect, they could be considered measures "*of an antisemitic character*".[5]

III. **Kálmán Molnár** (1881–1961), a professor at the faculty of Hungarian constitutional law at the University of Pécs was the first scholar of constitutional theory to note the dangers inherent in Kálmán Darányi's speech. This was no accident: he had been fighting against extremist and antisemitic incidents that occurred at the Pécs university for several years. He intended to respond to the prime minister's speech in a newspaper article. He summarized his thoughts in a piece entitled "Hatred Is Not a Constructive Power", dated 1 May 1937, but, as he later wrote on the first page of the manuscript, the papers all refused to publish it.[6] What was the article about? According to Professor Molnár, there were some aspects of the Jewish question on which there was agreement on the "*Christian side*". As regards the economic causes of the Jewish question, he agreed with the prime minister, but he expressed the conviction that such a grave economic and social issue could only be approached with composure, circumspection and responsibility, rather than hate and the desire to do harm. He felt it was beyond doubt that Hungary, standing guard at the Eastern gate of European, Christian civilization, could only resolve the Jewish question "*in an European, Christian spirit*". The great problems of public life cannot be resolved with finality using the methods of "*Eastern barbarism*". "*In our land, the louder the proclaimers of grandiloquent slogans, the less dangerous they are.*" In order to find the correct solution, "*the principles must be cleared up first*". In relation to that, he wrote that he considered the inclusion of converted Jews in the category of Jews to be an "*unchristian, unlawful and unreasonable*" demand. Unchristian, because it is contrary to the commandments of Christianity. Unlawful, because the constitutional law of Hungary only recognized the Jewish religion, but "*there is no Jewish race*". And the endeavor was also contrary to the spirit of the Hungarian constitution, as accepting racial theory would "*explode the very pillars of the state organization of the Holy Crown*". That was because the Holy Crown, as the embodiment of Hungary's statehood and national unity "*connected and united everyone*", the nobility, the serfs, "*settlers of foreign races*", and even the Jews, who were under royal protection. He believed that including converts among the Jews to be contrary to reason as well because there were not enough Hungarians to be able to afford excluding those whose ancestors "*were sons of a foreign race*". The notion was also unacceptable to Kálmán Molnár because he considered assimilation to be the "*most reassuring*" solution to the Jewish question. "*The original Jewry is practically assimilated already. That process should not be disturbed but assisted.*" He also considered the views urging the banishment of the great majority of Hungarian citizens of the Jewish religion – according to Kálmán Molnár's data, some 450,000 people[7] – to be irresponsible incitement, rabble-rousing demagoguery. Even the German Reich, which was certainly not using "*kid gloves*", had been unable to do that. The more extreme and unreasonable the antisemitic incitement, the more people with moderate and "*gentlemanlike*" ways of thinking would be repelled by this "*manhunt*", which is foreign to the Hungarian spirit. According to his summary statement, the mad excesses of antisemitism would result in increasing numbers of people becoming sympathetic to the Jews as the "*pitiable victims of spiritual brutality*".[8] Kálmán Molnár's article, written from a Christian humanist perspective, was clearly opposed to the racist attitudes poisoning public opinion as well. Consistently with the Hungarian tradition of constitutional law, he claimed that in Hungary, Jews belonged in a religious rather than a racial category. Contrary to the demands aimed at the institutional expulsion of Jews, he supported assimilation as a means of facilitating social integration.

On 5 May 1938, when the parliamentary debate on Bill no. XV of 1938 began, a group of emphatically Christian authors, artists and scientists published a protest in the daily paper "Pesti Napló" (*Pest Journal*). "*We are impelled by our Christian faith, our patriotic convictions and our insistence on the country's European convictions and our national independence to abide by the principle of the equality of citizens before the law, achieved by the best minds of European Hungarians during the most beautiful period of our history.*" – they emphasized.[9] They claimed that the bill degrades "*the Christian middle class*", as it assumes that through contempt for the principle of equality before the law, they hope to assure their livelihood by "*the stripping of rights, a humiliating paternalism and the use of coercion*". The bill also ascribed to the Christian middle class "*the moral aberration*" of attempting to succeed and prosper at the cost of stigmatizing their fellow citizens and robbing them of their civil rights. Two of the Hungarian scholars of constitutional theory signed the protest: Kálmán Molnár, and

[4] Magyar Távirati Iroda (*Hungarian News Agency*). Napi hírek/Napi tudósítások. (1920–1944). 18 April 1937, pp. 17-18. http://mol.arcanum.hu/mti/opt/a100929.htm?v=pdf&q=WRD%3D%28%FCzleti%20moh%F3s%E1g*%29%20and%20DATE%3D1937.04.15--1937.04.30_&s=SORT&m=0&a=rec

[5] Werkmeister budapesti követségi tanácsos jelentése a külügyminisztérimnak. külügyminisztérimnak. Budapest, 1937. április 20. (Report by Budapest Embassy Councillor Werkmeister to the Foreign Ministry, Budapest, 20 April 1937.) In: A Wilhelmstrasse és Magyarország. Német diplomáciai iratok Magyarországról 1933–1944. Editors: Ránki, György – Pamlényi, Ervin – Tilkovszky, Loránt – Juhász, Gyula. Budapest, Kossuth Könyvkiadó, 1968. p. 214.

[6] Molnár Kálmán: A gyűlölet nem építő erő. (Hate is a Non-Constructive Force) Manuscript Archive of the Library of the Hungarian Academy of Science, Ms 6217/253.

[7] According to the 1930 census, there were 444,567 citizens of the Israelite denomination living in Hungary, representing 5.1% of the country's total population.

[8] Molnár Kálmán: A gyűlölet nem építő erő. (Hate is a Non-Constructive Force) Manuscript Archive of the Library of the Hungarian Academy of Science, Ms 6217/253.

[9] Írók, művészek, tudósok deklarációja a magyar társadalomhoz és a törvényhozás tagjaihoz. (A declaration by authors, artists and scientists to Hungarian society and members of the legislature.) Pesti Napló, 5 May 1938.

Ödön Polner (1865–1961), a retired professor of constitutional law at Szeged University. Their arguments, which appealed to Christianity, European ideals and patriotism, failed to dissuade the legislator of its original purpose.

The provisions of Act no. XV of 1938, promulgated on 29 May 1938, reduced the permitted ratio of Jews in the so-called freelance professions (e.g. solicitors, public notaries, engineers, journalists, actors) to 20%, as well as at financial, commercial and industrial ventures employing more than ten people. According to the Act, not only members of the denomination of Judaism, but also people who had converted after 31 July 1919 were to be considered Jews. The so-called first anti-Jewish law jeopardized the jobs of some 15 thousand people and, including family members, it had an impact on some 50 thousand people.[10]

Barely six months after the introduction of Act no. XV of 1938, and after Kálmán Darányi was replaced by Béla Imrédy in the prime minister's chair, the government began to prepare the so-called second anti-Jewish act, eventually adopted as Act no. IV of 1939, which prescribed more severe limitations of constitutional and civil rights, and which was based much more firmly on racial principles, and thereby affected a wider range of people.[11]

At the turn of 1938/39, Kálmán Molnár opposed the proposed curbing and elimination of rights in public, in the daily paper "Magyar Nemzet" (*Hungarian Nation*). "*... every single Hungarian who is already able to think (...) has a tremendous responsibility for that which is happening in these fateful days for Hungarians. Today, when we hear so frequently the thunderous words and curses of intimidation and menace, when so many write and scream: Jews, beware, and the Christian stooges and the lapdogs of Jews, beware even more, I feel I must make my application. (...) So my request to those keeping the list of the proscribed is as follows: should my name not be on that list already, please add me to it now. I have never been, and I am still not a hunter of men.*" – he wrote, and continued: "*It were not the Jews that made me a defender of the Jews, but the un-Hungarian Hungarians and the Christians who have turned away from Christ*".[12] A few weeks later he published another article in Magyar Nemzet. He explained that in his view, the disturbed balance of social and economic life certainly did have to be redressed, "the unjustified predomination of Jews has to be eliminated, the just proportions need to be restored", but all of that should not be achieved at the cost of "*a severe disturbance of social peace, restfulness and cooperation*". He believed that it was wrong to establish a constitutional ghetto for the Jews. Instead of a constitutional ghetto, the ghetto "*should be swept clean*", irrespective of religious denomination. The full force of the law should be applied to criminals, Jewish and non-Jewish alike. On the other hand, "*the patriotic, industrious and unimpeachable Jews who have shared our fate for centuries may expect justice, understanding and fairness from us*". The yellow patch, Professor Molnár reminded his readers, places a mark of shame on the foreheads of "*those who wish to attach it to the clothing of their fellow men*". His sober, placatory words fell on deaf ears once again.[13]

Among Kálmán Molnár's documentary estate, there remains a draft letter he addressed to Károly Rassay, the leading figure of the parliamentary opposition that opposed the anti-Jewish laws bravely and consistently, during the parliamentary debate of the second anti-Jewish law. According to Professor Molnár, Rassay's speeches to the house of representatives would prove for posterity that "*even during that sorrowful age, there were still jurists who saw statutory law not only as the instruments and forms of power, but as the human expression and practical implementation of our divinely inspired sense of justice*". Rassay's contributions would also prove that "*even in that age, there were legislators who were able to think logically; who endeavored to produce statutes that were clear and free of internal contradictions, and which precluded tyranny and suitable for bona fide application by humane enforcers; and not suitable for use for the spiritual and bodily torture of decent people. They will prove that even during that age, there were some spiritually Christian people.*"[14]

Around the same time, Professor Ödön Polner expressed his opinion about the new anti-Jewish act under preparation in an interview published in the 6 January 1939 edition of the "Esti Kurír" (*Evening Courier*) newspaper. His view of the bill was that it was sharply opposed to the direction of Hungarian legislation from the 1848 bourgeois revolution to the period of World War I. His comment was referring to the liberal legal policies of that period. In that regard, the bill took a retrograde step. At the same time, the legislator introduced "*a new legal category of classes*", that of race, which – we could add – had been previously unknown in the Hungarian tradition of constitutional law. And the regression was also perceptible in humanitarian, cultural and economic areas. In its intentions, the anti-Jewish bill considered itself right-wing, patriotic and Christian. If the direction towards eliminating freedom and introducing constraints and limitations was the right-wing one, then, indeed, the anti-Jewish bill was right-wing. And if patriotism is the support of that which is in the interest of the nation – which is "*useful, expedient or necessary*" for it – then opinions may differ on that count. But Ödön Polner was convinced that the bill was not in "*Christ's spirit*", as the Savior – contrary to those that composed the bill – was of the opinion that "*all people are our brethren, irrespective of nation or race*".[15]

Those sober words were once more in vain. Act no. IV of 1939, promulgated on 5 May 1939, reduced the proportion of Jews employed by industrial and commercial firms from the earlier 20% to 12%, while the permitted proportion of Jews or rather persons classified as Jews among free-lance intellectuals was reduced to 6%, essentially their proportion in the total population. The proportion of Jews admitted to universities and colleges of higher education was limited to 6% with the exception of the

[10] Tilkovszky, Loránt: A zsidótörvények mint a Holocaust előzményei. (The anti-Jewish laws as antecedents of the Holocaust.) In: The Holocaust in Hungary: Fifty Years Later. Edited by: Randolph L. Braham – Attila Pók. New York, Columbia University Press, 1997. 124.

[11] Ladányi, Andor: A második zsidótörvény. (The Second anti-Jewish Law in Hungary) Századok, 2013/6 issue, pp. 1423–1458.

[12] Molnár, Kálmán: Mindenki felelős. (Everybody is Responsible) Magyar Nemzet, 30 December 1938.

[13] Molnár, Kálmán: A magyar múlt tanulságai. (The Lessions of Hungarian Past) Magyar Nemzet, 4 February 1939.

[14] Kálmán Molnár's draft letter to Károly Rassay. Pécs, 27 April 1939. Manuscript Archive of the Library of the Hungarian Academy of Science, Ms 2413/80.

[15] Polner, Ödön: Jobboldali, nemzeti, keresztény? Szakvélemény a zsidójavaslatról. (Right Wing, Nationalist, Christian? Report on the Jewish Bill) Esti Kurír, 6 January 1939.

technical university, to which a limit of 12% was applied. The right to sell goods under state monopoly was denied to Jews altogether. The political rights of Jews were severely restricted, resulting in almost a hundred thousand people losing their national and local municipal franchise. Jews on local municipal boards who received their places on account of being the largest taxpayers were stripped of their membership. With the exception of the representative of the Israelite denomination, retained until 1940, no Jew could be a member of the Upper House, either. Jews were completely barred from the civil service. As a result of the regulations, 60 thousand people became unemployed, impacting 150 thousand people including their family members.[16]

Kálmán Molnár and Ödön Polner explicitly rejected the so-called first and second anti-Jewish laws, which incorporated discriminative regulations into Hungarian law. They believed it was unacceptable that these provisions contradicted the principle of equality before the law, and they also objected to the fact that due to their racist character, the anti-Jewish laws were in contradiction not only with the Hungarian tradition of constitutional law but also with the Christian ethos. After the adoption of Act no. XV of 1938, Kálmán Molnár clearly stated in one of his books – though in 1938, the government were still trying to deny this – that the provisions of the anti-Jewish law had eliminated the equality of citizens in respect of Jews and persons considered to be Jews[17]. Any imbalances in social and economic life could not be remedied by the false promise of proportionality accompanied by the destruction of the legal equality of citizens.

Paradoxically, at the time of the adoption of the first anti-Jewish law, the government even attempted the constitutional absurdity of reconciling the principle of legal equality and the curtailment of rights. During a joint session of parliamentary committees (for constitutional law, economy and transport, public education and justice) where the bill was debated, Prime Minister Kálmán Darányi attempted to establish such a reconciliation. In his address, he claimed that "*the great principles*" – such the equality before the law – should be protected, "*but not in a formalistic fashion, but, rather, in their essence*". Accordingly, as far as possible, equal preconditions should be provided to make a living through the reduction of the economic inequality, which, according to the prime minister, had been brought about and maintained at certain ventures by the Jews. In his view, the bill did not infringe the provisions of Act no. XVII of 1867 on the civil and political emancipation of Jews, but he also emphasized that any law could be changed in time.[18] During the parliamentary committee debate of the bill, Minister of Justice Ödön Mikecz also touched on the issue of legal equality. The Hungarian legislature, as he put it, had never considered legal equality to be a supreme principle that had to be maintained above all, "*to the detriment of the nation's life*". When it has become necessary in order to prevent the loss of balance between certain social or economic strata of the nation or the alleviate conflict between them, the legislature had constrained the principle of legal equality in the interest of the state.[19] The difference in the attitudes of Prime Minister Darányi and Minister of Justice Mikecz is quite clear. While Darányi denied the claim that the bill curtailed legal equality, Mikecz found the curtailment of legal equality acceptable for the public good. The interpretation of legal equality was also raised during the debates of the bill in the House of Representatives and the Upper House. While the liberal and democratic opposition was unanimous in the view that the bill was in infringement of the principle of equality before the law, the supporters of the bill either attempted to refute the claim that equality was being infringed, or claimed that the curtailment of equality was justified in order to achieve the economic and social objectives they insisted on.[20]

Others among the scholars of constitutional law also voiced their reservations about the direction of the anti-Jewish laws, albeit in a more cautious fashion than Kálmán Molnár and Ödön Polner. In a study reviewing the changes of Hungarian constitutional aw in the period 1918 to 1939, **Béla Zsedényi** (1894–1955), professor at the Miskolc Evangelical Academy of Law, mentioned the first and second anti-Jewish laws, among others, when discussing the changes involving the rights and obligations of citizens. "*Among those laws*", he wrote, "*a few represent quite significant opposition to the old tenets and even the principles of the constitution*", as they bear the mark of the ideals and the new world-view of the new age with great certitude.[21] **József Bölöny** (1903–1990), a Budapest solicitor and a lecturer at the University of Pécs, in his summary of constitutional law published in 1942, merely noted that the effective anti-Jewish laws "*constrained the equality of citizens before the law*."[22]

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[16] Tilkovszky, Loránt: A zsidótörvények mint a Holocaust előzményei. (The anti-Jewish laws as antecedents of the Holocaust.) In: The Holocaust in Hungary: Fifty Years Later. Edited by: Randolph L. Braham – Attila Pók. New York, Columbia University Press, 1997. 127.

[17] Molnár, Kálmán: Alkotmányjogi reformjaink az 1937 és 1938 években. (The Reform of Constitutional Law in the Years of 1937 and 1938.) Pécs, Dunántúl Pécsi Egyetemi Könyvkiadó, 1938. p. 163.

[18] Magyar Távirati Iroda (*Hungarian News Agency*). Napi hírek/Napi tudósítások 1920–1944. 26 April 1938, p. 25. http://mol.arcanum.hu/mti/opt/a100929.htm?v=pdf&q=WRD%3D%28dar%E1nyi%29%20and%20DATE%3D1938.04.15--1938.04.30_&s=SORT&m=18&a=rec
See also Munkácsi, Ernő: A magyar zsidóság és a zsidó vallású magyarok jogi helyzete az 1938: XV. tc. után. (The Legal Status of Hungarian Jewry and the Israelite Hungarians after Act XV of 1938.) In: Ararát. Magyar Zsidó Évkönyv az 1939. évre. Ed.: Komlós, Aladár. Budapest, 1939. pp. 17-25.

[19] Magyar Távirati Iroda (*Hungarian News Agency*). Napi hírek/Napi tudósítások 1920–1944. 26 April 1938, p. 42. http://mol.arcanum.hu/mti/opt/a100929.htm?v=pdf&q=WRD%3D%28dar%E1nyi%29%20and%20DATE%3D1938.04.15--1938.04.30_&s=SORT&m=18&a=rec

[20] For the parliamentary debates of the so-called first anti-Jewish law, see K. Farkas, Claudia: Jogok nélkül. A zsidó lét Magyarországon, 1920–1944. (Without Rights. Jewish Existence in Hungary, 1920–1944.) Budapest, Napvilág Kiadó, 2010, pp. 50-75.

[21] Zsedényi, Béla: A magyar alkotmányjog fejlődése 1918-tól 1938-ig. (The Development of Hungarian Constitutional Law between 1918–1938.) Miskolc, Ludvig István Könyvnyomdája, 1939. p. 11.

[22] Bölöny, József: A magyar közjog időszerű kérdései. (Current Questions of Hungarian Public Law.) Budapest, Gergely R. Könyvkereskedése, 1942–43, p. 285. Quoted in: Lehotay, Veronika: Szabadságmegvonó intézkedések a Horthy-korszakban, különös tekintettel a zsidótörvényekre. (Restrictive Measures in the Horthy era, with Special Regard to the anti-Jewish Laws) PhD dissertation. Miskolc, 2012, p. 24.

IV. Constitutional theory justifications of the anti-Jewish laws can be found in the contemporaneous writings of **Vilmos Szontagh** (1885–1962), professor at the Miskolc Evangelical Academy of Law, and **Albert Kaas** (1885–1961), professor of constitutional law at the Budapest University of Economics.

Vilmos Szontagh first addressed issues associated with the constitutionality of Act no. IV of 1939 in a newspaper article, which he then followed up in a comprehensive study. In his view, the question of unconstitutionality may be raised in relation to any law if the provisions of that law are not consistent with the interpretation of the constitution in effect at the time of its adoption. Under that approach – in his view – Act no. IV of 1939 could not be considered unconstitutional, as its provisions were consistent with the current interpretation of the constitution at the time. At the time of adoption of Act no. XVII of 1867 on the emancipation of Jews, the "*liberal constitutional approach*" had dominated, but when Act no. IV of 1939 was passed, the "*nationalistic constitutional approach*" governed. And the nationalistic constitutional approach, he claimed, will not tolerate the selfish success of classes, orders, "*races*" to the detriment of "*the ideal of nationalism*" and "*national statehood*".[23] Therefore, it was not Act no. IV of 1939 that was unconstitutional, but rather the "*liberal state of law*" whose elimination was the actual purpose of Act no. IV of 1939 itself. In his work entitled "*The anti-Jewish law from the perspective of the theory of law*", published in 1939, he expounded the same, hardly justifiable views more precisely: he drew a distinction between formal unconstitutionality, and material unconstitutionality, which is relevant to the present review. In his view, a law is to be considered unconstitutional in the material sense if the provisions of the formally faultless statute contradict "*some previous written or unwritten constitutional tenet of law*". But as "*the spirit of the constitution*" varies from age to age, there can be no objection on the grounds of unconstitutionality against Act no. IV of 1939. Even he acknowledged, however, that as a result of the provisions eliminating legal equality, the Jewish population had been put in a less favorable situation, and hence the injury to their interests is "*beyond doubt*".[24]

In his paper published in 1938, Albert Kaas reviewed the Jewish question not with respect to changes in constitutional approach, but through aspects of economic and social life. "*In Hungary, the Jewish question was made vital and permanently relevant by the fact that they achieved a disproportionate domination within the economy, that they became aware of their indispensability at the end of the last century, and then wished to assert it in every field.*" His reasoning, based on generalizations, crossed into the field of constitutional theory when he derived the possibility of constraining legal equality from the necessity of the struggle for existence. "*The decisive thing is not human rights, nor is it the principle of equality before the law; it is the struggle for existence.*" In his view, legal equality and human rights have only been respected by states to the point where does principles of justice didn't threaten the universal interests of the community. "*And if the true salus rei publicae demanded it, they constrained them*". The Jewish question – in his view – could be resolved if the Jews gave up the advantage they had enjoyed for decades and renounce their "*selfishness*".[25]

V. In addition, several of the scholars of constitutional theory interpreted the discriminative regulations essentially consistently with the legislature's intentions. The group includes **Móricz Tomcsányi** (1878–1951), professor at the University of Budapest, whose textbook on Hungarian constitutional law published in 1940 discussed the theoretical aspects of the anti-Jewish laws in relation to personal liberties. In agreement with the official approach, he considered the purpose of the anti-Jewish laws to be the harmonization of the economic and social position of Jews – which had jeopardized the development of "*the Hungarian race and the Hungarian nation*" – with their proportion within the national population. In his opinion, the principle of equality before the law could be made consistent with the criterion of the proportionality of rights and obligations. From the perspective of legal policy, he believed all restrictions to be acceptable provided they were truly necessitated by the "*vital interest of the nation*"[26]

István Egyed (1886–1966), professor of constitutional law at the Budapest University of Technology, expressed a similar position in his summary entitled "**Our constitution**", published in 1943. He claimed that the constraints introduced in the economy, in social and public life were aimed at "*maintaining the Christian character of the state*", "*protecting the purity of the race*" and "*ensuring a leading role for the majority*". As regards equality before the law, he emphasized that the principle does not preclude "*certain groups of the national society being constrained to proportional success*".[27] It is important to note that at the time of writing of his book, Act no. XV of 1941, the so-called third anti-Jewish law, which prohibited marriage between Jews and Christians for "racial protection" purposes, was already in effect. Act no. VII of 1942, which encroached upon the legal status of the Israelite denomination by reclassifying it from a so-called accepted denomination to a so-called recognized one, and which, among other things, prohibited conversion to Judaism by law, had also come into effect by that time.

László Buza (1885–1969), who gave the main series of lectures on Hungarian constitutional law at the University of Szeged in the 1939/40 academic year, was of the opinion that while Act no. IV of 1939 may have contradicted the formal requirement of equality before the law, state intervention had nevertheless been necessary. The reason was that the suspension of legal equality was required in order to avert some obstacles to actual equality. As an example, Professor Buza

[23] Szontagh, Vilmos: A zsidótörvény és a magyar alkotmány. (The Anti-Jewish Law and the Hungarian Constitution) Magyar Élet, 28 May 1939, p. 7.
[24] Szontagh, Vilmos: A zsidótörvény jogtudományos szemléletben. (The Anti-Jewish Law from the Perspective of Legal Theory) Miskolc, Ludvigh István Könyvnyomdája, 1939, pp. 3-5.
[25] Kaas, Albert: A zsidókérdés. (The Jewish Question) Budapest, Stádium Sajtóvállalat Rt., 1938, p. 14.
[26] Tomcsányi, Móricz: Magyarország közjoga. (The Public Law of Hungary) Third, revised and extended edition. Budapest, Királyi Magyar Egyetemi Nyomda, 1940, p. 187.
[27] Egyed, István: A mi alkotmányunk. (Our Constitution) Budapest, Magyar Szemle Társaság, 1943, p. 159.

noted that in the economy, social conflicts between citizens, particularly large inequalities of wealth, could be eliminated in that fashion.[28]

The views of **István Csekey** (1889–1963), professor at Szeged and then at Kolozsvár University, were little different to those of László Buza. In his book published in 1943, entitled "**The constitution of Hungary**" he claimed that the curtailment and suspension of the principle of legal equality (equality before the law) had been justified in order to stop Jews being successful in economic and social life beyond their proportion within the population. As he put it: "*By suspending the formal requirement of legal equality the state aimed to remove some striking obstacles to actual equality*". Although he admitted that the restrictive measures against Jews were contrary to legal equality, he claimed that legal equality itself could only be a means to achieving actual equality.[29] However, in relation to Professor Csekey's views it must also be noted that on several occasions, for instance in his speech entitled "**Race and nation**" at the 1939 closing conference of Szeged University, he clearly opposed Nazi racial theory.[30]

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The representatives of Hungarian constitutional theory did not form a united position on the so-called anti-Jewish laws adopted after 1938. In addition to their honorably consistent opponents, the discriminative statutes also had their committed legitimators and, allied to the latter group, their loyal interpreters as well. The scholars or constitutional theory were obviously aware of the fact that the anti-Jewish laws had impacted the fundamental issues of Hungarian constitutional law. It is a conspicuous fact that they failed to agree even on the interpretation of legal equality, or equality before the law, a cardinal concept for constitutional theory.[31] Yet legal equality can hardly be said to exist if the proportions of positions in economic, social and intellectual life are limited to the proportions of a denomination within the total population of the country and if jobs are granted or withheld on that basis. The theory of "predomination" and the construction of "ratios" were only the government's tools for providing some sort of legitimization for the constrainment and elimination of equality before the law, or, in other words, the institutionalization of discrimination. In closing, I would like to quote a sentence from **Kálmán Molnár**'s 1945 study, "**The constitutional law balance of the provisional period between the two world wars**". In Professor Molnár's opinion, the anti-Jewish laws didn't simply have the fateful consequence of eliminating equality before the law, previously considered the soundest cornerstone of constitutional law – they also destroyed the rule of law as a whole.[32] Despite the fact, we may add, that the most eminent and courageous Hungarian scholars of constitutional theory had warned of their inherent dangers in good time.

[28] Magyar Közjog. Dr. Buza László egyetemi ny. r. tanár úr 1939/40. tanévi előadásai […]. (Hungarian Public Law. The Lectures of Professor László Buza in the 1939/40 academic year) Manuscript Archive of the Library of the Hungarian Academy of Science, Ms 4740/1.

[29] Csekey, István: Magyarország alkotmánya. (The Constitution of Hungary) Budapest, Renaissance Könyvkiadó, 1943, pp. 224-226.

[30] Csekey, István: Faj és nemzet. (Race and Nation) Szeged, M. Kir. Ferenc József-Tudományegyetem, 1939.

[31] Kiss, Barnabás: A jogegyenlőség problémája a magyar közjogi irodalomban 1945-ig. (The Dilemmas of Legal Equility in the Literature of Hungarian Public Law till 1945.) In: Emlékkönyv Dr. Szentpéteri István egyetemi tanár születésének 70. évfordulójára. Ed.: Tóth, Károly. Szeged, 1996, pp. 279-286.

[32] Molnár, Kálmán: A két világháború közötti provizórium közjogi mérlege. Pécs, Karl Lajos Könyvkiadó, 1945, p. 21.

Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle
(The History of the Hungarian Jurisdiction of Public Administration and the Relating International Models)

*István Stipta**

Abstract

The paper is concerned with the circumstances of the establishment of the legal protection in the Hungarian public administration in the 19th century. As part of that, it concentrates on what foreign impacts, contemporary Western models had influence on the Hungarian legislation. The author analyses the clear-defined characteristics of the English, French and German systems and their impact on Hungary. The ground thesis of the essay is that the Hungarian jurisdiction of public administration with limited competence did not adapt to neither of the models. The Hungarian contemporary political elite namely did not wish for the substantive abridgement of the executive power by the court.

***Key words**: jurisdiction of public administration; legal protection in the public administration; English model of public administration; French model of public administration; reforms of Hungary concerning public administration.*

Die damalige ungarische Fachliteratur der Verwaltungsgerichtsbarkeit teilte die bis dahin gekannten Lösungen vom Rechtsschutz der Verwaltung auf Modelle. Im Allgemeinen waren drei Versionen zu unterscheiden: die Verwaltungsjudikatur im Rahmen von ordentlichen Gerichten, das getrennte Verwaltungsgerichtsmodell und die innerhalb der Verwaltungsstruktur ausgerichteten Organisationsstrukturen. Die Fachliteratur und die politische Publizistik sprachen oft schematisierend von englischer, deutscher oder französischer Lösung. In der damaligen ungarischen Wissenschaft existierte noch keine eindeutige Rechtsterminologie und es fehlten oft auch die für den Vergleich geeigneten öffentlich-rechtliche Begriffe. Die auf die ausländischen Parallelen hinweisenden Schriften vermissten häufig den Vergleich vom Kompetenzbereich und der Prozessordnung. Da sich der Verwaltungsrechtsschutz in den Staaten des kontinentalen Europas beinahe simultan herausbildete, fehlte auch die Erfahrung zum Vergleich der Tätigkeit. Es wurde nicht einmal eindeutig, dass die Organisationsstrukturen nicht ganz von sich einander separierten. Zum Beispiel wirkte das englische System des Friedensgerichts wesentlich auf die Organisation der preußischen Rechtsprechung und dadurch auch die öffentlich-rechtliche Gerichtsbarkeit von Österreich.[1]

1. Das englische Modell und der Rechtsschutz in der ungarischen Verwaltung

In England formte sich der Rechtsschutz in der Verwaltung im Rahmen der ordentlichen richterlichen Rechtsprechung. Diese Situation änderte die Gesellschaftsbewegung vom 19. Jahrhundert oder der die Umgestaltung der Verwaltung ergebende Gesetzgebungsprozess auch nicht. Auch im 19. Jahrhundert war die Verwaltungsgerichtsbarkeit die Aufgabe der unabhängigen Verwaltungsbeamten, der Friedensrichter(judge of the peace). Speziell war die Lage von England, weil die Rechtsfragen zusammenhängend mit der Verwaltungsveranlassung auf höchster Instanz von den obersten Gerichten entschieden wurden. Während sich die Richterkompetenz in Verwaltungsstreiten von der Verwaltung im kontinentalen Europa im 19. Jahrhundert allmählich formte, operierte die Verwaltung in England auch zwischen richterlichen Formen, und nur im 19. Jahrhundert wurde die einzelnen Aufgaben der Verwaltung von der Kompetenz der Friedenrichter zum Aufgabenbereich der kommunalen Körperschaften (Boards) verwiesen. Die Boards bestanden grundsätzlich aus gewählten Mitgliedern. Die Zweckmäßigkeit dieser Maßnahmen wurde vom Dicasterium für innere Angelegenheit überprüft, das diese auch ändern konnte. Die Entscheidungen standen jedoch vom juristischen Aspekt weiterhin unter der strengen rechtlichen Kontrolle der obersten Gerichtshöfe. Der andauernde Wert der englischen Rechtsentwicklung war die Möglichkeit, gegen die Verwaltung das individuelle Recht schützen zu können, Klagebefugnis wurde also für die Individuellen (Körperschaft, Staat) gewährleistet, um im Fall einer Verwaltungsrechtsbeleidigung Rechtsmittel am Gericht zu suchen.[2]

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1 Thomas Olechowski: Die Einführung der Verwaltungsgerichtsbarkeit in Österreich. Wien, 1999. (im Weiteren: Olechowski 1999.) S. 12.

2 Zabulik, László: A közigazgatási bíróságról szóló törvény. [Das Gesetz vom Verwaltungsgericht] Budapest, 1894. 5. p.; Szabó, József: Demokrácia és közigazgatási bíráskodás. [Demokratie und Verwaltungsgerichtsbarkeit] Budapest, 1946. 25. p.; Károly Csemegi weist in seiner Studie „Verwaltung und Rechtsprechung" von 1862 darauf hin, dass im englischen Recht nicht nur das Privatrecht, sondern auch das Recht von Privaten unter dem Schutz des Gesetzes stehen. In: Csemegi Károly művei. [Die Werke von Károly Csemegi] (S.a.r. Edvi Illés Károly és Gyomai Zsigmond). I. köt. 88-89. p.

Die Auffassung von Gneist von der Rechtsstaatlichkeit vereinfachte die prinzipielle Angelegenheit der Verwaltungsrechtsprechung zur Frage der Verwaltungsreform. Es ist natürlich zu finden, dass diese Anschauung auch von den Verwaltungsexperten aus der Praxis unterstützt. Der Gedanke des Verwaltungsgerichts war generell das Produkt des Misstrauens, das ihre Tätigkeit begleitete, so befolgten auch die Experten selbst die Auffassung, dass die Verwaltung auch fähig ist, in seinem ursprünglichen Betätigungsfeld die juristische Ordnung zu schützen. Diese Konzeption erhielt die Mehrheit auch auf der ungarischen Juristenversammlung vom 1882. Das ansehbarer Juristenforum hielt es für wünschenswert, in jedem Bezirk einen Verwaltungsgerichtshof zu formen, der durch die gleichzeitige Durchsetzung der Wesenheit von Staatsverwaltung, Selbstverwaltung und Gericht, unabhängig und durch die Garantien der Angelegenheitsfähigkeit tätig ist.[3]

Das damalige Verwaltungsgerichtsmuster des Insellandes fügte sich der englischen Rechtsbetrachtungsweise und den Ansprüchen der derzeitigen Praxis. Es baute sich also keine ein separierter Verwaltungsgerichtshof aus, trotzdem formte sich die wirksame Kontrolle der Verwaltung vom rechtlichen Aspekt. Das konnte so passieren, weil im englischen Recht die Verwaltung von detaillierten Regeln umschrieben wurde, und die rechtliche Normativität von hoher Qualität und befriedigend vom Aspekt der Quantität war. Auch Győző Concha, der das englische öffentliche Recht tief kannte und respektierte, warnte beim Vergleich unserer Verhältnisse: „England ist eine eigene Welt, die auch im besten Fall lediglich Prinzipien und Richtungen geben kann, innerhalb dessen es sich jedoch zahlreiche Formen entfalten kann." Er hielt die Vorstellung der Vorzüge der englischen Verfassung für seine patriotische Pflicht, aber er verheimlichte nicht einmal ihre Fehler, strebend nach der Kompensierung der „Stimmung des Auslandskults", die in den 1870er Jahren in Ungarn zu erfahren war.[4]

Im ungarischen politischen Gemeinsinn nach dem Ausgleich war das englische System eine von den zu folgenden Lösungen, weil das dem Gedanke dem Selbstverwaltungsprinzip im ungarischen Sinn zu entsprechen war.[5] Es war jedoch vom Anfang an zu erfahren, dass die ungarische Gesetzgebung von der Übernahme des Musters geschreckt wurde, weil die Arbeitsstelle der Mitwirkenden in der englischen Rechtsprechung vom anderen Gesellschaftscharakter und ohne Dotation war.[6] Bei einer rechtswissenschaftlichen Diskussion erwähnte György Lukács den substantiven Unterschied der dem Grund dienenden Verhältnisse, als er davon sprach, dass es im England keine Verwaltungsgerichtsbarkeit im kontinentalen Sinne existiert, weil auch die Verwaltung selbst unter rechtlichen Rahmen funktioniert. Es gab solche Fachautor, der hielt es für ein fatales Fehler, die englische Praxis „in fremden Boden zu pflanzen".[7] Auch Dezső Szilágyi meinte, dass das nur im Urvaterland von Jury am besten funktioniert – funktionieren kann.[8]

In der ungarischen Fachliteratur brachte die Erscheinung des Grundwerks von Győző Concha einen geistigen Durchbruch. Das war das erste ungarische Werk, das die europäische Praxis der Verwaltungsgerichtsbarkeit mit prinzipiellem Anspruch prüfte und auch in den Teilfragen der erwünschten ungarischen Reformen sachkundig Stellung nahm. Die Studie analysierte ausführlich das Konzept des Rechtstaates, besonders die konkreten Lösungen, die sich im deutschen Land formten. Analysierend die belgische, französische, englische, badische, preußische und österreichische Regelung zog er die Folgerung, dass das englische Strukturmodell in Ungarn zu folgen und die öffentlich-rechtliche Gerichtsbarkeit der ordentlichen Gerichtsorganisation zu vertrauen. Der wichtige Gedanke des Werkes ist, dass die Verwaltungsgerichtsbarkeit die unverzichtbare Bedingung des modernen Staatslebens und das elementare Kriterium der Rechtsstaatlichkeit ist.[9]

[3] Auch der ungarische Komitatsgesetzentwurf vom 1891 ging von dieser Konzeption aus. Vgl: Kmetty, Károly: A közigazgatási bíróságok hatáskörének szabályozásáról. [Von der Regelung der Kompetenz der Verwaltungsgerichtshöfe] Budapest, 1891. 9-10. p. Auf Gneist weist Károly Csemegi hin: Csemegi, Károly: Taxáció és az elvi meghatározás. [Taxation und die prinzipielle Sacherklärung] In: Csemegi Károly művei.[Die Werke von Károly Csemegi] (S.a.r. Edvi Illés Károly és Gyomai Zsigmond). I. köt. 432. p.

[4] Concha, Győző: A közigazgatási bíráskodás. [Die Verwaltungsgerichtsbarkeit] *Magyar Igazságügy* 1881. XVI. évf. 5. sz. 471. p.; Bónis, György: Az angol alkotmánytörténetírás tegnap és ma. [Die englische Verfassungshistoriographie gestern und heute] Különlenyomat a *Századok* 1940. évi 4-6. számából. Budapest, 1940. 4. p. In diesem Geiste schrieb Jenő Zergényi, dass die Verwaltung Ungarns das Produkt eines eigenartigen, historischen Wachstums, sie kann den englischen Instituten doch nicht verglichen werden. „Unsere Heimat erfreute sich an jahrhundertlanger friedensvoller Entwicklung nicht, als England." A közigazgatási bíróságokról. [Von den Verwaltungsgerichtshöfen] *Jogtudományi Közlöny* (im Weiteren: Rechtswissenschaftliches Rundschau) 1891. 5. sz. 35. p.

[5] Lánczy, Gyula: „Nyolcadik magyar Jogászgyűlés" [„Achte ungarische Juristenversammlung."] *Jogtudományi Közlöny* XVII. évf. 44. sz. 1882. november 3. 351. p.

[6] „Es wurde bei der englischen Gentry ein Gebrauch, auf die Belohnung zu verzichten, und dadurch das Friedensrichtersamt wurde eine für die höheren Klassen reservierte ehrenamtliche Stelle." Grünwald 1876. 46. p. „Ein gebildeter, reicher, unabhängiger englischer Aristokrat, der seine geistige und materielle Stärke dem Gemeinwohldienst opfert, […] kann nicht mit der Bauernbehörde des ungarischen Dorfrichters parallelisiert werden." Dr. Dell' Adami, Rezső az államhatalom megosztása szempontjából. [Die Reform unserer Rechtsprechung und Verwaltung vom Aspekt der Teilung der Staatsmacht] Magyar Jogászegyleti Értekezések I. (gelesen auf der ordentlichen Sitzung am 9. Mai, 1880) Budapest, 1880. 28. p. (im Weiteren: Dell' Adami Rezső) 23. p.

[7] A közigazgatási bíróság törvényjavaslatáról. A Magyar Jogászegyletben 1894. évi január hó 21-én Németh Károly és Lukács György által tartott előadások. [Vom Gesetzentwurf des Verwaltungsgerichtshofes. Die Vorträge von Károly Németh und György Lukács auf der Ungarischen Juristenversammlung am 21. Januar, 1894] *Magyar Jogászegyleti Értekezések*. X. köt. 7. füzet. Budapest, 1894. 171. p. Aufgrund des Bandes 52 der Zeitschrift *Magyar Közigazgatás* [Ungarische Verwaltung] Jahresgang Dezember 24, 1893. „formt in England die Veraltungsgerichtsbarkeit mit der Verwaltung sozusagen eine einheitliche Tätigkeit, hier also der Kompetenzteil des Institutes beherrscht keine praktische Wichtigkeit." Der Standpunkt gegen die Adaptation wurde von Jenő Zergényi vertreten. *Jogtudományi Közlöny* 1890. 42. sz. 330. p.

[8] Antal, Tamás: Törvénykezési reformok Magyarországon (1890–1900). Ítélőtáblák, bírói jogviszony, esküdtszék. [Rechtsprechungsreformen in Ungarn 1890–1900. Gerichtshöfe, Rechtsverhältnis der Richter, Spruchkammer] Szeged, 2006. 220. p.

[9] Concha, Győző: A közigazgatási bíráskodás az alkotmányosság és az egyéni joghoz való viszonyában. [Die Verwaltungsgerichtsbarkeit im Verhältnis von der Verwaltungsmäßigkeit und zum Individualrecht] Budapest, 1877. (im Weiteren: Concha 1877.) 89-93. p. Vgl: *Jogtudományi Közlöny* XII. évf. 17. szám. 1877. ápr. 27. (Die Kritik von Ágost Pulszky vom Buch von Győző Concha)

Die Argumentation von Concha übereinstimmte mit den Konzepten von Gneist und Stein, nach denen die Verwaltungsgerichtsbarkeit für die Harmonie der Gesetzgebung und der Ausführung ein unbedingt notwendiges Institut ist, weil die ministeriale Verantwortung lediglich auf der höchsten Eben des Staatslebens die Ausführung der Gesetze dient, die (in der Verwaltungstätigkeit manifestierenden) Alltage des Staates entbehrt diese Harmonie.[10] Concha betrachtete zweifelsohne kritisch auch die Ansichten von Gneist. Er meinte, dass die Verwaltungsgerichtsbarkeit nur den Selbstverwaltungen nicht überlassen werden kann. „Denn der kluge Gesetzgeber dort, wo es keinen tatsächlichen Bedarf gibt, wird nur wegen einer unwahrscheinlichen Möglichkeit keinen besonderen Organismus schaffen, so begnügte auch England mit der Verbindung des Verwaltungsgerichtshofes zur Verwaltung auf niedriger Instanz, als es sich beruhigte, dass ein Teil der Strafrechtsprechung von Verwaltungsorganen behandelt wird. Aber dadurch, dass er den höchsten Gerichtshof des Landes, als revisionales und kassatorisches Forum über die Verwaltung stellte, bestärkte am definitivsten die Möglichkeit der Kompetenz der ordentlichen Gerichtshöfe auch bezüglich der Verwaltungsstreite."[11]

Der immerwährende Verdienst von Győző Concha ist es, dass er die Verwaltungsgerichtsbarkeit als ein Mittel und unverzichtbares Institut für den Rechtsschutz betrachtete. Er bestand darauf, den Rechtsschutz auch in Ungarn zu institutionalisieren und im englischen System, also vor den ordentlichen Gerichten zu verwirklichen. Er blieb mit dieser Meinung in Minderheit, aber seine Ansichten und Teillösungen enthaltenden Gedanken seiner späteren Monografien übten eine formende Wirkung auf unsere öffentlich-rechtliche Gesetzgebung aus.[12]

In der ungarischen Fachliteratur erschien simultan die Initiative an der Errichtung der Verwaltungsfachgerichtshöfe, der zuerst von Ignác Kuncz verfasst wurde, und am wirksamsten von Gyula Lánczy vertreten wurde.[13] Von der theoretischen Grundlagen und der Situation Land nach Land der Verwaltungsgerichtsbarkeit publizierte auch Lajos Gruber ein elementares Werk. Der Autor unterstützte die Idee des separaten Verwaltungsgerichtes, und widersprach der Aussage, dass in England der ordentliche Gerichtshof in Verwaltungsangelegenheiten entscheidet. „In England wird die Administratio nicht von der Rechtsprechung separiert, es ist also zu sagen, dass nicht nur die Administratio über dem Gericht, sondern auch das Gericht über der Administration entscheidet."[14]

Auf die Abgeordnetenansprachen übte auch seine Artikelserie eine große Wirkung aus, die die europäische Situation, die einzelnen Regeln und die institutionellen Teillösungen der Verwaltungsgerichtsbarkeit überblickte.[15] Auch Jenő Zergényi der Aussage überzeugend widersprach, aufgrund deren die Rechtspraxis des englischen obersten Gerichtsforums unter den ungarischen Verhältnissen maßgeblich sein könnte. Die englische Selbstverwaltung reparierte nämlich meistens selbst die von ihr begangenen Verfehlungen. Das dortige oberste Gerichtsforum sollte sich mit entschwindenden Zahlen von Verwaltungsangelegenheiten beschäftigen. Außerdem verfügen die Richter der englischen Hauptgerichtshöfe über erforderliche Verwaltungserfahrungen, öffentlich-rechtliches Verständnis und politische Vergangenheit, bei uns dominiert bei der Auswahl der Richter der berufliche Aspekt.[16]

Im Jahre 1896 wurde der Verwaltungsgerichtshof mit allgemeiner Kompetenz in Ungarn veranstaltet. Bei der Bewertung des Institutes wies Győző Concha auf das progressivere Wesen der englischen Lösung hin, das da „den völligen, perfekten richterlichen Schutz der – subjektiven Rechte ermöglichte, die sich von Rechtsverhältnissen ergaben, die gegen die öffentliche Behörde enstanden".[17] Laut ihm ist das Grundfehler des Gesetzes, dass es den im Prinzip erkannten Rechtsschutz zum engsten Kreis beschränkt. Es gewährleistet keinen Rechtsschutz im Fall von Militärpflicht, Angelegenheiten von Kirche, Ausbildung, Staatsangehörigkeit, Verein, Enteignung und polizeiliche Maßnahmen ausser des Strafprozesses. Das Gesetz weicht von der englischen Lösung auch davon, dass in Militärangelegenheiten – beziehend auf die Ausgleichsgesetze – es den Richterschutz verweigert. Seine größere Mangelhaftigkeit als diese ist, dass das Gesetz die Herrschaft des positiven Rechts dem Gesamtinteresse unterwirft, und zwar nicht dem in den Gesetzen, Rechtsnormen definierten objektiven Gesamtinteresse, sondern dem, den die Regierung und ihre Organe und die Gerichte für dasjenige halten.[18]

[10] Ausgelegt wird das Werk Conchas von: Ruhman, Emil: A közigazgatási bíráskodás. [Die Verwaltungsgerichtsbarkeit] In: Fejezetek a közjog és közigazgatási jog köréből. Némethy Károly születésének 70. évfordulója és a Magyar Közigazgatás félszázados fennállása alkalmából. [Abschnitte vom Kreis des öffentlichen Rechts und des Verwaltungsrechts. Anlässlich des 70 jährigen Jubiläums der Geburt von Károly Némethy und des 50 jährigen Bestehens der Zeitschrift Ungarische Verwaltung] (Szerk. Mártonffy Károly). Budapest, 1932. 121. p.

[11] Concha, Győző: A közigazgatási bíráskodás. [Die Verwaltungsgerichtsbarkeit] *Magyar Igazságügy*. 1881. XVI. évf. 5. sz. 389-390. p.

[12] Concha, Győző: Hatvan év tudományos mozgalmai között. Összegyűjtött értekezései és bírálatai. [Unter den wissenschaftlichen Bewegungen von sechzig Jahren. Seine versammelten Beiträge und Kritiken] I. köt. Budapest, 1928. 332-335. p., uő: Politika. II. köt. Budapest, 1905. 126. p. Von den seine spätere Ansichten spiegelnden Debatten: *Jogtudományi Közlöny* 1893. évi 50-53. sz.; *Magyar Jogászegyleti Értekezések* [Die Beiträge des Ungarischen Juristenvereins] X. köt. 5., 6., 7., 8. füzet.

[13] Kuncz, Ignác: A közigazgatási bíráskodás. [Die Verwaltungsgerichtsbarkeit] *Jogtudományi Közlöny* 1878.; Lánczy, Gyula: A közigazgatási bíráskodás szervezéséről Magyarországon. [Von der Veranstaltung der Verwaltungsgerichtsbarkeit in Ungarn] Budapest, 1883.

[14] Gruber 1877. 48-49. p.

[15] Gruber, Lajos: A közigazgatási bíráskodás alakzatai Európában. [Die Formen der Verwaltungsgerichtsbarkeit in Ungarn] *Jogtudományi Közlöny* XII. évf. 35. szám. 1877. aug. 31.; 36. szám 1877. szept. 7.

[16] Zergényi weist auch darauf hin, dass es im Feld der Wissenschaft und der praktischen Politik in Ungarn eine allgemeine Mode war zu denken, dass notwendigerweise England die Heimat für jedes liberale oder für liberal gehaltene Institut ist. A közigazgatási bíróságokról. [Von den Verwaltungsgerichtshöfen] *Jogtudományi Közlöny.* 1891. 9. sz. 68-69. p.

[17] A közigazgatási bíróság törvényjavaslatáról. A Magyar Jogászegyletben 1894. évi január hó 8-án Concha Győző és Reinhard Zsigmond által tartott előadások. [Vom Gesetzentwurf des Verwaltungsgerichtshofes. Die Vorträge von Győző Concha und Zsigmond Reinhard auf dem Ungarischen Juristenverein am Januar 8. 1894] *Magyar Jogászegyleti Értekezések*. X. köt. 5. füzet. Budapest, 1894. 5. p.

[18] *Jogtudományi Közlöny* 1896. 50. szám 394. p.; Martonyi, János: A közigazgatási bíráskodás bevezetése, szervezete és hatékonysága Magyarországon (1867–1949). [Die Einleitung, Struktur und Wirksamkeit der Verwaltungsgerichtsbarkeit in Ungarn] *Acta Jur. et Pol*. Tomus XX. Fasc. 2. Szeged, 1973. 5-6. p.

Der ungarische Klassiker der Verwaltungsgerichtsbarkeit fand die ungarische Konstruktion von 1896 weder vom verfassungsrechtlichen noch vom Verwaltungsaspekt die Verwaltung nicht erfolgreich. Obwohl es darin einen Fortschnitt gibt, im Vergleich zu dem früheren diskretionellen Wesen der Verwaltung, es kann ernsthaft beanstanden werden, dass sie die angelsächsische Idee des Rechtsschutz von den ordentlichen Gerichten aufgab. Ein Teil der Rechtsliteratur – gleichend die Lösung der englischen – beanstand es auch, dass das erste Gesetz vom Verwaltungsgerichtshof mit allgemeiner Kompetenz den richterlichen Schutz der Selbstverwaltungsrechte ermöglichte nicht.[19]

Die aufgeführten Standpunkte können beweisen, dass die maßgebenden Kreise der ungarischen wissenschaftlichen öffentlichen Leben und der Politik bei der Auslegung und der Anwendbarkeit des englischen Verwaltungsmodells geteilt waren. Es ist zu bemerken, dass die Teilnehmende der ungarischen wissenschaftlichen und Gesetzgebungsdebatten auf die damaligen englischen Lösungen grundlegend richtig hinwiesen. Die Situation kam nicht vor, wie im Fall des so genannten deutschen Modells, wo sich die gesamt-deutschen und die ländlichen Lösungen in den Referenzen mischten, und nicht einmal der Zeitraum des Vergleichs nicht gleich war.[20]

Den Unterschied zwischen dem kontinentalen und englischen System erklärte 1947 der letzte Vorsitzende des Verwaltungsgerichtshofes János Csorba mit den verschiedenen Umständen ihrer Herausbildung. Laut ihm bürgerte sich das englische System nur in den angelsächsischen Staaten ein. In England nämlich existierte die Gefahr des äußeren Angriffs nicht. So war es nicht notwendig, eine größere Armee aufzubehalten oder die allgemeine Militärpflicht einzuleiten. Auf dem europäischen Kontinent wurde jedoch der Schutz der Bewohner die erste Aufgabe des Staates, deshalb wurde eine entwickelte Verwaltungsorganisation geschafft. Der Verwaltungsapparat verfügte über das Einkommen und die Exekutive des Staates, und er erwarb einen Respekt, der das Bewusstsein der Superiorität der Verwaltung akzeptieren ließ. Am Anfang entschied diese Verwaltung in den Klagen gegen ihr, später wurden getrennte Fachgerichte errichtet, die nicht unabhängig waren, oder wenn doch (wie die ungarischen), war ihre Kompetenz beschränkt.[21]

József Szabó schrieb 1946: „Der sachliche Schutz des Verwaltungsrechts wurde gerade in England am reinsten formuliert. Ohne geschriebene Gesetze, oder ihre Rahmen ausfüllend, aus Präzedenzfällen und Richterpraxis (judge made law), während langen Jahrhunderten bildete sich das erstaunlich feste Gebäude des Rechts und der Gerechtigkeit, das – schützend gleicherweise die individuelle Freiheit, die soziale Gerechtigkeit, die Vielfalt der erworbenen Rechte und die unverlierbare ewige Menschengleichheit – heute schon der Drittel der Menschheit als einen sicheren Schutz dient."[22] Er hielt dieses Muster für verfolgbar. Man weist, dass sich diese Gedanken nicht verwirklichten. Im Jahre 1949 endete die Verwaltungsgerichtsbarkeit mit selbständiger Struktur.

Mit einer merkwürdigen Wende der Geschichte des ungarischen öffentlichen Gerichts vernichtete das Verfassungsgericht in seiner Entscheidung 34/1990 (XII. 22.) mit der Gültigkeit von März 31, 1991 die früheren beschränkenden Regeln, und stellte fest, dass der Mangel der Gesetzregelung in Bezug mit der Gerichtsüberprüfung der Verwaltungsbeschlüsse eine Verfassungswidrigkeit wegen Versäumnis verwirklicht. Das Gesetz vom 1995 Nr. XXVI bezieht die provisorischen Regeln bezüglich der Ersetzung des Versäumnisses ein. Durch die Entscheidung (am englischen Beispiel sozusagen) gerieten die heutigen Verwaltungsrechtsstreite vor das ordentliche Gericht.

2. Heimische Meinungen vom Rechtsschutzmodell der französischen Verwaltung

Die wissenschaftliche öffentliche Meinung informierte sich vom französischen Rechtsschutzsystem zuerst aus dem Werk von Győző Concha. Frankreich – schreibt ein von den ungarischen Aposteln den heimischen Verwaltungsrechtsschutz – verfügt über eine große Struktur von Richtern im Kreis des Rechtschutzes in der Verwaltung, aber das ist unnüztlich.

Im Aspekt der Freiheit ist das französische Modell demütigend. Die Franzosen teilen mit schematisierender Logik die Gewalten auf, trennen rigoros die Handlung und ihre Beurteilung, also die Verwaltung und die Gerichtsbarkeit. Deshalb wurde die in der Regierung und Verwaltung eingefügte Gerichtsbarkeit herausgefunden, unternommen, dass diese Rechtsprechung die Unabhängigkeit vermisst. Die französische Auffassung hielt für die Aufgabe der Verwaltung die unfehlbare Geltendmachung den Gesamtinteressen. Die Rechtsmäßigkeit ist bei den Franzosen nicht eine elementare Forderung der Verwaltung. Das soll von dem vollstreckenden Apparat geltend gemacht werden, wenn das dem Gesamtinteresse nicht zusammenstoßt. Nach ihrem Standpunkt soll der Verwaltungsgerichtshof deshalb von der Verwaltung abhängen, da das Gericht nur das Recht, die Formen für maßgeblich halten würde, die dem Begriff Gesamtinteresse untergeordnet sind. Das Gesamtinteresse definieren die Franzosen so weit, dass es auch gegen das Privatrecht und Strafrecht Priorität hat. Von diesem stammt der Begriff des Verwaltungsgerichtsverfahrens (contentieux administratif), in dessen Kreis auch die Privat- und Strafangelegenheiten gehören, und die – im Fall der Betroffenheit des Gemeininteressen – fallen unter Verwaltungsgerichtsdiskretion.

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[19] *Jogtudományi Közlöny* 1896. 52. sz. 413-416. p; Boér, Elek: Törvényhatósági önkormányzatunk és közigazgatási bíróságunk hatáskörének kiterjesztése. [Die Erweiterung der Kompetenz von unserer Selbstverwaltung und unserem Verwaltungsgerichtshof] *Magyar Jogászegyleti Értekezések*. Budapest, 1908. XXXVI. köt. 6. füzet. 46. p. Vgl: Rudolf von Gneist: Das englische Verwaltungsrecht (Selfgovernment). 69. p.

[20] Stipta, István: A német közigazgatási bíráskodás kialakulása, és hatása a magyar közigazgatási jogvédelemre. [Die Herausbildung der deutschen Verwaltungsgerichtsbarkeit und ihre Wirkung auf den ungarischen Rechtsschutz der Verwaltung]. In: *Facultas nata*. Ünnepi tanulmányok a miskolci jogászképzés 25. évfordulójára. (Szerk.: Szabadfalvi József) Miskolc, 2006. 347-364. p.; ders.: A francia közigazgatási bíráskodás hatása a dualizmus kori magyar törvényhozásra. [Die Wirkung der französischen Verwaltungsgerichtsbarkeit auf die ungarische Gesetzgebung vom Dualismus] In: Sapienti iniuria non potest fieri. Ünnepi tanulmányok Zlinszky János tiszteletére. (Szerk.: Horváth Attila, Koltay Tamás, Máthé Gábor) *Jogtörténeti értekezések 36.* (Sorozatszerkesztő: Mezey Barna). Gondolat Kiadó Budapest, 2009. 263-282. p.

[21] *Jogászegyleti Szemle* 1947. 17. p.

[22] Szabó 1946. 34. p.

Von dieser Auffassung ergibt sich der Anspruch an einem Kompetenzgericht (Cour de compétence), das unter dem Einfluss der Regierung steht und gegen die ordentlichen Gerichtshöfe auch die Durchsetzung des Gemeininteressen gewährleistet. Von dieser Auffassung ergibt sich es weiterhin, dass die französischen Verwaltungsbeamten nur mit der Genehmigung des Staatsrates durch das Gericht zur Rechenschaft zu ziehen. Concha betonte die Gefahren der französischen Verwaltungsgerichtsbarkeit aber er hob hervor ihre Vorteile auch. Er lobte den besonderen Ausbildungsberuf, die Schnelligkeit und die Öffentlichkeit des Prozesses.[23]

Das französische Modell wurde von der ungarischen Legislative prinzipiell negativ beurteilt. Nach der Parlamentsrede von Gyula Schvarcz vom 21. März, 1871 ist die französische Lösung mit dem Rechtsstaat nicht kompatibel. In Frankreich nämlich hängen die in Verwaltungsstreiten entscheidenden Organe und Personen von der Vollstreckungsmacht, „der Gnade der Regierung" ab. Sie üben auch das Recht der Gesetzgebung aus, verwenden auch Ordnungen, ohne zur Verantwortung gezogen werden zu können.[24]

Den ausführlichen Entwurf des Vorschlags von der Errichtung des ungarischen Staatsrates legte Gyula Schvarcz dem Abgeordnetenhaus am Mai 23, 1878 ein. In dem Vorschlag erörterte er en détail den Unterschied zwischen den französischen und ungarischen öffentlich-rechtlichen Verhältnissen. „Die Staatsräte, die sich Europaweit ausser der Vorbereitung der Gesetzentwürfe auch mit der Verwaltungsgerichtsbarkeit beschäftigen, ähneln essentiell der Struktur des französischen Staatsrates."[25]

Nach seiner Auffassung legen die französischen Verfassungen auf die Verantwortung des Staatsoberhaupt und nicht der Minister den Grundgedanken das Gleichgewicht der geteilten Staatsmachten, und so konnten sie ihre Staatsräte auch mit dem Recht der Verwaltungsgerichtsbarkeit ruhig befugen. „Dieses französische Institut imitierten bestimmte europäische Staaten mit einigen Änderungen, unter von unseren ganz und gar abweichenden Verhältnissen" aber man kann das in Ungarn nicht tun. „Das in unserer Verfassung existierende Gleichgewicht der Staatsgewalt würde das Recht der Verwaltungsgerichtsbarkeit überschlagen, mit dem der zur Vorbereitung der Gesetzvorschläge berufene Staatsrat befugt wäre."[26]

In der Debatte vom Juni 24, 1878 des dargelegten Vorschlags von der Gestaltung des Staatsrates kritisierte Gyula Schvarcz wieder stark das französische Modell. Laut ihm war Frankreich noch kein parlamentarisches Land, als der Staatsrat seine zweifache Aufgabe (die Verwaltungsgerichtsbarkeit und die Vorbereitung der Gesetze) erwarb. Die Ministerverantwortung war unbekannt, lediglich der Kaiser verantwortete nominell der Gemeinschaft der Wähler. [27] Bei der Debatte des Gemeindegesetzesvorschlages Antal Csengery warnte jedoch dass die Franzosen auch das Petitionsrecht und das Interpellationsrecht verwandten, „und diese Rechte werden von niemandem verharmlost, auch wenn sie bei jeder Privatbeschwer nicht immer Remedur bieten."[28]

Die angeführten Standpunkte können beweisen, dass der massgebenden Kreise der ungarischen Wissenschaft, Politik und des öffentlichen Lebens das französische öffentlich-rechtliche Rechtsschutzsystem und die dort herausbildete Praxis unterstützten nicht. Es ist zu merken, dass die Teilnehmende der ungarischen wissenschaftlichen und Gesetzgebungsdebatten auf die damaligen französischen Lösungen grundlegend richtig hinwiesen. Die Situation kam nicht vor, wie im Fall des so genannten deutschen Modells, wo sich die gesamtdeutschen und ländlichen Lösungen in den Anführungen mischten, nicht einmal war der Zeitraum der Komparation gleich.[29]

Das französische Modell, die auf die Zentralisierung und die Priorität der Gemeininteressen bildende Strukturlösung fand also keinen Folgender in Ungarn. Den Rechtsschutz innerhalb der Verwaltungsstruktur halt sowohl die Rechtsliteratur als auch die Regierungspartei und die Opposition für ungeeignet. Lange schien es so, dass das englische oder das österreichische Beispiel zum Rechtsschutz der Bürger gegen den Staat das Modell wird. Kálmán Tisza entschied jedoch anders.

Die Begründung des Gesetzvorschlags von der Verwaltungskommission erwähnte unter den Aufgaben der geplanten Kommission den Verwaltungsrechtsschutz nicht. Auf einem Platz wies sie jedoch auf die Verwaltungsgerichtsbarkeit hin, von dem es sich klärt, wie Kálmán Tisza 1876 diesen Begriff auslegte. Die Paragraphen § 44-58 der Vorlage detaillierten die disziplinarischen und behördlichen Aufgaben der Kommission. Die interne Beurteilung der Berufung gegen die disziplinarischen Entscheidungen begründete der Ministerpräsident-Innenminister so: „Das weiter, dass die Berufung jedes Organ zum kompetenten Minister einreicht, so die Gemeinden- und Munizipal-Organe immer zum Innenminister einreichen, ist zu begründen, dass es eine ungebührliche und so eine unvertretbare Maßnahme sein würde, die oberste Gerichtsbarkeit – obzwar das die Verwaltungsgerichtsbarkeit ist – für den selben Beamten oder Büroangestellten verschiedenen Organen zu überlassen."[30] Auf dem gleichen prinzipiellen Grund entschieden die Verwaltungsorgane auch im Fall der individuellen Klagen.

Gegen jeden prinzipiellen Vorbehalt gegen den Rechtsschutz innerhalb der Verwaltung organisierte das Gesetz Nr. V vom 1876 jedoch auf französisches Beispiel die Beurteilung der da-

[23] Concha 1877. 84-88. p.
[24] Die Ansprache von Gyula Schvarcz: KN-1869. XV. köt. 1871. március 13-április 4. 1869-315 (1869-XV-120. p.)
[25] „Der französische Staatsrat folgt [...] der Verfassung von Ungarn ganz kontroverser Fassung und Richtung - besonders hinsichtlich der Verantwortung der Regierung." KI-1875. XXV. köt. 1875-870 (1875-XXV. 386. p.)
[26] KI-1875. XXV. köt. 1875-870 (1875-XXV. 386. p.)
[27] KN-1875. XVIII. köt. 1878. május 21-június 29. 1875-415 (1875-XVIII-279-280. p.)
[28] KN-1869. XV. köt. 1871. márczius 13- április 4. 1869-317 (1869-XV-169. p.)
[29] Vgl: *Stipta, István*: A német közigazgatási bíráskodás kialakulása, és hatása a magyar közigazgatási jogvédelemre. [Die Herausbildung der deutschen Verwaltungsgerichtsbarkeit und ihre Wirkung auf den ungarischen Verwaltungsrechtsschutz]. In: *Facultas nata.* Ünnepi tanulmányok a miskolci jogászképzés 25. évfordulójára. (Szerk.: Szabadfalvi József) Miskolc, 2006. 347-364. p.
[30] KI-1875. I. köt. 1875-43 (1875-I-322. p.)

maligen Verwaltungsklagen. Es wies die individuellen Ansprachen gegen den Selbstverwaltungs- und Staatsprozess vor den Verwaltungsbeamten und-Organen, so entschieden sie von der Überprüfung, die die Entscheidungen trafen, oder im deren Interesse war, die beschwerte Entscheidung gelten zu lassen. Es verwirklichte sich, und das justice administrative mit pejorativem Inhalt, und es funktionierte also bis 1883 auch in Ungarn, allerdings ohne die die individuellen Rechte gewährleistenden und in Frankreich wirksam durchsetzenden prozessrechtlichen Garantien.

3. Das deutsche Modell und die ungarische Verwaltungsgerichtsbarkeit

Das bedeutende Teil der ungarischen Forscher der Verwaltungsgerichtsbarkeit hält die ungarische öffentlich-rechtliche Rechtsprechung für deutsch von Herkunft. Hier sind – unter anderen – Móricz Tomcsányi, Zoltán Magyary, János Martonyi und auch der damalige Professor der staatsphilosophischen Schule von „Szeged" József Szabó zu erwähnen. Szabó schrieb in seinem Buch von 1946, dass unsere Gesetzgebung nach 1848 unsere nationalen Traditionen verriet, und sich ganz in germanische Richtung drehte. Laut ihm ist es kein Wunder, dass ein großes Teil unserer öffentlich-rechtlichen Institute, vor allem unsere Verwaltungsgerichtsbarkeit bloß eine preussische Reproduktion ist.[31]

Was die eventuelle ungarische Wirkung der deutschen Regelung betrifft, ist – als methodologische Grundforderung – zum ersten die Sinkronität zu beachten. Die Gegenüberstellung kann nur dann wissenschaftlich korrekt, wenn mit der ungarischen rechtlichen Regelung gleichzeitigen oder frühere deutsche (imperiale oder ländliche) organisatorische-rechtliche Lösungen zu vergleichen sind. Betrachtend von diesem Aspekt die Geschichte der maßgeblichen Mitgliedsstaaten der deutschen Verwaltungsgerichtsbarkeit, es stellt sich heraus, dass fast alle Länder sein Rechtsschutzsystem am Ende der 1890er Jahre radikal umgestalteten, und dann brachten sie ihren Struktur-, Kompetenz-, und Prozessordnung gültig auch für das 20. Jahrhundert hervor. Da die ungarische Regelung 1896 endete, kann die ungarische, Institut begründende Wirkung ausländischer Modelle nicht gefunden werden, die sich nach der Errichtung des ungarischen Verwaltungsgerichtshofes formten. Wie auch immer merkwürdig es ist, tat die Mehrheit der heimischen Autoren so.

Der andere wichtige Aspekt ist der Reichscharakter der deutschen öffentlich-rechtlichen Gerichtsbarkeit. Obwohl die Mitgliedsstaaten ihrer Verwaltungsrechtsschutz selbst formten, war die – langsam bildende, auf wichtigeren Angelegenheiten allmählich erweiternde – Reichsgerichtsbarkeit um die Jahrhundertwende immer häufiger trotzdem zu beachten. Der deutsche Verwaltungsrechtsschutz von doppelter Struktur für die ungarischen Verhältnisse keine ohne Änderungen durchsetzbaren Organisationsschemen bieten. Es ist die weitere Mangelhaftigkeit der auf die „deutsche Lösung" hinweisenden Standpunkte, dass diese die zwischenzeitlichen Gesetzänderungen nicht befolgen. Baden z.B. befolgte am Anfang das angelsächsische Modell, umformte sein Rechtsschutzsystem von 1863 im Jahre 1870, 1882 und 1884 deutlich, erweiterte allmählich die Kompetenzen der Verwaltungsgerichtshöfe. So – gegenüber einem Teil der bezüglichen Literatur – ist sich auf kein statisches badisches Modell zu beziehen.

Wenn man die deutsche Regelung betrachtet, können nicht einmal die Lösungen der Mitgliedsstaaten, die zur ungarischen Regelung ein Beispiel zeigen können, nicht verallgemeinert werden. Ein Teil der Autoren beweisen das so, dass die Deutschen – gegen das englische System – die ordentlichen Gerichtshöfe nicht in Anspruch nahmen. Demgegenüber ist es eine Tatsache, dass Württemberg, Hessen, Hamburg und Bremen vom Anfang an bis 1921 diese Lösung wählte. Von den Verwaltungsfachgerichten war das erste das badische von 1863, das konnte jedoch kein Beispiel sein, weil – gegenüber den beiden, kostensparenden ungarischen Lösungen – es zweistufig war. Seine Kompetenz umfasste auch einen taxativen, jedoch wesentlich weiteren Sachkreis, als das ungarische. Das Berufungsgericht verfügte über die Garantie der richterlichen Unabhängigkeit, konnte also sowohl in Tatsachen- als auch Rechtsfragen entscheiden. Seine Entscheidungen erstreckten sich auf den Inhalt sowie die Form der Verwaltungsentscheidung. Der englischen Lösung ähnelte die Methode der Bildung des richterlichen Gremiums der ersten Instanz, weil seine Mitglieder aus der Bewohner des Bezirks gewählt wurde.

Das Verwaltungsgericht von Preußen von 1872 war auch ein Fachgerichtshof, der jedoch auf einzigartiger Weise auf drei Instanzen ausgebaut wurde. Seine andere Eigenartigkeit ist es, dass der Rechtsschutz auf der ersten Instanz von Verwaltungsorganen geleistet wurde. Die Ausbildung der Körperschaft der preußischen Beamten war viel höher als in Ungarn, so funktionierte diese rechtstechnische Methode wirksam. Die Kompetenz der Gerichte wurde durch taxative Aufzählung festgestellt, aber in den für die wichtigsten erachteten Steuer- und Finanzwesen (z.B. Doppelbesteuerung) entschied der ordentliche Zivilgerichtshof. Diese Lösung wäre das legale Mittel der Steuerabwehr in Ungarn gewesen.

Der preußische Rechtsschutz in der Verwaltung bildete sich auch allmählich heraus. Im Jahre 1872 erschien die Prozessordnung des Bezirks, dann 1875 wurde der Zentralgerichtshof errichtet. Die Gerichtshofstruktur wurde durch die Gesetze vom 1880 und 1888 grundsätzlich modifiziert. Von seiner Kompetenz wurde im Jahre 1883 ein selbständiges Gesetz verabschiedet, der – ähnlich dem ungarischen Finanzverwaltungsgerichtshof – die Zusammensetzung des vorgehenden zentralen Gerichtshofes regelte. Dieses konnte jedoch auf die ungarische Regelung nicht wirken, weil ihren Entwurf schon zwei Jahre früher fertig wurde. Bayern hätte auch ein Beispiel sein können, weil sich sein Gerichtshof relativ früh, im Jahre 1878 formte. Das schien jedoch – vom Aspekt des individuellen Rechtsschutzes – auch kompliziert und zu wirksam zu sein, weil das ein dreistufiges, nach den Instanzen der Verwaltung des Landes organisiertes Gericht war, in dem die zwei unteren Organisationen – auf französisches Muster – im Verwaltungssystem waren.

[31] Szabó, József: Demokrácia és közjogi bíráskodás. [Demokratie und öffentlich-rechtliche Gerichtsbarkeit] Budapest, 1946. 17. 158. p. Von der Debatte von der Auslegung des deutschen Modells: Ude, Carl Hermann: Verwaltungsrechtsschutz. In: Handwörterbuch der Sozialwissenschaften. 11. Bd. Stuttgart, Tübingen, Göttingen. 1961. S. 281-282.

Von der Übersicht ist es zu sehen, dass die Richtung der so genannten deutschen Rechtsschutz aus vielfarbigen, sowie englische als auch französische Elemente integrierenden und ständig verändernden Lösungen bestand.[32] Die ungarische politische Elite wählte nicht und konnte das als zu folgende Lösung nicht wählen. Die Idee der mehrstufigen Verwaltungsgerichtsbarkeit mit völliger Kompetenz geriet nämlich schon in der Zeit von Kálmán Tisza in die Peripherie.

4. Zusammenfassung

Die ungarischen Regierungen nach dem Ausgleich konnten noch nicht daran denken, den Rechtsschutz der Verwaltung auszubauen. Unter der Zeit der Andrássy-Regierung war die Konsolidation des Staatshaushalts die dringendste Aufgabe, und danach sollte ein „kleiner Ausgleich" zwischen den regierenden Organe und die Munizipien zusammengebracht werden. Das Land, das in der Führung der inneren Angelegenheiten selbständig wurde, wurde bald gezwungen, sich gegen die ethnischen Gruppen mit separatistischem Ansatz zu schützen. Der Staat sollte Garantien ausbauen, um die den Dualismus angreifende Opposition zu neutralisieren. Die damaligen Regierungen dachten, dass dazu lediglich eine schnelle, vom Zentrum führende Verwaltung fähig ist. Die Einführung der Verwaltungsrechtsprechung wurde auch vom Fehlen der gesetzlichen Regelung der Vollstrekkung behindert. Die Staatsorgane und die die Aufgaben des Staates ausführenden Selbstverwaltungen betätigten sich in entscheidender Maße aufgrund seiner damaligen Statute, der fortlebenden Gewohnheiten und der Normen vom Alter des Neoabsolutismus. Das materielle Verwaltungsrecht wurde weder in keinem System noch keinem Gesetz festgelegt, so konnte es von dem Gericht – wie in Baden, Preußen oder Württemberg – nicht geschützt werden.

Die historische Verantwortung wird von der damaligen Elite getragen. Nicht, weil sie fremde Modelle wählte, aber vielmehr weil sie wog nicht, keine Varianten davon zu folgen. Die ungarische Politik scheute die zentralistische Macht vor dem wirksam arbeitenden Verwaltungsgerichtshof, und bestrebte sich, dass sich der Rechtsschutz der Verwaltung auf den engsten Kreis ausstreckt. 1896 wurde unseres Verwaltungsgericht nicht aufgrund der von den englischen, französischen oder den deutschen Staaten verliehenen Muster gegründet, sondern es formte sich entsprechen dem für das ungarische öffentlich-rechtliche Leben charakteristischen Muster voll von Kompromissen und Verzögerungen.

[32] Thomas Henne: Verwaltungsrechtsschutz im 19. Jahrhundert: Von Lokalstudien zur europäischen Perspektive. Zugleich ein Literaturbericht. Ius Commune. Zeitschrift für Europäische Rechtsgeschichte. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte. XXVIII. Frankfurt am Main, 2001. S. 313-321.

The self-defense in the Tripartitum and the European ius commune

*Péter Bónis**

Abstract

In this paper the author intended to elucidate the origin of the doctrine contained in the Tripartitum on self-defence. As it is shown, there is no reason to discriminate between the Prologue and the other parts of the Tripartitum, as old Hungarian legal Historians did so. Important citations from the ius commune, from Bartolus and Baldus, were incorporated not only in the Prologue, but also in the three other parts of the Tripartitum. We have shown that the doctrine of the self-defence derived from the ius commune was incorporated in the third Part of the Tripartitum, and these legal ideas from the learned law had a huge importance in the everyday legal practice, they were not a display of legal knowledge and learning. The above-mentioned and discussed sources of Werbőczy are evidences that Werbőczy was not a half-educated and isolationist jurist of a backward country, but he was fully acquainted with the European legal science. The legal knowledge of Werbőczy was a modern and up-to-date legal knowledge.

***Key words**: criminal law; self-defence; Werbőczy; Tripartitum; ius commune.*

1. Introduction

In 1514 Stephen Werbőczy presented the *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* to the Hungarian legislative assembly, the diet. The Tripartitum was sent to inspection to committees, and the diet authorised the king to seal and distribute it. Finally, the king approved the text. Although the Tripartitum was not sealed and distributed, it acquired legal authority by the force of use and custom. In 1517 it was printed in Vienna.

The Tripartitum is the most important Hungarian law-book from the Middle Ages. This law-book retained legal authority until 1945. It was an important part of the customary Hungarian constitution, an unchangeable monument of the fundamental rights of the Hungarian nobility and the symbol of the independence of the Hungarian State.

The sources of the Tripartitum have been researched since the 19th century, at least in modern times. The first historian who engaged himself in this field, was an Austrian, Johann Adolf Tomaschek. In 1883 he published an extensive study on the *Summa legum Raymundi* and its relationship to Werbőczy's Tripartitum.[1] Tomaschek stated that the Summa legum was a compilation of an Austrian author, and important parts of the Tripartitum were copied from this Summa.

Hungarian legal historians have firmly rejected any speculation about the influence of any foreign legal system on Hungarian law, be it Austrian or European (*ius commune*). As they explained, the Tripartitum was a law-book of specifically Hungarian legal institutions, and was not influenced by foreign legal systems. The Kingdom of Hungary did not receive Roman law at all, its legal system remained essentially customary and Hungarian.[2] If there are some copied sentences from the Roman law in the Prologue, it is because Werbőczy intended to impress his audience by a display of legal knowledge, but the remaining three parts are the true Tripartitum, the true compilation of Hungarian law, where there is no trace of Roman law or foreign influence.[3]

After the dissolution of the Habsburg Monarchy, perhaps, we can fully appreciate the merits of Tomaschek without any nationalistic influence. I think, he did not want to undermine the authority of the Tripartitum.

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1 Tomaschek, J. A., *Über eine in Österreich in der ersten Hälfte des XIV. Jahrhunderts geschriebene Summa legum und ihr Quellenverhältnisse zu dem Stadtrechte von Wiener-Neustadt und dem Werbőczyschen Tripartitum*, in *Sitzungsberichte der phil-hist. Klasse der kaiserlichen Akademie der Wissenschaften in Wien* 105 (1883) 241-328.

2 Timon, Á., *Magyar alkotmány- és jogtörténet*, Budapest 1917, 304.

3 For further elements, see Bónis György: Der Zusammenhang der Summa Legum mit dem Tripartitum, in *Studia Slavica Hungarica* 11 (1965) 373.; Bónis György: *Középkori jogunk elemei*. Budapest, 1972, 237-249.; Bónis György: *Einflüsse des römischen Rechts in Ungarn*, Ius Romanum Medii Aevi V.10., Milano, 1964, 71.

Although the main conclusions of Tomaschek were confuted by German and Italian legal historians, he deserves our appraisal, because he discovered this unpublished manuscript, and he called our attention on it. Certainly, the anonymous author of the Summa legum has nothing to do with Austria or Wiener-Neustadt, as it is a derivative compilation from the *Summa decretalium* of *Goffredus Tranensis*, as it was shown by Besta.

After Tomaschek, the sources of the Tripartitum remained a very debated question. Seckel demonstrated that the Summa legum was widely diffused in Eastern Europe.[4] József Félegyházy wrote a book on the influence of canon law on the Tripartitum, where he tried to identify not only canonical, but Roman law sources, as well.[5] He found citations from Gratian, Liber Extra, Hostiensis, Thomas Aquinas, all authors from the 12-13th centuries. Recently, David Ibbetson and Martyn Rady has made some valuable contribution, but these regard only the Prologue of the Tripartitum.[6]

Is it thinkable that Werbőczy did not use other than 12-13th century sources? Is it thinkable that there are 'two Tripartitums', the Prologue and the remaining three Parts, the true Tripartitum?

In the 500th anniversary of the Tripartitum, I think, it is time to pay attention to Italian commentators, as well, if we want to paint a more detailed picture regarding the sources of the Tripartitum. It is obvious that we cannot pretend to do all this huge work in this paper, and we can only highlight some interesting points from the Tripartitum, and we cannot publish here our investigations on the whole Tripartitum, but, I think, it is worth trying.

2. The self defense in the Tripartitum III. 21-24.

The issue of the legitimate self-defense has been one of the most debated question in criminal law for centuries. The ancient Romans' criminal law was rather rude and the penal law was not a separate branch of law in Rome. In the Middle Ages, the Glossators made a new branch of law of which one of the first text-books was the Tractatus maleficiorum of Albertus Gandinus.[7] The penal law reached a considerable scientific level at the time of Werbőczy, and many treatises of penal law were available to him. The chapters of self-defense indicate that Werbőczy was acquainted with this legal literature, at least as to the legitimate self-defense.

In accordance with the Glossa[8], any person attacked by another, should have the right to counteract aggression against his own person or his goods, only if a controlled amount of blameless force (*cum moderamine inculpatae tutelae*) was used. Self-defense, therefore, requires a) proportionality, b) immediacy, c) intention of defending.

3. The proportionality requirement

Aggression can be repelled by many ways. The defender was required to choose the less harmful way of defending. The proportionality requires that the harm to be prevented significantly outweighs the harm that will be inflicted. The defender has to estimate the dangerousity of the assailant. The proportionality is assessed mainly by establishing which instruments and weapons were used, what was the physical force of the defender and aggressor like. An unarmed attack is not permitted to be fended off with arms, but a person may defend himself with weapons against an attack with arms. The legitimate defense ought to take into consideration the physical force of the attacker, and for this reason, if an assailant can cause such a harm, that could be prevented by the weaker defender only with arms, it is deemed that the legitimate defense is conducted in due proportion, if he uses a sword. It is very difficult to assess the proportionality, because on the other side there is only a potential harm, as the attacked person is not obliged to expect the end of the attack, in order to know clearly what is the real intention of the attacker. As Bartolus stated, it suffices to approach another with an unsheathed sword to begin to defend himself. Werbőczy[9] has a similar opinion, when he states that "if a person approaches another with an unsheathed sword it may at once be presumed that he plans either to kill him or to inflict a wound."[10]

4. The in continenti requirement

As the Gloss stated, the second requirement of the legitimate self-defense is the immediacy of the defense. The legitimate self-defense situation lasts as long as the unlawful attack. It ceases, if the unlawful attack ends. The unlawful attack, therefore, must be unended, when the self-defending action is going on. As it is stated by the Gloss, returning the blow after interruption is not an act of self-defense, but rather of vengeance. Those actions that aim to revenge, and not to self-defense, do not fall within the scope of legitimate self-defense. If someone has been struck, and the attacker runs away, but the offended person starts to pursue him, to return the blow, this is not an act of legitimate self-defense, but rather of revenge. According to Werbőczy, „if he has been already struck, and the striking stopped for a time,

4 Seckel, E., *Beiträge zur Geschichte beider Rechte im Mittelalter*, 1. kötet, Tübingen 1898, 497-498.; Rebro, K., *Summa Legum Raimundi v. metskom práve na Slovensku*, in Sbornik filozofickej fakulty Univerzity Komenského 15 (1961) 155-170.; Rebro, K., *I manoscritti della Summa Legum Raimundi Parthenopei in Slovacchia*, in *Atti del Convegno Internazionale di Studi Accursiani*, Bologna, 1963, III. kötet, Milano 1968, 955-980.

5 Félegyházy J., *Werbőczy Hármaskönyve és a kánonjog*, Budapest 1942.

6 Rady, M., *The Prologue to Werbőczy's Tripartitum and its Sources*, in *English Historical Review* 121 (2006) 104-145.

7 Kantorowicz, H., *Albertus Gandinus und das Strafrecht der Scholastik*, II. kötet, Berlin,Leipzig 1926.

8 Gl. *moderatione* ad C. 8.4.1., *unde vi*, l. *possidenti* (Lugduni 1627, coll. 2054.): „Moderamen circa tria attenditur. Primum, ut si armis inferatur violentia, et armis repellatur. Si sine armis, simili modo repellatur. (....) Secundum, ut in continenti flagrante adhuc maleficio violenter invasor repellatur. ... Tertium, ut ad defensionem, non ad ultionem seu vindictam. ... Item circa illud quod dixi de moderamine, primo quaeritur: Quid si pugnus unius plusquam alterius ensis percutit? Respondeo: defendat se ense propter inequalitatem virium, cum vim vi repellere omnia iura proclament. (...) Item numquid est necesse ut prius percuti expectes? Quidam dicunt quod sic. (....) Tu dic quod sufficit terror armorum, vel iactatio percussionum."

9 Tripartitum III.21.1.: „Nam, qui gladio evaginato alterum aggreditur, statim praesumitur, quod aut necem illi inferre, aut lethalia vulnera infligere machinatur."

10 The English translation of the Tripartitum is quoted in this article from S. Werbőczy, *The Customary Law of the Renowned Kingdom of Hungary in Three Parts* (the Tripartitum), ed. and trans. by János M. Bak, Péter Banyó and Martyn Rady, Budapest and Idyllwild, 2005.

then he had no right to return the blow after the interruption; for by doing so, it may be considered and judged that the return blow was not an act of defense but rather of vengeance: unless, the person struck was perhaps acting to escape other fresh blows which his attacker intended to repeat and continue. In other words, there is a difference between defense and vengeance: defense takes place at once; vengeance after a delay."[11] As it appears clearly, Werbőczy adheres to the Gloss.

It is an act of legitimate self-defense, if the unlawful attack has not been yet commenced, but there is a possibility that it can be carried out. If somebody was threatened to be killed, then the possibility of an unlawful attack is actual. Therefore, it was deemed as a self-defense situation by the Gloss, if the person was of the habit of putting his threats into effect. But if he was a weacker person or without arms, it was not deemed a self-defense situation. This was the opinion of Bartolus, as well.[12]

Baldus had a different opinion. He stated that a person who threatens to attack, did not started the commission of the crime, the verbal menace, therefore, can be only proportional with the verbal self-defense, but with the physical one cannot. According to Baldus, in the case of verbal threats, everybody should expect, and it is not permitted to re-attack.[13] There is only one exception, which is unknown to the Gloss. According to Baldus, it is permitted to carry out self-defending action against a verbal menace, only if the delay would be dangerous, because the person who threatens to attack is waiting for others to join him.

Werbőczy dedicates a separate paragraph to the question. As Werbőczy has it, "it must be said that although it is not permitted by the law and approved custom of our realm to attack another in response to threats or menaces (except in case and act of arson, where the person who threatens to set fire to and burn down a city, village, or another person's house is usually punished by death), nevertheless, by common law, if the man who threatened to kill another usually puts his threats into effect, and especially if he is powerful and has the habit of beating others, then (because the same act can be presumed again from his side) self-defense as well as attack is allowed, in order to avoid being killed. However, if the person is not of the habit of beating others or of putting his threats into effect, then it is permissible to argue with him and resist him by words, and not by arms or sword. Except perhaps if he is waiting for others to join him."[14]

It is clear from the Tripartitum that Werbőczy has accepted the doctrine of the ius commune of self-defense. Werbőczy refused to adhere to the Gloss, and he did not accepted the views of Bartolus, either, but he followed the doctrine of a later commentator, Baldus. Werbőczy did not accept the teachings of the Gloss or Bartolus, because it was not sufficient for him that the assailant is able to put his threats into effect, as it sufficed for the Gloss or Bartolus. Werbőczy mentions an important exception, which was formulated by Baldus, because for Werbőczy it is legitimate to repel the defender, who is waiting for others to join him, because the delay would be dangerous.

The use of these words makes it undeniable that Werbőczy was acquainted with the commentary of Baldus on the Codex Iustinianus, or at least he used a textbook drawn on Baldus. We could mention here the commentary of Angelus Aretinus[15] on the Institutes, which is not entirely identical, but many keywords are the same.

5. Intentionality of defense

As the Gloss states, the third requirement of the legitimate self-defense is the intention of defending. If there is no intention of defending, the counteracting conduct amounts to revenge. The intention of defending may be inferred from the circumstances. The unproportional defense is always an indication of revenge. The Gloss presumed the intention of defending, if the unlawful attack was going on. Werbőczy requires the intention of defending, as well, as he states that "regarding the protection of body and person, self-defense can be done and is allowed only immediately and before the wrong is completely finished or in the same fight and struggle during the commission of the first crime: that is, before the attacker (or the person who struck first)

[11] Tripartitum II.21.6.: „Si autem fuit jam percussus, et cessavit actus percussionis per aliquam moram: tunc non est sibi licitum repercutere post moram. Quia hoc modo non defensio, sed vindicta potius illa repercussio censetur atque judicatur. Nisi forte percussus faceret, ut evaderet alias percussiones, quas aggressor de novo facere et continuare praetendebat. Et sic differentia est inter defensam et vindictam, quia defensa sit in continenti, vindicta autem post moram infertur."

[12] Bartolus, *Comm*. in C. 2.19.9., *de his quod metus causa*, l. *metum* (Lugduni 1552, fol. 95va): „ Quando minae inferuntur, debet inspici persona inferentis minas. Sunt enim quidam potentes et ita mali quod illud quod dicunt, consueti sunt facere, tunc esset iustus metus ex minis et iactationibus, ut supra eo. l. si donationis. Si vero erat quidam homo, quod consuevit multum dicere et modicum facere, tunc non esset iustus metus."

[13] Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 16 (Venetiis 1615, fol. 134vb): „Sed numquid solis minis minatus possit percutere minatorem? Glossa dicit quod sic, si consuevit minas suas minator exequi, nam tales minae terrorem inferunt, ut l.j. si quacumque et l. 1 si rec. provin. Nam consuetudo et qualitas personae debet attendi in talibus, l.j. si quis imp., l. si de act. et obl. facit quod nota ff. de arb. l. licet (D. 4.8.15). Mihi videtur contra, quia licet minetur, non incipit delinquere facto, sed tantum verbo, nec procedit ad actum proximum, et ideo verbis resisti contrario verbo debet, non ad manus et ferrum veniri, facit quod no. in Spec. de accu. ver quid si vocavi te latronem. Verumtamen si in mora expectationis esset periculum, ex quo liquet de animo, starem cum glossa."

[14] Tripartitum III.23.1-2.: „Dicendum, quod licet de regni nostri lege et approbata consuetudine, propter minas et comminationes non sit licitum cuipiam alterum offendere (praeter combustionis et incinerationis articulum atque casum, in quo quilibet civitatem aut villam, vel alterius domum succendere, ignisque voragine conflagrare minatus, morte damnari solet): de lege tamen communi, si homo ille, qui minatus alteri mortem, solitus est minas suas executioni demandare, praesertim si fuerit potens et alias consuetus percutere (quia verisimiliter hoc idem praesumitur etiam de isto), mortis evitandae gratia admittitur defensa, pariter et offensa. Verum si non fuit solitus alias percutere, nec minas suas executioni demandare: tunc verbis quidem resistere, et ei contradicere permittitur, sed non ferro vel gladio; nisi forte ille expectaret socios, et mora periculum esset allatura."

[15] Angelus Aretinus, *Comm*. in Inst. 1.2.2., *de iure naturali, gentium et civili*, § *sed ius quidem civile*, n. 9 (Venetiis 1609, fol. 15va): „Quid si minatus est mihi, an possum eum licite offendere? Bar. in d.l. metum C. quod me.cau. dicit, quod si ille erat homo consuetus minas suas executioni mandare, quod est iustus metus, alias non, facit quod notat Bar. in l. de pupillo § si quis ipsi praetori. ff. de no. op. Sed Baldus in l. 1. C. unde vi, dicit, quod immo verbis est resistendum, et non ferro, nisi ille expectaret socios, et mora esset pericula allatura."

departs from the scene. For, as previously explained, if it is done afterwards, it cannot be called self-defense but vengeance."[16]

Another important question treated by Werbőczy in the Tripartitum was the duty of retreat. The unlawfully attacked person is often able to escape or to withdraw, but in these cases the self-defending action would be unnecessary and unproportional. It may be asked: the right of self-defense can be invoked by somebody who could have been retreated himself? There was a lot of discussion among the Glossators on the duty of retreat. Everyone was required to withdraw when retreat would not endanger his honour. The clerical persons were always required to withdraw, but the military persons were not.[17] Bartolus thought, that no one is required to retreat, and everyone has the right to counteract aggression.[18] Baldus taught, that if the injury affects only his property rights, everyone is entitled to expel foreign invaders, but in case of an attack against persons, it is legitimate to counteract, only if escaping endangered his life or his honour. If there is a danger of being attacked from behind, there is no need to retreat.[19]

Werbőczy holds the duty of retreat to be mandatory for everyone, although the text is not clear, and we could also presume that only the retreat in case of an attack against life was required by Werbőczy, but in case of an attack against property rights, it was not, as stated Baldus. In fact, Werbőczy explains[20] that one has to withdraw, if he can escape without a harm of his person and honour, hence we can deduce, that he has not to withdraw, if he can escape without a harm affecting his property rights, as Baldus stated.

In case of violent crimes, it is often impossible to elucidate who was the aggressor and who was the defender, who bate the other for the first time, that is who was the defender and who was the assailant. According to the Gloss, both are to be acquitted.[21] Baldus states, that everyone is an unlawful assailant, therefore punishable. According to Werbőczy, if it does not emerge clearly from testimony or otherwise which blow preceded the other, then the guilty will fall on the person who provoked the other to fight and to strike a blow. Werbőczy's opinion is identical with the teachings of Angelus Aretinus.[22]

In Tit. 24 of Part III, Werbőczy puts a further question: whether one can come to the help of another unlawfully attacked person. This chapter is fully in accordance with the ius commune. According to the natural law, only the attacked person has the right to defend. The legislator must carefully weight, if he extends or not the right to defend to other by-standing people. However, this can be dangerous, because these violent fights and firing can result in an all-in-wrestling. The commentators of the ius commune were aware of this danger, and hesitated to extend the right to defend to everybody. A special affection was required by the Gloss[23], and it was the reason why the Gloss acknowledged the right to defend the son, the parents, the spouse or the concubine. However, according to the Gloss, a stranger who is called on for assistance, can not come to the aid of an attacked person.

As Baldus taught,[24] if the attacked person is asking for help, every person, even a stranger is permitted to come to the aid of another to defend him from attack, as Bartolus taught already. Werbőczy follows the doctrine of the commentators saying that "anyone, even a stranger, who is called on for assistance, can always come to the help of a person he sees placed in mortal peril."[25] The source deriving from the ius

[16] Tripartitum III.22.1.: „Quantum igitur ad corporis et personae tutelam: debet fieri et admitti defensa in continenti, et ante consummatam injuriam, vel in eadem pugna et contentione, flagrante adhuc primo crimine, antequam scilicet aggressor vel primus percussor de loco recedat. Nam si postea fieret: non defensa (prout praenarratum est), sed vindicta diceretur."

[17] Huguccio Pisanus, *Summa Decretorum*, Tom. I. Distinctiones I-XX, Vatican City 2006, 42.: „Ex his omnibus patet quod nullus debet repercutere."; Goffredus Tranensis, *Summa* in X. 5.12., *de homicidio*, n. 6 (Venetiis 1586, fol. 205ra): „Ad hoc dicunt quidam quod licet laicis, clericis vero non. Ego credo quod clericis et laicis licet iniuriam propulsare et repercutere."

[18] Bartolus, *Comm*. in C. 8.4.1., *unde vi*, l. *possidenti*, n. 8 (Lugduni 1552, fol. 110rb): „Si ego potui evadere fugiendo, et nolui, sed volui resistere, an liceat? Et quidam distinguunt: Aut est persona cui fuga est verecundia, aut non. Mihi videtur indistincte dicendum, quem non debere fugere, nam aliquem fugatam esse est iniuria, ut l. item apud, § j. ff. de iniur., ergo propulsanda ista iniuria."

[19] Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 12 (Venetiis 1615, fol. 134ra): „Sed pone quidam fecit insultum contra me. Ego poteram a facie eius fugere. Non feci hoc, sed percussi eum. Queritur an puniar? Videtur quod sic, quia aliter poteram me defendere, scilicet fugiendo, et terga vertendo, et quilibet tenetur rumores fugere, nec se eis accomodare, ut ff. de poe. l. capitalium, § solent. Item ponere manus ad arma debet esse ultimum refugium et ultimum subsidium. Solutio: aut violentia infertur circa res ad earum occupationem vel destructionem, et non debet quis fugere, quia fuga trahit secum periculum. (....) Aut circa personas, non respectu rerum occupandarum, tunc aut fuga importat periculum, ut quia inimicus est sibi ad spatulas, et terga vertendo posset de facili vulnerari, tunc non debet fugere. (...) Aut fuga importat periculum honoris, et idem secundum Iacobum quia quilibet tenetur et debet honorem suum tueri, et omni lucro preferre, ff. si quis omis. cau. test. l. Iulia. Aut fuga nullum importat periculum, sed cautelam quandam, tunc debet quis fugere, quia sibi non nocet, et alii prodest."

[20] Tripartitum III.21.4.: „Quod si vero aggressus cum honore et salvatione personae suae aggressorem evadere poterit: tunc evadere et minus malum, ne maius sequatur, evitare tenetur."

[21] Gl. *sibi* ad D. 9.1.11., *si quadrupes pauperiem fecisse dicatur*, l. *cum arietes* (Lugduni 1627, coll. 1014.) „Sed quid si non apparet quis fuerit aggressus? Responde: neuter alteri tenetur, arg. infra ad legem Aqui. l. scientiam § cum instrumenta."

[22] Angelus Aretinus, *Comm*. in Inst. 1.2.2., *de iure naturali, gentium et civili*, § *sed ius quidem civile*, n. 7 (Venetiis 1609, fol. 15rb): „hoc casu potest intelligi quod praesumatur culpa in eo, qui provocavit."

[23] Gl. *nam iure* ad D. 1.1.3., *de iustitia et iure*, l. *ut vim* (Lugduni 1627, coll. 15.): „Sed quid si ob tutelam rerum suarum? Responde idem, dummodo cum moderamine, ut C. unde vi, l.j. (C.8.4.1). Item quid si ob tutelam alterius? Responde affectionem considerari."

[24] Baldus, *Comm. (rep.)* in C. 8.4.1., *unde vi*, l. *possidenti*, n. 12 (Venetiis 1615, fol. 134ra): „Queritur an cessante qualibet speciali affectione, possit quis assumere defensionem hominis ignoti? Et videtur quod non, quia gl. l. ut vim, dicit affectionem ponderari, sed ad ignotum nulla est affectio saltem singularis et notabilis. In contrarium videtur, praesertim si offensus exclamat: accurrite, accurrite. Primum, quia in defensionem rerum hoc licet, ut no. in lege 3 § eum igitur, de vi et vi ar., infra tit.1. l. 1, ergo multo magis in defensionem personarum."

[25] Tripartitum III.24.: „Adhuc quaeritur: an alius alium possit adjuvare? Dicendum, quod sic. Nam si pro tutela rerum, et haereditatum mearum possum amicos et fratres convocare: longe fortius pro corporis et personae meae defensione. Unde quilibet, etiam extraneus, dum in adjutorium acclamatur, poterit illum, quem in periculo vitae constitutum viderit, semper adjuvare."

commune is betrayed by a sentence where there is a reference to the defense of property rights, as a justification, because the application of the Roman norm for the defense of property to personal self-defense was an often used argument by the glossators and commentators.

6. Conclusions

Which conclusions can be deduced from this research? Above all, it became clear that the source of the Tripartitum was not the ancient Roman law, because Werbőczy did not quote and use the sources of Roman law, but the authors of the *ius commune*, that is the glossators and commentators who were the most up-to-date legal sources of that time. The glossators and commentators have substantially transformed and changed the Roman law. In the Tripartitum there is no close adherence to Roman law. Roman terms are used to describe medieval institutions. The texts of the commentators are applied to produce arguments to answer the needs of the Hungarian medieval society.

We have shown that Werbőczy used the legal sources of his own time, he was not behind his time. He was not backward or behind his time regarding canon law sources, as well. He used not only 12-13th century old canonical literature, but he studied decretalists from the 14-15th centuries, e.g. Johannes Andreae, Antonius de Butrio, and Dominicus de Sancto Geminiano. However, the proportion of canonical sources was not as important as Félegyházy and other Hungarian legal historians thought. Werbőczy paid much more attention to the civilian sources than the canonical ones. Bartolus and Baldus exerted much more influence on Werbőczy than the canonists did, whose importance is represented by the fact that they intermediated the doctrines of the civilians, instead of giving his own contribution.

The above-mentioned and discussed sources of Werbőczy are evidences that Werbőczy was not a half-educated and isolationist jurist of a backward country, but he was fully acquainted with the European legal science. The legal knowledge of Werbőczy was a modern and up-to-date legal knowledge.

We have shown, as well, that there is no reason to discriminate between the Prologue and the other parts of the Tripartitum. Important citations from the ius commune from Bartolus and Baldus, were incorporated not only in the Prologue, but also in the three other parts of the Tripartitum. We have shown that the doctrine of the self-defence derived from the ius commune was incorporated in the third Part of the Tripartitum, and these legal ideas from the learned law had a huge importance in the everyday legal practice, they were not a display of legal knowledge and learning.

The Appearance of General Principles of Law in the Historical State Administration Procedures in Hungary during the Socialist Era

*István Turkovics**

Abstract

The real significance of the basic principles is that they provide points of reference for legislative regulations, and, on the other hand, they facilitate the adequate enforcement of the relevant legislations as well as the interpretations of laws. In this study, I wish to present when and why the basic principles became integral parts of the rules of administrative procedures. In the laws of Socialist countries, one could usually find general regulatory laws on state administration procedures. Accordingly, it can be stated that recording the legal institution that can be considered as the most sufficient safeguard of legal security, i.e. the general principles of law in the field of administrative law proceedings already took place in Hungarian law during the Socialist Era.

Key words: *Socialist Era; State Administration Procedures; General Principles of Law; General Principles of Law.*

The so-called basic principles included in details in the Act on Procedural Law have a significant role in the effective Hungarian procedural legislations. The real significance of the basic principles is that they provide points of reference for legislative regulations, and, on the other hand, they facilitate the adequate enforcement of the relevant legislations as well as the interpretations of laws.[1] By now, a substantial number of decisions have been made in Hungarian legal practices – in the practices of the Constitutional Court as well as the Supreme Court and its successor, the Curia – which provide references for the appropriate applications of law through the interpretation of such basic principles, thus verifying the significance of legal principles from the aspect of legal institutions.[2] In this study, I wish to present when and why the basic principles became integral parts of the rules of administrative procedures.

General Principles of Law

Apparently, legal proceedings verify from time to time that despite the existence of written law, certain basic principles that are not explicitly included in substantive (written) law also have to be applied in legal practices. Principles of law of such nature first occurred in the practices of legal courts, and their name originates from the legal practice applied in France called "Conseil d'État".[3] It was also brought to the attention of jurisprudence, and as a result, different theories were published in relation to the general principles of law.[4] The first theories on the general principles of law were rooted in French jurisprudence. A certain amount of tension can be witnessed among the first theories of general principles of law, due to the fact that such principles were regarded as limitations on the powers of court judges by certain people, whereas others tried to prove the case to be the opposite. Nevertheless, it is a general fact that the theories of general principles of law also found support in the jurisprudence of other countries. The possible reason for this issue may be the fact that the theory of the general principles of law can be traced to a basis of natural law (although this is questioned by a number of authors). According to interpretations as per natural law, individual principles of laws as basic values are considered as the bases for the rule of law.[5] When taking courts practices into consideration, we can take similar assumptions, as – similarly to

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1 Lajos Szamel: Magyar Államigazgatási jog, General Issues, Sándor Berényi (editor) BM könyvkiadó, Budapest, 1984, pp. 658.

2 q.v.: It is related to the decision-making right of the client made within the given period of time, Resolution No. 72/1995. (XII.15.) of the Constitutional Court; Resolution on Administrative Law Uniformity ("KJE") No. 1/2010 (II.18.) or No. 1/2002 on the subject of uniformity from the aspect of law

3 In the legal practices of Conseil d'État (State Council), such principles of law were applied for grounding its resolutions that were not recorded in written legislations. At the same time, the Council also pointed out that it applies such principles of law because, according to its belief, the principles are in accordance with the intents of the legislator. Géza Kilényi: Az államigazgatási eljárás alapelvei, Közgazdasági és Jogi könyvkiadó, Budapest, 1970, (hereunder: Kilényi, 1970) pp. 9-10.

4 Kilényi, 1970 pp. 9-11

5 Kilényi, 1970 pp. 14

French court practices – British, and even German and Austrian courts applied so-called general principles of law in their practices. The theories of general principles of law first appeared in the middle of the 20th century (after World War 2). By this period, Europe was already in a politically and economically divided state. Consequently, the so-called "iron curtain" limited – among other things – many potential cross-border legal applications. This is also reflected by the statement made in relation to theories of general principles of law, according to which *„the whole concept of the general principles of law – which, whether intentionally or not, will lead to the legal basic principles' and, accordingly, the practical legal applications' opposition to or at least the separation from substantive law – is totally alien to the political science and the jurisprudence of states of the Socialist regime".*[6] However, in reality, the effects of the theories of general principles of law appeared in the legislations of Socialist countries as well as in socialist jurisprudence. The general principles of law or basic principles, however they may be called, were acknowledged within the legislations of Socialist countries. Accordingly, socialist jurisprudence interpreted basic principles as such principles of law in which general requirements are set out with respect to legal applications and legislative powers which go beyond (positive) substantive legal materials.[7] Perhaps it is not an exaggeration to claim that certain basic principles serving the roles of the general principles of law were already recorded in the administrative procedural codes of certain countries belonging to the Socialist regime, even overtaking the legal practices of Western European countries (naturally, in the subject of this study, and regarding state administration official processes.

Basic Principles in Administrative Proceedings

The application of the so-called basic principles in the administrative proceedings of public administration – formerly known as state administration – appeared relatively late, decades after the appearance of basic principles in civil or criminal procedural law. The reason for this later appearance may be traced back to the simple fact that regulated and separate public administration was formed relatively late, let alone the regulatory framework of administrative proceedings. Accordingly, as public administration law can be considered as the 'youngest' of the classic branches of law, it can be concluded – if one examines the history of law in Hungary in this subject - that the development of laws of this category (including court practices and the scientific aspects of public administration) took place later. The first law to regulate administrative processes was the Spanish State Administration Act adopted in 1889.[8] It was followed by the 1925 Austrian State Administration Procedural Code[9], which made a significant impact on Hungarian legislations as well. Austrian regulations (serving the basis for future administrative procedural codes) were one of the contributing factors due to which state administration procedures were codified in other countries; in 1928 they were codified as a government decree in Czechoslovakia, and as a law in the same year in Poland, and also as a law in Yugoslavia in 1930.[10] The regulations of administrative processes of public administration were in no better situation in the Socialist countries, as there was actually only one Soviet member state, the Ukrainian Federal Socialist Republic, where a Public Administration Code was adopted and published in 1927, which, although it was not a legislation of procedural law, did contain certain general procedural regulations. Only after these years did the concept of the unified regulation of state administration emerge in the Soviet Union at the level of the whole Federation, after the relevant regulations had already been adopted with respect to the complaint procedures; these issues were regulated by the decrees made by the Council of Public Counsellors of the Soviet Union in 1933 and in 1935.[11] However, developments in line with international legal practices came to a halt after World War 2 had broken out.

When studying the Hungarian situation regarding administrative procedures within public administration, we can come to a similar conclusion. It is a fact that Act XX of 1901 unified the regulations on legal remedies with respect to administrative procedures of public administration. However, developments were halted at that point, as Act XXX of 1929 –specifying rules on spheres of authority and legal remedies - was effective until World War 2. Another legislation in the subject was Ministry Decree No. 5500/1929 (Ministry of the Interior), which contained some general rules of procedure.[12] However, it must be noted that the issue of codifying the administrative procedures of public administration were continuously debated in Hungary until World War 2 broke out. This is also demonstrated by the literary work of József Valló published in 1937 - in the work written in the subject of preparing the public administration bill, Valló used the term "basic principles" not as a detailed rule; this may mean that he considered the discussion of issues related to basic principles to be important[13] – and the one published in 1942, as well as by the bill prepared by Jenő Szitás in 1939. Similarly to other countries, the Second World War brought further developments in legal practices in Hungary as well.

The first steps taken with respect to codification matters proved that high quality regulatory affairs required certain general principles of law to be taken into consideration. At that time, this did not mean that such principles of law were stipulated as individual articles in different laws, potentially in the form of basic principles, but they were indeed reflected in the resolutions of the legislations. One of the reasons was the fact that in general, there were three aspects playing significant roles in codification attempts. The first and the second aspects were the already codified civil and criminal procedural laws, as well

6 Kilényi, 1970 pp. 16
7 Imre Szabó: A szocialista jog, Közigazgatási és Jogi Könyvkiadó, Budapest 1963, pp. 66-67
8 Anita Paulovics: Az általános és különös eljárási szabályok a közigazgatásban Bíbor kiadó, Miskolc, 2003, pp. 31
9 Allgemeines Verwaltungsverfahrengesetz – hereunder: AVG
10 Preface of Zoltán Magyary in József Valló, Közigazgatási eljárás, Magyar Közigazgatástudományi Intézet, Budapest, 1937
11 Kilényi, 1970 pp. 36
12 ,Magyar Közigazgatástudományi Intézet (Hungarian Academic Institute of Public Administration), Budapest, 1937, pp. 8
13 József Valló, Közigazgatási eljárás, Magyar Közigazgatástudományi Intézet, Budapest, 1937. pp. 10

as the outcomes originating from them that could be found in the jurisprudence of civil / criminal law. The obvious reason for their progress was that these two branches of law were in more advanced states compared to public administration law, as they had been codified earlier.[14] Despite the divergent characteristics of these three fields of law, there are, without doubt, certain basic principles, which are applicable to any and all procedures, regardless of their types. If you take the basic principles with respect to the rule of law as an example, they have to be present in the procedural laws of each field of law.

The third aspect is judicial practices established in state administration cases. Undisputedly, legal courts can shape laws through their decision-making practices, not only in British, but also in Continental law. This is particularly true with respect to areas where the regulations of administrative procedures are incomplete or not refined. The application of the general principles of law in court practices, however, was actually induced by the lack of relevant and applicable legislations. The first public administration court in Austria was established in 1875; it the course of its operations, the court set out legal practices with respect to procedures applied by public administration authorities, and also specified important theoretical aspects. Such theoretical aspects were then developed further and systemised by theoreticians. Practically, this process served as the basis for the establishment of the law on administrative procedures; the law stipulated both the basic procedure as well as the phase of legal remedy.[15] Accordingly, even the very first procedural law included some principles that could later be included as basic principles in the regulations of other countries. Such regulation was, among others, the principle of conducting practical, fast, simple and cost-effective procedures in AVG, which can be considered as a pathfinder law in the subject.[16]

Basic Principles in the Administrative Procedural Laws of Countries Belonging to the Socialist Regime

After the Second World War, Hungary became one of the countries belonging to the Socialist Regime, and accordingly, the Hungarian legal system was also reorganised. This, however, did not hinder further improvements in law, which was actually based on demands, as the general and complex law regulating administrative procedures of public administration was adopted in 1957. It was the first Hungarian administrative procedural code, Act IV of 1957 (Act on Procedures, "AP"). Although this law did not include specific basic principles, it had a number of regulations which later became basic principles, therefore the effects of the general principles can be demonstrated. Such regulation, among others, is the protection of rights acquired and applied in good faith.[17] This basic principle proved to be long-lasting, as it is one of the legal issues brought up the earliest times in administrative proceedings of European public administrations.[18] This principle obviously became one of the regulations with the aim of satisfying the demand for legal security, for the legal force applied in state administration affairs in a special way. Accordingly, the reason for establishing regulations can ultimately be traced back to the basic requirements of the rules of law. However, researches in the subject of basic principles did not stop upon the adoption of the law; actually, it may be stated that they even gained more strength.[19] I believe that it can be pointed out that that a facilitating issue for this trend was the fact that out of the Socialist countries with effective laws on state administration procedures, the Hungarian PA was the only one lacking the specific definitions of basic principles.[20] It is true, however, that the procedural laws in the different Socialist countries could not be considered as unified with respect to the issue of basic principles, not even specifying such principles in a separate article, such as in the case of Yugoslavia[21] or such as defining basic principles based on other rules, like in Bulgaria[22]. Nevertheless, I believe that it can be verified – as the practices of the given age also demonstrate – that no effective procedural regulations can be prepared – at least, in a practical manner - without specifying the basic principles.

Codification of the 1981 Changes in the Basic Principles regarding Administrative Procedures

The year 1981 was a significant milestone in the evolvement of Hungarian administrative procedures, as the AP was substantially revised, and as a result, Act I of 1981 on State Administration Procedures was adopted. The title of Article 2 of the "new" law was "Basic Principles". The law was adopted during the Socialist Era, and the legal systems of countries belonging to the Socialist regime were based on the same ideological principles. Nevertheless, if you compare the basic principles set out by different state administration procedures, you can find differences even where such principles were actually

[14] Valló also is used to outcomes of the two other procedural laws: *„As, when I looked up the legislations that can be considered as related to this subject and have been adopted as Acts and Ministry Decrees since 1867, it became apparent to me that we cannot find answers to several procedural law-related questions in such legislations. Accordingly, researches had to be extended to other fields of law; namely, it needed to be stated whether or not the orders and decrees of criminal and civil law procedures could be applicable in the cases of public administration procedures.",* Valló, 1937. pp. 9; years later, Géza Kilényi also applied this method, Kilényi, 1970 pp. 32

[15] Preface of Zoltán Magyary in: József Valló, Közigazgatási eljárás, Magyar Közigazgatástudományi Intézet, Budapest, 1937.

[16] AVG Article 44 in: Valló, 1937. pp. 19

[17] The academic law of the era classified this rule among the safeguards of the legality of orders. Ferenc Toldi: Államigazgatási jog, Általános rész (General Section), Sándor Berényi (editor) BM Tanulmányi és propaganda Csoportfőnökség, Budapest, 1975, pp. 428

[18] Gergely Barabás: Nagykommentár a közigazgatási eljárási törvényhez (editor) Barabás-Baranyi-Kovács, Complex, Budapest, 2013, pp. 24

[19] This is proven by the publication of several works in which the basic principles of state administration law are discussed: Kilényi (1970), Imre Szabó (1963), Imre Szabó: Szocialista jogelmélet-népi demokratikus jog. Budapest. 1967, pp. 122; Mihály Samu: A szocialista jogrendszer tagozódásának alapja. Budapest, 1964 pp. 42; Lajos Szamel: Az államigazgatás törvényességének jogi biztosítékai, Budapest, 1957, etc.

[20] Kilényi, 1970 pp. 64

[21] In Yugoslavia, Article I of the Procedural Law provided details on basic principles. Kilényi, 1970. pp. 64

[22] The Bulgarian Procedural Law does not mention specific individual principles of the rules of procedure, it presents the principle of legality and the protection of rights within the rules of the effectiveness of the law. Lajos Szamel: Magyar Államigazgatási jog, General Issues, Sándor Berényi (editor) BM könyvkiadó, Budapest, 1984, pp. 661

recorded.[23] This had adverse effects on the improvement of legal issues with respect to basic principles. Accordingly, legislators were not in the comfortable situation of being able to rely on properly tried and tested, internationally accepted practices in this field. Moreover, court practices could not provide support either, as no court proceeding public administration cases was in operation at that time in Hungary.[24] Although court reviews were indeed applied with respect to state administration resolutions, but only regarding specific types of cases, and this could not substitute general court practices regarding public administration cases. We can say that a certain amount of uncertainty could be witnessed with respect to the introduction of the basic principles in this period. Perhaps this lack of general court practices of state administration cases was the main reason that generated the cautiousness of some of the legal professionals with respect to the introduction of basic principles. In this period, legal applications of public administration were not restricted by existing court practices and experiences, therefore bodies of law enforcement had higher power in their hands. Concerns could rightfully emerge regarding, for example, what limitations could be available towards bodies of law enforcement in case such bodies should apply the basic principles in an arbitrary manner, in line with their interests. It was a potential real threat that bodies of law enforcement would use the basic principles based on an unlawfully extended or restricted interpretation of the principles, or they arbitrarily fill up some existing or potential loopholes, referring to one of the basic principles.[25]

The significance of basic principles is not decreased by the lack of unified socialist regulatory practices, as there is a kind of shift in the focal points of different basic principles. Accordingly, I believe that the specification of certain principles and legal institutions as basic principles is debatable, whereas there are other principles which are essential and integral basic principles. On the other hand, basic principles cannot be fully separated from one another, as certain general requirements are set out in some basic principles which only contain certain elements of other basic principles. Accordingly, whole-part relationships can be demonstrated between some basic principles. In my opinion, an objective demand towards an administrative procedural code is that certain, so to say essential basic principle(s) should be set out in such codes. Such essential basic principles include principles directly related to the need for the rule of law. Furthermore, however, the subject of principles of law included as basic principles is actually only a secondary issue, because in case a broadly interpretable principle of law is included in the regulations, it can be broken down to several content elements. In my view, law enforcement can be improved if an element of a broader basic principle is individually stipulated among the basic principles, but does not become an essential part of the regulations. If this principle cannot be applied, it logically leads to the prejudice of the basic principle containing the smaller unit. In reverse cases, if the basic principle containing more general principles of law is prejudiced, the prejudice of a smaller element of such principle may become irrelevant. If one examines the basic principles set out in the procedural codes of the countries included in the table below on the basis of their contents, it can be stated that they do not have significantly large differences. The principle of legality, for example, appears in all three codes. The right of persons to be informed, although named differently, is also included in all three codes, and the list could go on.[26]

Conclusion

In the course of my studies, I found some statements according to which the application of certain legal institutions - the application of basic principles, in particular – which could provide opportunities of legal applications contrary to substantive laws were unwanted in the laws of Socialist countries[27]. This, on one hand, can be considered in a way that basic principles were viewed as applications of legal institutions, which – contrary to their functions – would actually threat legal security. It can also be interpreted in a way that basic principles were assumed to be a barrier in executing the decisions of the single-party states. According to the points of view presented in this study, however, the facts prove a different situation. In the laws of Socialist countries, one could usually find general regulatory laws on state administration procedures. When studying the development of the Socialist state administrative procedural rules, Socialist regulations may provide proper clues, as they can be considered as individual chapters of legal fields. In contrast to the above statement, it can be pointed out that - although not with unified content, and by different means, for example being separately specified or placed among the regulations under different names - the general principles of law are almost always present. Regarding Hungarian legislations, it can be said that certain principles of law already appeared in the first law (1957), and its revised, improved version (1981) reached a level where the basic principles were actually separately defined. Accordingly, it can be stated that recording the legal institution that can be considered as the most sufficient safeguard of legal security, i.e. the general principles of law in the field of administrative law proceedings already took place in Hungarian law during the Socialist Era. The significance and modern approach of this issue is well demonstrated by the fact that the law remained effective after the 1990 change in the political system for 15 more years with some smaller and larger amendments. In fact, if we examine the Basic Principles section of the currently effective legislation, it can be concluded that they are based on the principles included in the very first regulations.

[23] see Table 1

[24] István Stipta: "Történeti érvek az önálló közigazgatási bíráskodás és a körültekintő igazság-szolgáltatási reformok mellett". Közérdekvédelem (Protection of Public Interest), PPKE JÁK- KIM, Budapest, 2011, pp. 62

[25] Lajos Szamel: Magyar Államigazgatási jog, General Issues, Sándor Berényi (editor) BM könyvkiadó, Budapest, 1984, pp. 660

[26] see Table 1, Section 10 of Yugoslavian law, Section 6 of Polish law, and Section 8 of Hungarian law

[27] Kilényi, 1970. pp. 16

Basic principles in the Yugoslavian Procedural Law (1958)	Basic principles in the Polish Procedural Law (1960)	Basic principles in Act I of 1981
1. The principle of legality	1. The principle of legality	1. The principle of legality
2. Protecting public interests and civil rights	2. The principle of expediency	2. The principle of humanism
3. The principle of substantive justice	3. Authority guarding over compliance with public legality	3. The principle of democracy
4. The principle of free discretion of evidence	4. The principle of officiality	4. The principle of unity of rights and obligations
5. The principle of hearing all parties	5. Protecting social interests and fair civil interests	5. The principle of concordant interests
6. Independence of the body in making decisions	6. The principle of legal information of citizens	6. The principle of legal proceeding participants' obligation to co-operate
7. Right of appeal	7. The basic principle of right for expressing one's opinion	7. The principle of equality under law
8. The principle of irrevocability of decisions	8. The principle of belief	8. The principle of ensuring the procedural rights of clients
9. The principle of ensuring proceedings to be economical	9. The principle of fastness and simplicity	9. The principle of ensuring the fastest and most simple proceedings
10. Informing the disputed parties about the respective laws	10. The principle of written records	
11. The use of mother tongue	11. The principle of the permanence of decisions	
	12. The principle of activities aiming to enhance trust towards public administration bodies	

Table 1: Basic principles in the Codes of Procedural Law in the Socialist Era[28]

[28] Kilényi, 1970. pp. 64-65; Szamel, 1984. pp. 659.

Die Rotschlammkatastrophe in Ungarn
(Red Mud Catastrophe in Hungary)

*Judit Kertész**

Abstract

On October 4th, 2010, Hungary suffered its biggest ever ecological accident, which became known as the red mud catastrophe. This unprecedented natural disaster raised a number of legal questions. Germany also had to face a similar problem due to an explosion in a chemical plant of Oppau in the early 20th century.

As a result of the natural disaster, members of the public administration were overwhelmed with various tasks. This article examines to what extent they were able to manage these tasks and what challenges they had to face. The catastrophe evidently necessitated changes in the legal framework as well in order to prevent or eliminate a forthcoming accident.

Key words: *red mud catastrophe; government; mayor; police; the military; financial support; changing laws.*

„Der Mensch kann sein Leben nicht ändern,
ohne sich selbst zu ändern."
Simone de Beauvoir

1. Einführung

Der obige Gedanke von Simon de Beauvoir, der auf die Wichtigkeit und die Wirkung der Änderung verweist, trägt eine außerordentliche Lehre in Verbindung mit der *Rotschlammkatastrophe*[1] in sich.

In Südungarn (Kolontár, Devecser, Somlóvásárhely) kam es am 4. Oktober 2010 zur sogenannten Rotschlammkatastrophe. Deshalb beschäftige ich mich mit diesem Thema, weil es eine beispiellose ökologische Katastrophe war und die Auswirkungen sowohl juristisch als auch ökonomisch bis zum heutigen Tage zu spüren sind. Ich gehe dieses Thema von der verwaltungsrechtlichen Seite an und lege Wert auf die Reaktion der staatlichen Organe und Selbstverwaltungsorgane. Die Katastrophe stellte für das ungarische Verwaltungsrecht eine große Herausforderung dar.

Es stellt sich die Frage, ob der juristische Hintergrund entsprechend war. Weiterhin ob die Behörde die notwendigen Maßnahmen getroffen hat und man der Katastrophe hätte vorbeugen können? Und wie man eine erneute Tragödie verhindern könnte.

Leider kam es Anfang des 20. Jahrhunderts schon zu ähnlichen Unfällen. *Im deutschen Verwaltungsrecht* kennt man dieses Problem, seitdem 1921 auf dem BASF-Werksgelände in Oppau bei Ludwigshafen ein Düngemittel-Silo explodierte. 561 Menschen fanden dabei den Tod, fast 2000 wurden verletzt. Das Chemiewerk war ein einziges Trümmerfeld, auch von den damals etwa 1000 Wohnhäusern in Oppau waren 800 total zerstört oder unbewohnbar. Die Explosion von 4500 Tonnen Ammoniaksulfatsalpeter hatte einen 125 Meter langen, 90 Meter breiten und knapp 20 Meter tiefen Krater ins Erdreich gerissen. Im Umkreis von 25 Kilometern wurden Dachziegel abgerissen und Türen und Fenster aus den Angeln gedrückt. Im etwa 20 Kilometer entfernten Heidelberg blieb die Straßenbahn in Scherben stecken. Die Detonation war so gewaltig, dass noch im etwa 90 Kilometer entfernten Frankfurt am Main Fenster barsten.[2] Auch diese furchtbare Katastrophe bedeutete ernste Schwierigkeiten für die deutschen Behörden; ähnlich wie 2010 in Ungarn.

Heuzutage bedeutet die globale Erwärmung eine ernste Gefahr für alle Länder. Außerdem wirkt sich der Einsatz von Pestiziden in der Landschaft auf Mensch und Tier schädlich aus. Wenn wir die Häufigkeit der ungarischen ökologischen Katastrophen mit den anderen Ländern vergleichen, könnnen wir behaupten, dass Ungarn ein mittelmäßig gefährdetes Land ist. Die größte

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1 Der Rotschlamm ist ein Nebenprodukt bei der Herstellung von Aluminium.

2 http://www.welt.de/newsticker/dpa_nt/infoline_nt/thema_nt/article115410885/Die-Chemie-Katastrophe-von-Oppau- 1921.html (abgerufen am: 25.06.2013)

ökologische Gefahr haben besonders folgende Länder: Spanien, Italien und Frankreich; aber Mittel-Deutschland, Tschechien und das südöstliche-Großbritannien ist auch gefährdert.[3]

Leider war es nicht die erste ökologische Katastrophe in Ungarn. Am Anfang des XXI Jahrhunderts ist eine andere Misere – *die sogenannte Zyanverschmutzung* - geschehen, obwohl sie keine Menschenopfer gefordert hatte. Der Damm ist in der Nähe von dem Dorf Zazar in der Nacht am 30. Januar 2000 zirka 25 Meter lang gerissen. Das Abwasser, das das Zyankali und das Schwermetall enthielt, ist in den Fluss Lápos geflossen und hat die Theiß durch den Fluss Szamos erreicht.[4] Ein großer Teil des Fischbestandes ist eingegangen, es hat zu viel Zeit gedauert, dass die Biosphäre der Theiß dem Zustand 2000 angenähert werden konnte.

Die Abwehr der Katastrophen ist eine nationale Angelegenheit, und staatliche Aufgabe, d.h. einheitliche Lenkung und einheitliches Vorgehen. Bei den gesetzlich benannten Organen, ist es das Recht und die Pflicht für alle auf irgendeine Art die ökologischen Katastrophen abzuwehren. Diese Regelung ist durch das Gesetz über den Katastrophenschutz befestigt, das Gesetz wurde am 19. September 2011 verabschiedet und trat am 1. Januar 2012 in Kraft.[5] Das Gesetz besagt, dass alle Staatsbürger bzw. die Einzelpersonen das Recht haben, die Katastrophengefahren in der Umgebung kennenzulernen, sich die wegweisenden Schutzregeln anzueignen, und alle dürfen und müssen im Katastrohenschutz mitwirken.[6]

Das sogenannte *Katastrophenschutzgesetz* benennt zum ersten Mal „die Katastrophe" und systematisiert die Aufgaben der Regierungen, der Ministerien und der landesweiten Organe in der Verteidigung. Außerdem sind der Sitz und die Funktion der zentralen Organe in der Aufbereitung, in der Vorbereitung und im fachlichen Management festgelegt. Das Ziel war, dass sich die zu entscheidenden Ebenen immer mehr den lokalen Organen und den Staatsangehörigen nähern. Anhand der bisherigen Erfahrungen können wir sagen, dass es eine größere Wirksamkeit ergibt, als eine übertriebene Zentralisierung. Man fällt die aktuelle rechtskräftige amtliche Entscheidung in solchem Level, wo die nötigen Daten, die Informationen, die Asservate zur Entscheidung vorgelegt werden. Einer der wichtigsten Grundsätze des Katastrophenschutzes ist, dass man sich bei den Notfällen zuerst auf die Lokalen vorbereiten muss.

In meinem Artikel suche ich die Lösung, wie die Dezentralisierung herrschen konnte und welche Aufgaben die staatlichen Organe erledigen konnten.

In der Ajka-Region, wo die Rotschlammkatastrophe passiert ist, werden industrielle Rohstoffe produziert. *Kolontár, Devecser und Somlóvásárhely* liegen in Mittel-Transdanubien, im Komitat Veszprém.

Kolontár hat die kleinste Bevölkerung, mit weniger als 1000 Einwohnern. Der Bereich und die Population von Somlóvásárhely ist größer als Kolontár, wobei die größte Siedlung die Stadt Devecser ist. 5000 Menschen leben auf etwa 64 km^2.[7] Diese Fläche wird mit dem Planeten Mars seit der Rotschlammkatastrophe verglichen, weil es sich zu einem kargen und unbewohnten Bereich verändert hat.

Im Folgenden präsentiere ich die Partizipation und den Auftritt der staatlichen Organe und der Selbstverwaltungsorgane und lege Wert auf den relevanten juristischen Hintergrund mit Bezug auf die Rotschlammkatastrophe.

2. Die Reaktion der staatlichen Verwaltungsorgane

Für alle Länder ist es eine große Herausforderung den Katastrophen vorzubeugen, um die befriedigende Abwehr zu sichern, und die Wiederherstellung zu organisieren. Der klassische staatliche Ansatz besagt, dass der Staat zunächst das Recht, die Ordnung und die öffentliche Sicherheit zu garantieren hat.[8] Im XX. Jahrhundert wurde diese Ansicht allmählich verändert, und es wurde wichtiger, als früher, dass der Staat in einem gewissen Grad Verantwortung für das Schicksal und den Wohlstand seiner Bürger hat.[9] Also der Wohlfahrtsstaat soll sich auch mit anderen Problemen außer der öffentlichen Ordnung beschäftigen.

Es hat sich bestätigt, dass nur der Staat Funktionen besetzen kann. *Nach Meinung Fukuyamas*[10] ist die Stärke des Staates wichtiger, als der Umfang seiner Funktionen. Die staatlichen Organe sollen die Katastrophen abwehren, die individuelle Initiative ist nicht ausreichend, die Folgen der Liquidation wird viele persönliche, technische und finanzielle Direktion benötigen. Die staatlichen Organe, die an der Liquidation der Folgen teilnehmen, müssen verschiedene Aufgaben übernehmen, um die Wiederherstellung zu verwirklichen.

Man kann die Katastrophen *in vier Typen* nach der Voraussichtbarkeit und nach der Verhütbarkeit einordnen:

der 1. Typ: voraussehbar und verhütbar;
der 2. Typ: voraussehbar, aber nicht verhütbar;
der 3. Typ: nicht voraussehbar, aber grundsätzlich verhütbar;
der 4. Typ: nicht voraussehbar und auch nicht verhütbar.[11]

Die Schlammkatastrophe in Kolontár wird in den ersten Typ eingeordnet. Der Unfall war voraussehbar und verhütbar, trotzdem hat kein Organ damit gerechnet. Die staatlichen Behörden und Institutionen haben sich in den ersten Tagen geäußert, dass

[3] http://www.agroinformszaklap.hu/cikkek/viz_es_kornyezetgazdalkodas/klimafelmelegedes_fokozodo_rovarveszely_es_vegyszerfelhasznalas (abgerufen am: 25.06.2013)
[4] http://ozonenetwork.hu/ozonenetwork/20100130-tiz-eve-tortent-a-tiszai-cianszennyezes.html (abgerufen am: 26.06.2013)
[5] Über den Katastrophenschutz und über einige modfikante Gesetze, die zum Katastrophenschutz gehören 2011.CXXVIII. Gesetz *(im Weiteren: Über das Katastrophenschutzgesetz 2011. CXXVIII. Gesetz)*
[6] Über das Katastrophenschutzgesetz 2011.CXXVIII. Gesetz §1 Abs.2.
[7] http://www.magyarkarmentoalap.hu (abgerufen am: 30.06.2013)
[8] Egedy, 2010, 27. S.
[9] do.
[10] *Yosihiro Francis Fukuyama ist ein amerikanischer Philosoph, politischer Ökonom und Schriftsteller. In seiner Arbeit - „Über den Staatbau" – macht er einen klaren Unterschied zwischen dem Umfang der staatlichen Rolle und der Fähigkeit des Staates, wie er die Gesetze einhalten lässt.*
[11] Hajnal, 2008, 23. S.

die Zusammensetzung des Rotschlammes keine ernste Gefahr bedeutet, aber sie hatten nur frühere Messergebnisse.[12]

Später hat es sich durch die verschiedenen Plätze erwiesen, dass der Rotschlamm sehr gefährlich für die Umgebung ist. Der Rotschlamm wird als sekundärer Rohstoff wegen der inneren Metalle betrachtet, er enthält in der größten Quantität Eisen. Die Ungarische Wissenschaftliche Akademie schätzt zirka 15-18 Millionen Tonnen Eiseninhalt in den 50 Millionen Tonnen Rotschlamm, die in Ungarn anzutreffen ist (davon sind 15 Millionen Tonnen Feuchtigkeit).[13] Tatsache ist, dass wenn man den Rotschlamm bei den aktuellen Techniken nutzbar machte, es nur rentabel wäre, wenn die Rohstoffpreise und die Energiepreise niedriger würden. Aber am 4. Oktober 2010 verursachte gerade der nutzbare industrielle Stoff das Problem. In Devecser haben 319 Soldaten und 127 militärische Fahrzeuge, sowie 5 Wagen für die Rettung einer möglichen Evakuierung der Menschen bereitgestanden.[14]

Die Bereitschaft zeigt auch, dass die Rotschlammkatastrophe eine echte Gefahr war und sie entspricht dem Katastrophenschutzgesetz. Gemäß Gesetz ist *die Katastrophe* ein Zustand, der für den Ausruf der Gefahrenlage geeignet ist bzw. eine mildere Situation ist. Dieser Zustand gefährdet das menschliche Leben, die Gesundheit, den materiellen Wert und die natürliche Umgebung so, dass spezielle Maßnahmen eingeführt werden müssen. Solche Maßnahmen sind wichtig, um den Schäden vorzubeugen und die Folgen abzuleiten.

Die Katastrophengefahr ist ein Prozess oder ein Zustand, bei dem man mit Wahrscheinlichkeit mit einer Katastrophe rechnen kann und sie gefährdet dadurch die menschliche Gesundheit, die Umwelt, die Lebenssicherheit und die materielle Sicherheit.[15]

Das heisst, die effektive Teilnahme der staatlichen Verwaltungsorgane war für den gesetzlichen Zustand unabkömmlich.

Im Zusammenhang mit dem Katastrophenschutz fallen den Verwaltungsorganen herausragende Aufgaben *der Regierung* zu. Die Regierung ist ein allgemeines zuständiges Organ in der Verwaltung.[16] Die Regierung darf die Anwendung der Zivilschutz-Organe bei Gefahr verordnen, und entscheidet über den Einsatz der Ungarischen Armee und der Polizei. Nach der Katastrophe hat sich die Regierung als ersten Tagesordnungspunkt mit dem Desaster beschäftigt. Die Regierung hat den Katastrophenfall in Veszprém -, Győr-Moson-Sopron-, und im Vas-Komitat verordnet.[17] Die Regierung hat die wichtigste finanzielle Maßnahme erbracht, sie hat die Ungarische Stiftung für Schadensrettung geschaffen. Weiterhin hat sie in Kolontár und in Devecser deshalb Badezelte aufstellen lassen, damit sich die Leute direkt nach ihrem Einsatz noch in der Schutzkleidung abwaschen konnten. Für die Vorbereitungsmaßnahmen der Regierung bezüglich des Katastrophenschutzes sowie für die Abstimmung der Entscheidungen ist das Komitee für Regierungskoordination verantwortich. Es macht die folgenden Aufgaben für den Katastrophenschutz: die Vorbereitung der Entscheidungen, die Ausrüstung, die Vorbeugung und die Wiederherstellung.[18]

Es hat eine koordinative nicht so eng-bindende Rolle unter den Einrichtungen. Das Organ für Regierungskoordination verfolgt die Vollziehung, die in den zwei-und dreiseitigen Vereinbarungen sind.[19] Wenn eine solche Katastrophe ist, die sich über viele Komitate erstreckt, stimmt das Organ die verschiedenen Aufgaben miteinander ab. Es bezieht die Aufgaben der regionalen Einrichtungen und die Umschichtung der finanziellen Mittel mit ein.[20]

Der Bürgermeister nimmt an den Katastrophenschutz-Problemen teil. Er führt und bewerkstelligt örtlich die landesweiten Staatsverwaltungsaufgaben in landwehrlichen, in Zivilschutz- und Katastrophenschutzfällen, er gibt das Gesetz und die Regierungsverordnung an. Ich meine, dass die örtliche Führung am effizientesten für die Dezentralisation geeignet ist, weil die örtlichen Verhältnisse am Standort bekannt sind und so kann man sich auch auf die Quellen konzentrieren. Bei der Zentralisation ist die Entscheidungsebene von der Möglichkeit der präventiven Intervention zu weit entfernt. Das sogenannte „Zentralisation-Dezentralisation"-Problem ist schon sehr lange anwesend in der ungarischen Verwaltung, und die Rivalisierung zwischen den Staatsverwaltungs-Zweigen erschwert wahrscheinlich die konkreten und wirksamen Maßnahmen.

Der Bürgermeister versorgt unter anderem die folgenden Aufgaben in der Verteidigung:

a) er führt die Katastrophenschutz-Tätigkeit neben der fachlichen Anweisung des professionellen Organs in der Siedlung;
b) im dringenden Fall verfügt er zeitweise über die Massnahmen, die zum Schutz des Lebens und der materiellen Güter nötig sind;
c) die Staatsangehörigen, die unter der Zivilschutzpflichtung stehen, verpflichtet der Bürgermeister zum Zivildienst für den Katastrophenschutz;
d) er organisiert und führt den Schutz-, die Aussiedlung-, die Evakuierung-, die Übernahme,- und die Zurücksiedlung der Einwohnerschaft;[21]

Weiterhin hat der Bürgermeister von Ajka den geschädigten Siedlungen geholfen: Zum Beispiel hat er die Sporthalle zur Verfügung gestellt und hat die medizinische Pflege für die Bevölkerung von Kolontár, von Devecser und von Somlóvásárhely gesichert.[22]

Die Aussiedlung begann in der Rotschlammkatastrophenlage so, dass sich die Einwohner bei den Mitarbeitern des Ka-

[12] Jávor, 2011, 10. S
[13] http://www.fn.hu/zold/20101008/kitorhetjuk_vorosiszap_meregfogat (abgerufen am: 30.06.2013)
[14] http://gazdasagiradio.hu/cikk/54574/. (abgerufen am: 01.08.2013)
[15] Über das Katastrophenschutzgesetz 2011. CXXVIII. Gesetz, §3 Punkt 9.
[16] Die zentralen staatlichen Verwaltungen, sowie die Mitglieder der Regierung und der Status der Staatssekretäre 2010. XLIII. Gesetz §16 Abs.1.
[17] http://www.origo.hu/itthon/20101005 (abgerufen am: 25.08.2013)
[18] Über das Katastrophenschutzgesetz 2011. CXXVIII. Gesetz, §7
[19] Die Regierungsverordnung 234/2011. (XI. 10.) Die Vollziehung über den Katastrophenschutz und über einige modfikante Gesetze, die zum Katastrophenschutz gehören 2011.CXXVIII. Gesetz §8 Punkt c)
[20] Die Regierungsverordnung 234/2011. (XI. 10.) §8 Punkt e)
[21] Über das Katastrophenschutzgesetz 2011. CXXVIII. Gesetz §16
[22] *Obwohl eine kleine Unstimmigkeit wegen der Finanzierung der ärztlichen Behandlung war, stand dieses Problem später nicht im Vordergrund und sie konnten es klären.*

tastrophenschutzes registrieren mussten. Zuerst mussten sich die Leute beim Verlassen des Dorfes eintragen und zweitens mussten sie sich beim Ankommen in der Sporthalle in Ajka registrieren, wo eine Unterkunft eingerichtet wurde. Doch die Mehrheit der Dorfbewohner in den umliegenden Dörfern ist zu Verwandten oder Bekannten geflüchtet. Die meisten ländlichen Leute haben die Zufluchtsorte bei Bekannten und bei Verwandten in den Nachbarorten gefunden. Die Zurücksiedlung hat mehr als zwei Wochen später angefangen.

Zacher Gábor, der namhafte ungarische Toxikologe äußerte, dass es sehr gefährlich wäre, die Leute in die Dörfer zurückziehen zu lassen, weil die Konzentration des Toxikum Mitte Oktober nicht gestiegen sei, aber man könne die Folgen schwer voraussagen. Es ist eine beispiellose ökologische Katastrophe in Europa.[23] Auch die internationale Umweltorganisation Greenpeace hat gegen die Rücksiedlung der Einwohnerschaft Kolontár protestiert, denn die Bevölkerung hat die Staubmasken umsonst bekommen, da es eine Kurzzeitlösung bedeutete. Die Trinkwassersversorgung ist nach den einzelnen Messdaten in den betreffenden Dörfern sicher gewesen, weil die Bereiche nicht von den ausgegrabenen Brunnen versorgt wurden, sondern dort ist Leitungswasser gewesen, dass bedeutet, dass der Wasserverbrauch während der Tragödie auch erlaubt gewesen ist. Im Gegensatz dazu behauptete Greenpeace, dass die Qualität der Luft,- und des Wassers gefährlich gewesen ist.[24]

Beim Katastrophenschutz versorgt *die Ungarische Armee* viele bedeutungsvolle Aufgaben. Das Landwehr-Gesetz[25] beinhaltet für die Mitglieder im sonderlichen Zeitraum folgendes:

a) die Annahme zum professionellen militärischen Bestand ist im Ruhen, sowie auch der professionelle militärische Bestand mit der Absage nicht abgeschafft wird,
b) der Beginn,- und das Ende der Dienstzeit wird im vorangehenden Schutz-Zustand, im besonderen Zustand oder im Notfall anders geregelt,
c) es werden andere Regeln zur Beförderung festgelegt; wie auch die Großkreuze, die Verdienstmedaillen und die Denkmalmedaillen für die Erfüllung des Dienstes und für die Anerkennung des Verdienstes gegründet werden,
d) es darf von den gültigen Regeln anders festgestellt werden: die Ernennung und die Entlassung in der Abteilung, die Versetzung, die Dirigierung, die Bestellung, die Besorgung, der Urlaub, die disziplinare Verantwortung, die Unwürdigkeit und die sonstigen Regeln des Dienstes,
e) die Schutzregeln der Vorgesetzten müssen wie folgt festgelegt werden: die Reputation, die finanzielle Unterstützung, die Anerkennung und der Schutz der berechtigten Interessen,
f) die Besoldung ist zu Friedenszeiten hinsichtlich des dienstlichen Wesens anders zu regeln, ein Teil der Besoldung muss für die Angehörigen flüssig gemacht werden oder sie muss hintergelegt werden,
g) die unversorgten Angehörigen der Diensthabenden und die Angehörigen der Demobilisierenden (wegen der Verwundung, des Unfalles oder der Erkrankung) müssen an der familiären Unterstützung beteiligt werden. [26]

Betreffs der strikten vorgeschriebenen Aufgaben hat die Landwehr bei den anderen Übungen mitgeholfen. Von Anfang an haben die ungarischen Soldaten bei Rettungsaktionen und Schadensbeseitigungen teilgenommen; sie waren fast ein und eine halbe Stunde mobilisiert. Bei den Rettungsarbeiten waren mehr als 2000 Soldaten im Einsatz. Die Landwehr hat ihre erloschenen Kasernen übergeben, nachdem sie die ehemaligen militärischen Gebäude als Wohnungen für die Benachteiligten umgeändert hatten. Die Soldaten haben die erwähnte Fläche von zirka 250 Tonnen Ruinen und Rotschlamm entsorgt, sie haben sogar eine Brücke gebaut. Die Helikopter der ungarischen Landwehr haben durchgängig an der Rettungsarbeit teilgenommen.[27]

Die Polizei hat sich an der Rettungsaktion bei der Rotschlammkatastrophe auch beteiligt. Außerdem hat sie bei der Evakuierung mitgeholfen, und hat die Bewachung des Gebietes gesichert. Es war sehr wichtig, weil leider die Plünderer erschienen sind und so sind teuere Arbeitsmaschinen, sowie Sachwerte von den verlassenen Häusern verschwunden.

Damit die Schadensbehebung schneller und effizienter vollzogen werden kann, hat die Polizei den Weg zwischen Ajka und Kolontár für eine kurze Zeit geschlossen. Die Polizei versuchte, auch außer der offiziellen Hilfeleistung zu helfen. Die Mitarbeiter der Bereitschaftspolizei haben die Spendensammlung für die Benachteiligten organisiert. Während der Spendensammlung hat die Polizei 40 Kartons Kleider, Schuhe, Spielzeuge und andere Gebrauchsartikel für die benachteiligten Kinder gespendet. Außerdem hat die Dienststelle des Luftpolizeiwesens, die zur Bereitschaftspolizei gehört, hat ihren 60. Geburtstag gefeiert und sie hat viele Schüler von Devecser zum Geburtstagfest eingeladen. Die Organisation hat die Fahrt und die volle Kost für die Schüler gesichert, diese Veranstaltung wurde in der Haupstadt Budapest abgehalten.[28]

3. Finanzielle und andere Unterstützungen

Nach der Tragödie haben der Ministerpräsident und der Präsident der Republik einen Aushang kundgemacht, worin sie auf die ökologische Katastrophe verwiesen haben. Die Regierung von Ungarn hat *die Ungarische Stiftung für Schadensrettung* geschaffen, diese Maßnahme ist am 10. Oktober 2010 in Kraft getreten. Die Stiftung ist eine Rechtsperson, ihr Standort liegt in Veszprém (Veszprém ist ein Komitatsstandort in Mittel-Transdanubien). Das Hauptorgan der Stiftung ist das Schadensrettungskomitee (im Weiteren: das Komitee). Die Mitglieder des Komitees sind:

a) der Vorsitzende ist der Präsident im Veszprém-Schutzkomitee

[23] http://www.hir24.hu/belfold/2010/10/16/zacher-gabor-kolontar-elhetetlen/ (abgerufen am: 25.08.2013)
[24] http://www.origo.hu/itthon/20101008-a-greenpeace-merese-szerint-sok-a-veszelyes-anyag-a-kolontari.html (abgerufen am: 30.10.2013)
[25] Über die Landesverteidigung und über die ungarische Landwehr, sowie die Maßnahmen, die im sonderlichen Zeitraum eingeführt werden dürfen 2011. CXIII. Gesetz *(im Weiteren: Über das Landwehr-Gesetz 2011. CXIII. Gesetz)*
[26] Über das Landwehr-Gesetz 2011. CXIII. Gesetz §65 Abs.2.
[27] Das Dateiverzeichnis von der Csongrád-Komitat-Katastrophenschutz-Direktion aufgrund der Meldung vom 10. Oktober 2010
[28] http://www.police.hu/friss/vorosiszap.html. (abgerufen am: 06.02.2014)

b) der Hauptnotar in der Veszprém-Komitee-Selbstverwaltung
c) die Person, die zum Katastrophenschutzbestand gehört wurde vom Innenminister ausgewählt
d) die Bürgermeister von Kolontár, Somlóvásárhely und Devecser
e) der zugewiesene Vertreter von der Budapester- Offene-Gesellschaft- Institut- Stiftung.[29]

Der Präsident der Republik hat einen Prospekt für die Leute geschickt, der enthalten hat, dass die Regierung eine zentrale Finanzstiftung geschaffen hat und um die finanzielle Unterstützung für die Wiederherstellung auf das Konto der Stiftung für Schadensrettung gebeten hat. Die Quellen der Stiftung bestehen aus den freiwilligen Einzahlungen, und den freiwilligen Schenkungen der inländischen,- und der ausländischen natürlichen Personen und der juristischen Personen, sowie der Organisationen ohne Rechtspersönlichkeit. Dazu bezahlen noch die anderen Staaten und die internationalen Organistionen. Der Aufsichtsrat mit drei Mitgliedern kontrolliert die Anwendung der Unterstützungen. Bakondi György, der Generaldirektor der Hauptverwaltung des Landes-Katastrophenschutzes und Regierungskommissar war sehr aktiv bei der Hilfeleistung für die Benachteiligten.

Auch international haben viele berühmte Leute das Land durch ihre Förderung gesichert. Im Aufruf der Ungarischen Stiftung für Schadensrettung kann man sehen, dass Georg Soros, der ursprünglich ungarische Geschäftsmann 1 Million Dollar für die Opfer geboten hat.[30]

Georg Pataki, der ehemalige Gouverneur im Staat New York half auch bei der internationalen Spendensammlung. Es kam auch andere internationale Hilfe an. Unter anderem haben die japanisch-ungarische Freundschaftsgesellschaft aus dem Komitat Gifu und die dortige Lions Klub-Organisation 420 000 Masken mit hoher Qualität für die Benachteiligten geboten. Der Wert der Masken war zirka 6 Millionen Forint. Die Lieferung der Spenden haben das japanische Außenministerium und die dortige Budapester Botschaft organisiert.[31] Die Gesundheits-Weltorganisation (WHO) hat auch bei der Unterstützung mitgeholfen. Das Europäische Regionale Büro der WHO hat die internationalen Gruppen zwischen 12. und 16. Oktober im Jahre 2010 nach Ungarn delegiert, um die ungarische Regierung zu unterstützen.[32] Am Anfang gab es fast jeden Tag eine ausländische Delegation, die nicht nur die seelische, sondern auch die finanzielle Unterstützung sicherte, dadurch haben sie zum schnelleren Wiederaufbau beigetragen.

Von den ungarischen Hilfsorganisationen haben auch *das Ungarische Rote Kreuz und die Ungarische Maltesische Karitas* bei der Rettung mitgearbeitet. Die Ungarische Maltesische Karitas hat die Wohnungen für 150 Familien ein halbes Jahr lang gemietet.

4. Sollen wir uns um unsere Zukunft sorgen?

Nicht nur in Ungarn, sondern auch in anderen Ländern beginnen sich die Leute, erst dann mit den Problemen zu beschäftigen, wenn die Katastrophe erfolgte. Wenn sie aber nicht so beträchtlich ist, verdrängt man das Problem, und man neigt dazu, die Fragen, die ungelösten Sachen unter den Teppich zu kehren.

Ohne die Vorbeugung ist der Katastrophenschutz kein richtiger Katastrophenschutz, sondern nur Räumungsarbeit und Schadensmilderung oder ein sogenannter Katastrophenschutz, der eine Notwehr der öffentlichen Institutionen ist. Es kann auch die Suche der äußeren Verantwortlichen sein, oder es ist die „Schuldenbocksuche."[33]

Man hat von den Fehlern gelernt und *das Katastrophenschutzgesetz wurde geändert* und die Vorschriften der Umweltschutz-Ermächtigung wurden verschärft. Die Katastrophe hätte wahrscheinlich verhindert werden können, wenn die Information und nötige Entscheidung auf dem entsprechenden Stand gewesen wäre. Wenn der Entscheidungsstand sehr weit von der präventiven Eingriffmöglichkeit ist, wird der Entscheidungsvorgang gebremst und sein gewünschter Zweck wird oft nicht erreicht. Es wäre zweckmäßig, wenn sich die ständig eingreifende Staatsverwaltung auf den Konsens, auf die Kooperation konzertrieren würde.

Die Leute, die im Katastrophenschutz arbeiten, haben *immer mehr an spezieller Bildung* in den letzten Jahren teilgenommen, aber ich bin der Meinung, dass weitere Fachbildung neben der jetzigen Bildung gebraucht wird, damit man sich auf die unerwartete Situation gebührend vorbereitet. Ich glaube, dass es nicht genug ist, wenn sich nur die Leute, die direkt im Katastrophenschutz arbeiten, mit der Vorbereitung beschäftigen. Ich meine, dass eine allgemeine, umfassende Vorbereitung nötig wäre. Die grundlegenden Kentnisse sollten schon im Mittelstufen- Unterricht ermöglicht werden. Die Bildung für die Leiter der Polizei, die Leiter der offiziellen Verwaltungsfeuerwehr und die Mitglieder der karitativen Organe soll gesichert werden, die beim Schutz freiwillig die Funktion übernehmen. Weiterhin ist es nötig, dass das Vorschlagspositionsrecht von den verschiedenen Interessenschutz-Organen beachtet wird.

Viele Zivilorganisationen sind gegen das Fehlen der ausgefallenen Umweltschutzüberwachungen präventiv aufgetreten, aber ihre Standpunkte und Vorschläge wurden nicht gebührend beachtet. Ich bin mit der Atem-Stiftung einverstanden, das heisst, dass jener Vorgang umgekehrt werden muss, dass die Behörden die Zivilorganisationen als behinderten Faktor betrachten. Ich meine solche Zivilorganisationen, die die Verfahren der Behörden begutachten. Anstatt dieser Konzeption müssten die Zivilorganisationen als Verfahrensteilnehmer betrachtet werden, die das berufliche Niveau und die gesellschaftliche Annahme erweitern.[34]

Nicht nur *die finanziellen Kraftquellen*, sondern auch *die humanen Kraftquellen* müssen bei den Umweltschutz,- Naturschutz,- Wasserschutzaufsichtsämtern, bei der Wasserschutzdirektion und bei dem Naturschutzwachdienst erweitert werden. Es müssen sogar die durchschaubaren Organ-Voraussetzungen geschaffen werden, die die Benutzung der Kraftquellen je effezienter ermöglichen.[35]

[29] Die Regierungsverordnung über die Ungarische Stiftung für Schadensrettung 252/2010 (X.21.) §3 Abs. 1.,2., §9 Punkt a), b)
[30] http://index.hu/belfold/2010/10/09/a_magyar_karmento_alap_szamlaszama/ (abgerufen am: 09.02.2014)
[31] http://www.naplo-online.hu/iszapkatasztrofa/20101123_japan. (abgerufen am: 10.03.2014)
[32] http://www.greenfo.hu/hirek/hirek_item.php?hir=25994/. (abgerufen am: 10.03.2014)
[33] Csalagovits, 2010, 155. S.
[34] Jávor, 2010, 36. S.
[35] do.

Jedoch sieht man vorläufig nicht, ob die Grünen-Behörden effizienter funktionieren können. Ich meine solche Behörden, die immer mehr Aufgaben und immer weniger Mittel haben.

Die Entwicklung in der Kommunikation ist auch äußerst wichtig. Die Leiterhierarchie und das Aufgabensystem haben die Entwicklung des Netzwerkes und des Mittelsystemes gedrängt. Die Theiß-Zyankatastrophe, die im Januar 2000 geschehen ist, dann die Wiederherstellungsarbeiten haben den Betroffenen bewusst gemacht, wieso es wichtig ist, die Information rechtzeitig dem Benutzer zu übermitteln, und wie es das Entwicklungsverfahren erleichtert. Der fachgemäße Ausbau des Informatiknetzwerkes und des Telefonnetzwerkes haben der Überregionalen Katastrophenschutz-Hauptdirektion geholfen, sie haben zur Erhöhung der Wirksamkeit beigetragen.

Wegen des EU-Anschlusses ist es für Ungarn unablässig, dass es das Katastrophenschutz-Informatiknetzwerk fortentwickelt, das das EU-Anforderungssystem sich weiterentwickelt. Die gesellschaftlichen und beruflichen Anforderungen erfordern solche komplexen Ausstattungen der Aufgabensysteme, die so wirksam funktionieren, wenn genug Informationen zur Erbringung der nötigen Entscheidung vorliegen. In der Katastrophenschutz-Datenbank werden die Selbstverwaltungen, die Regierungsstellen, andere Organe und die Europäische Union hinzugezogen.

Nicht nur die entsprechende Kommunikation scheint wesentlich unter den Staatsverwaltungsorganen, sondern auch die abgestimmte und widerspruchslose Gesellschafts-Orientierung ist wichtig. Die umfassenden Verwaltungsreformen sind notwendig, sie legen Wert auf die Leistungsfähigkeit, auf die Kapazitätentwicklung und auf die verantwortliche Erfüllung.

Mensch, pass auf, achte wohl auf die Welt, dies war die Vergangenheit, dies ist die wilde Gegenwart.-… und wisse immer, was du dafür tun musst, damit es anders sei.
(Miklós Radnóti: So er leidet es halt nicht...)

Ich hoffe, dass wir die Stadt Kolontár und die anderen überschwemmten Siedlungen in der Zukunft ähnlich sehen, wie früher, wenn auch nicht unbedingt in der gleichen Form. Die Behörden haben von den vierjährigen Ereignissen viel gelernt, d.h. sie werden wahrscheinlich richtige Entscheidungen treffen, wenn wieder eine Katastrophe geschehen würde. So würden die Rettungsarbeiten sowohl in der Prävention, als auch in der Kommunikation und in der Bildung abgestimmt werden. Endlich wird es nötig, die Vorschriften weiterhin zu schärfen und die Kraftquellen zu erweitern.

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The Development of the Legal Profession of the North-Western Provinces of Russian Empire in the Nineteenth and early Twentieth Century

*Mikolaj Tarkowski**

Abstract

The article is dedicated to lawyers of Russian Empire, particular the lawyers of North-Western governorates. The paper describes the legal principles and the political conditions under which the lawyers of Russian Empire were acted in the late nineteenth and early twentieth century. The author focused, inter alia, on the principle of the independence of the lawyers. He also pointed out the differences between the systems operated in the Russian Empire and in countries such as: England, Belgium, France, Germany and Austria. The main factor, which had an impact on the development of the lawyers of the North-Western governorates - was not the normative factor, but the political factor.

Key words: *legal profession; Russian Empire; judicial reform 1864.*

1. Introduction

The acquisition of the imperial throne by Alexander II in the second half of the nineteenth century marked the beginning of the reforms, not only within the society, but also in the entire Russian Empire[1]. The new ruler favoured the long-term process of replacing the doctrine of autocracy with the concepts specific for the post-absolute monarchy[2]. Russian elites were in favour of the path to create a modern state in the spirit of European solutions. State weakened during the Crimean War, required a rapid restructuring in the field of public finance, social system, as well as in economics. The need for modernisation measures was also noticeable in state institutions[3].

The need of a reform was also advocated by the conservative part of the Russian intelligentsia. Some of its representatives resigned from supporting the messianic-utopian vision of Russian history and analysed the events of the Crimean War. Jurij Samarin, a Slavophile, did not perceive the military weakness of the country as the reason for the failure - rather the outdated ideas constantly justifying the inconsistent social system were to blame. The old fashioned system of relations between various social classes, separation of a subject from an autocrat, economic crisis or intellectual stagnation could not result - in his opinion – in the necessary release of nation's energy during the armed confrontation[4].

2. New legal status of lawyers in the Russian Empire - context

The discussions within the Russian state elite preceded the changes in the justice system[5], which included the implementation of modern institution of certified defenders. The officials of the Chancellery of His Majesty participated in the discourse, who while drafting a new judiciary system evaluated its current state. One report found that professional defenders were present only in the commercial courts. In ordinary courts, on the other hand, the party could have been represented by anyone, who was not prohibited by law to do so.

It was noted that the representatives were not chosen only from the group of minors, clergy, persons deprived of their civil rights by a court judgment, as well as convicts sentenced to the corporal punishment[6]. In 1860, the Russian lawyer Alexander Łochwicki presented a similar opinion on the development of the bar. He stated that: "we do not have the bar in the Western sense of this word". He criticised the lawyers partitioning under the provisions of Collection of Laws of the Russian Empire from

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1 S. Kucherov, *The legal profession in pre – and post revolutionary Russia*, [in] „The American Journal of Comparative Law", 1956, vol. 5, no 3, p. 443.

2 J. Baberowski, *Law, judical system and the legal profession*, [in:] *The Cambridge History of Russia. Imperial Russia 1689–1917*, edit. D. Lieven, vol. II, 2006, p. 344; see also: J. Baszkiewicz, *Władza*, 1999, p. 114.

3 D. Szpoper, *Między caratem a snem o Rzeczypospolitej. Myśl polityczna i działalność konserwatystów polskich w guberniach zachodnich Cesarstwa Rosyjskiego w latach 1855–1862*, 2003, p. 22-24.

4 R. Pipes, *Russian conservatism and its critics. A study in political culture*, 2005, p. 126; see also: A. Walicki, *Legal philosophies of Russian liberalism*, 1987, p. 34; A. Walicki, *W kręgu konserwatywnej utopii. Struktury przemiany rosyjskiego słowianofilstwa*, 2002, p. 336-337.

5 On the results of judicial reform 1864 see: S. Krimse, *Law and Empire in late tsarist Russia: Muslim Tatars go to court*, [in:] „Slavic Review", vol. 72, no 4, 2013, p. 778-801.

6 Giessen I. W., *Istoria russkoj adwokatury. Adwokatura, obszczestwo, gosudarstwo,* vol. 1, 1914, p. 2.

1832. Among them, he mentioned scribes devoid of any ethical values, who provided services for a nominal fee of twenty kopecks, or in exchange for the proverbial glass of vodka. On the other hand, he pointed at plenipotentiaries from the aristocratic social classes, college graduates who, in spite of their rather high status, were willing to cooperate with representatives of the degenerate class of lawyers[7].

Włodzimierz Spasowicz also described the image of an outdated judiciary system, in which jobs were given to unskilled and corrupt officials[8]. The Polish lawyer described a procedure valid before Alexander's reform that did not allow the professional deputies to participate in court hearings. He wrote that in one of the courts by Neva river "[...] pens creak and sound of a ringing bell comes out of the chamber. The secretary and the clerk keep running between the chamber and the office. If somebody asked, where in this factory the justice was made, it would have been hard to find the answer. […] Both assessors from the tradesman state would, without hesitation, sign their own death warrant […] judges rarely come by to the court […]. Only two Parcae spin the thread of life: a clerk and a secretary, but before their fingers finish the thread, there already runs the writer to show the accused a copy of the proposed sentence"[9]. His memories also included the picture of the police state during the reign of Nicholas I, which was described as follows: "If we were then asked where the courts were, we would not have been able to answer. Courts actually were non-existent; there was only the powerful and omnipotent police […]. Everything started and ended with the police. Inside, allegedly there was a court, but it was rather a place, where the police brought their papers to the chamber, with a table […] at which people in uniforms sat, who talked a little and signed papers without even seeing or asking the accused […]"[10].

The idea of the judiciary system reform, both in criminal and civil law, matured among the Russian state elite. In the official newsletter from 1861, the State Council (*Gosudarstvennyi Soviet*) expressed the opinion on the desperate situation of the courts. The legal profession was to be one of the elements supporting modernised justice and ensuring lawful functioning of the judiciary system. It functioned in the modern form until 1864 in the Baltic governorates, where since 18th century sworn defenders (*prisiażni powierenni*)[11] represented the accused. In the indigenous Russian governorates, the group of *prisiażni striapczi,* appointed in 1832, was also perceived as a correctly organised structure [12].

It seems that the creation of sworn legal profession became one of the conditions for judicial reform of Alexander II to succeed. It was impossible to carry out the processes of civil and criminal matters without the creation of sworn legal profession[13]. Opinions expressed by the prince Dmitry Obolenski were in a similar spirit – he also advocated the implementation of solutions in the field of law in Western European style, including the procedural rules such as the principle of transparency and principle of orality. Count Dmitry Bludov[14], Chairman of the State Council in the years 1862–1864 presented the projects of judiciary system substantially free from the occidentalistic influences. In autumn of 1861 Alexander II appointed a committee that was to present the assumptions of judiciary reform under his initiative[15]. Even before, the issue of legal profession became the subject of fierce disputes. Count Bludov, in the preparation phase prior to the introduction of the judiciary reforms, rejected the idea of modernising the system of justice, basing on the principles of transparency, openness, directness and equality of the parties in the course of the process. Antagonists of reforms in the Western European form excluded the participation of the representatives of the parties, namely lawyers. Initially, the political line adopted by the Russian authorities assumed that the argument formed during the reign of Catharine II, stating that legal profession created a group spreading revolutionary ferment. This opinion was adopted on the basis of observation of France during the Great Revolution, in which the lawyers played a major role.

For this reason, the project to create sworn legal profession submitted in September 1858 by the group of people associated with Count Dmitry Bludov, is considered to be a significant shift towards overcoming the negative attitude of the Russian authorities to legal profession[16]. Its status was planned to be formed deriving from the examples of existing models in France, Belgium and England on one hand[17], and in the German states and Austria[18], on the other. The presence of a two-stage differentiation of lawyers was characteristic for the first group:

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[7] *Id.*, p. 10-11.

[8] J. Bardach, *Spasowicz Włodzimierz*, [in:] „Polski Słownik Biograficzny", vol. XLI, no 168, 2002, p. 48; see also: M. Jankowski, *Być liberałem w czasie trudnym. Rzecz o Włodzimierzu Spasowiczu*, 1996, p. 80; L. Bazylow, *Polacy w Petersburgu*, 1984, p. 293; A. Romanowski, *Pozytywizm na Litwie. Polskie życie kulturalne na ziemiach litewsko-białorusko-inflanckich w latach 1864–1904*, 2003, p. 135; M. Zdziechowski, *Od Petersburga do Leningrada*, 2009, p. 9; R. Łyczywek, *Historia adwokatury polskiej okresu zaborów*, [in:] „Palestra", 1971, no 9, p. 41.

[9] B. K., *O nowym zbiorze mów Włodzimierza Spasowicza*, 1902, p. 10.

[10] *Id.*, s. 11.

[11] A. Walicki, *W kręgu konserwatywnej utopii…*, *supra*, s. 349.

[12] I. W. Giessen, *id,* p. 24; see also: E. Waśkowski, *Sudiebnyje ustawy 20 nojabra 1864g. za piet'diesiat let*, vol. II, Sankt Petersburg 1914, p. 250; *Istorija gosudarstwa i prawa Rossiji*, edit. Ju. P. Titow, 2006, p. 176.

[13] H. Cederbaum, *Adwokatura w Królestwie Polskim. Luźne kartki. Rola adwokata. Walka o prawo i prawdę. Stosunek do sądu, stron i kolegów. Krasomówstwo. Etyka zawodowa. Organizacje adwokatury. Rozwój adwokatury*, 1911, p. 7.

[14] *Błudow Dmitrij Nikołajewicz*, [in:] D. N. Sziłow, *Gosudarstwiennyje diejateli Rossijskoj Imperii. Gławy wysszich i centralnych uczrieżdenij 182-1917. Biobibliograficzeskij sprawocznik*, 2001, p. 82

[15] Je. P. Tołmaczew, *Aleksandr II i jewo wremia*, [in:] *Tajny istorii, wjek XIX*, vol. 1, 1998, s. 253-255.

[16] B. W. Wilenskij, *Sudiebnaja rieforma. Uczrieżdanije sudjebnych ustanowljenij. Ustaw ugolownogo sudoproizwodctwa. Ustaw o nakazanijach, nalagajemych mirowymi sudjami*, [in:] *Rossijskoje zakonodatjelstwo X-XX wjekow w diewjati tomach*, edit. O. N. Czisttjakow, vol. 8, 1991, p. 9-10.

[17] E. Waśkowski, *Sudiebnyje ustawy…*, *supra*, p. 252.

[18] W. Bastian, *The profession of law in England and America. It's orgin and distinction* [in:] „American Bar Association Journal", 1960, vol. 46, no 8, p. 817.

advocates (*avocats*, *barristers*) and defenders (*avouès*, *solicistors*)[19]. German and Austrian systems did not develop the duality of lawyers' profession. The parties' representation in courts therefore remained in the hands of a homogeneous group of agents (*Rechtsanwält*). While in the French, Belgian and English systems, lawyers were subject to a corporate regime; in the German states, central authorities controlled the profession of defenders. In order to be accepted a member of local defence attorneys; decision of a state was required (Head of State or Minister of Justice)[20]. The institution of sworn lawyers, unknown in the West, functioned under the regime of Russian legal profession, after the implementation of the reforms of Alexander II. The legal status, however, was also shaped by two other factors: first - external (Western European), and the other internal (Russian). The defenders in Russia were, according to the models adopted in France or in England, self-governing corporations, independent in the judicial disciplinary matters, or in the decision to admit new members. Structure of the Bar (sworn lawyers) and tasks placed before it, were therefore essentially identical to those adopted in Western Europe[21]. The main difference was confined to internal factors of corporate lawyers (certified solicitors). Russian legislature in 1864 did not base the structure of the group on occidentialist (English-French) differentiations. This is because the construction was "flattened"; there was no distinction between the advocates and defenders within it[22]. In this respect, the structure of the Russian legal profession was initially convergent with the model existing in Germany and Austria[23]. The situation changed after the introduction of the act of 1874 about the private defenders. Since then, alongside sworn lawyers, who formed legally organised profession, private defenders began their work. In this regard, the organisation of Russian legal model started resembling the solutions adopted in France and England[24].

3. Sworn lawyers under the rules of judiciary reform from 1864

The creators of Russian legal profession system based it on the institution of sworn legal profession[25]. Councils of Sworn Lawyers were the principal bodies of the legal profession institution. Councils were elected in the judicial districts, with less than twenty lawyers employed in each one. If in some town there was between ten to nineteen sworn defenders, there existed a possibility of establishing a division of the lawyer's council, after the consent of an appropriate district court[26]. In districts where such bodies did not exist, their functions performed by the committee of lawyers working within the structures of the local district courts[27]. Lawyers submitted the request to create such a committee to the president of the judicial chamber. After that, the court designated a chairman from the common gathering of sworn defenders, where – in separate ballots – the chairman, his deputies and members of the board were chosen[28]. The tasks of this body, having a status of a local governmental institution, included: 1) consideration of applications of candidates who wished to join the ranks of the defenders and informing the judicial panels about it; 2) exercising the judicial disciplinary over corporate members, ensuring compliance with the rules of professional conduct; 3) appointing public defenders; 4) setting the salary at the applicable rates and the settlement of disputes in this respect between the parties of plenipotentiary act.

The Council could hold the lawyers responsible for breaching the judicial discipline. In this case, following sanctions were applied: warning, reprimand, suspension in duties for a specified period (not longer than one year), exclusion from a group sworn defenders, as well as referral to the criminal court in particularly important cases. It should be noted that disciplinary penalties pronounced by the courts, including disqualification in practice, were effective on the entire territory of the Russian Empire[29]. All decisions of the board, except for those issuing penalty warnings or reprimand, could have been appealed to the judicial panel, within two weeks period, calculated from the date of publication. Convicted lawyer could appeal such a decision. Prosecutor applicable to the judicial panel was entitled to set aside the judgment (convicting or acquitting) of the disciplinary court[30].

Sworn defenders were engaged in cases from the recommendation litigants, accused or any other parties involved in the process of subjects. The same provision to the duties of lawyers handling cases included also cases designated by the board or the chairpersons of courts. The position of the defender was open only to people certified with a university degree or graduates of other types of higher education institutions, providing a complete course of law. Additionally, they needed to have five years of working experience in the judicial faculty positions that allowed acquiring practical knowledge in the conduct of litigation or five years of training as an assistant under the direction of sworn lawyers[31].

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[19] S. Kucherov, *id.*, p. 444; see also: M. Tarkowski, *Działalność naukowa profesorów Wydziału Prawa i Nauk Społecznych Uniwersytetu Stefana Batorego w Wilnie*, [w:] „Przegląd Wschodni", 2011, vol. XI, no 4, p. 790-791.

[20] E. Waśkowski, *Sudiebnyje ustawy…*, *supra*, p. 252.

[21] F. Payen, *O powołaniu adwokatury i sztuce obrończej*, [1938], p. 65-66, 74-99 i 158-167.

[22] E. Waśkowski, *Sudiebnyje ustawy…*, *supra*, p. 252; see also: H. Cederbaum, *supra*, p. 61.

[23] S. Car, *Stan adwokatury w Królestwie Polskim*. *Referat na pierwszy ogólny Zjazd Adwokatów Polskich we Lwowie w roku 1914*, 1915, p. 18-19.

[24] A. Stawski, *O stanowisku prawnym pomocników adwokata przysięgłego według ustaw rosyjskich*, 1917, p. 2 i 7.

[25] J. Baberowski, *Autokratie und Justiz: zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914*, 1996, p. 483-492.

[26] *Sudiebnaja rieforma…*, *id*, p. 325 (art. 366).

[27] A. Korobowicz, *Reforma sądowa w Królestwie Polskim 1875/76 roku a kwestia organizacji adwokatury*, [in:] *Parlament, prawo, ludzie. Studia ofiarowane profesorowi Juliuszowi Bardachowi w sześćdziesięciolecie pracy twórczej*, edit. S. Russocki, W. Sudnik, 1996, p. 120.

[28] *Sudiebnaja rieforma…*, p. 324-325 (art. 358-365).

[29] A. N. Markow, *Prawiła adwokatskoj profiessji w Rossiji. Opyt sistematizacii postanowienii sowtow prisjażnych powierienныch po woprosam profiessionalnoj etiki*, 1913, p. 13.

[30] *Sudiebnaja rieforma…*, *id.*, p. 327 (art. 371-377).

[31] A. Korobowicz, *Sądownictwo Królestwa Polskiego…*, *supra*, p. 110.

Prior to being accepted to the board of defenders, the candidate was required to take an oath[32]. In addition to these prerequisites, the legislature formulated the directory of obstacles preventing the entrance to the profession. Following applicants were therefore eliminated: 1) those under the age of 25; 2) foreigners; 3) those in debt; 4) those, who remained in government positions by choice, with the exception of persons who hold honorary or social functions; 5) those, who were deprived the status of priest by the decision of the Orthodox church court; 6) those, who were excluded from the judicial or church service, or from the nobility; 7) those, who were prohibited from representing parties before the court, as well as those who were removed from the list of sworn lawyers. In addition, the rules forbade simultaneous execution of a lawyer and notary profession. After taking the oath, the defenders chose to reside in one of the city district of the chamber, to which they were assigned[33].

There was no rule of advocatory obligation in Russian judiciary system. Party could submit proposals and take process actions before the court itself or through a proxy chosen from the sworn defenders. On the other hand, lawyers had the right to take cases in all courts in the local district of the chamber to which they were assigned. In accordance with the client's command, defender was entitled to represent his interests as in courts, which were outside the circle of his business, including institutions of highest level, dealing with comprehensive course of proceeding in the case. In this case, serving outside the jurisdiction of the judicial district, lawyer was subordinated to the authority of the relevant local council. Limitation of freedom to choose the proxy occurred in the county towns, governorate capitals and in the governorates, where, in accordance with the limits set by the State Council, the number of lawyers the jury was sufficient. Then the litigants could only appoint an alternate proxy from defenders assigned to the court in which the trial proceeded. Regardless of these standards, a parent, a spouse, an adult child and a party to the process under the principle of co-participation or curators of litigants could all become the plenipotentiary[34].

Sworn lawyers acted on the basis of two types of already existing plenipotentiary acts. Therefore, power of attorney was used in legal practice. It entitled the defender to lead the case in its entire course, until its actual closure. The power of attorney to carry out particular legislative acts became another option. At the same time, it was not prohibited to employ several sworn lawyers in one case[35]. Remuneration between the parties of this legal relationship was established in an agreement[36].

New regulations, introduced through judicial reforms of Emperor Alexander II, were to establish modern deontological rules that aimed at preserving the dignity of legal profession. They therefore prohibited, inter alia, purchase or acquisition of powers of attorney granted by the principals. All transactions of this kind were considered *ex lege* as void, and lawyers engaged in them were liable to disciplinary proceedings before the council. Sworn defenders were also unable to act against members of their families (including spouse, children, parents, grandparents, brothers and sisters). Standards of dignity of the profession also did not accept the situation when conflict of interest occurred, prohibiting the representation of the parties of the same trial[37].

The number of sworn lawyers was insufficient in the first years of the reforms. At that time, provisional solutions were chosen in order to mitigate the results of the reform. Those possessing the legal capacity and good reputation could represent the parties before the court. With response to the emerging issues with personnel, government authorities had proposed the creation of private defence institution (*chastnye poverennyje*). Laws in force from the 25th of May 1874[38] also accepted them as professional lawyers; however, it was the judiciary chamber that always decided whether to include them in the circle of private defenders. Verification included the examination of qualifications and practical knowledge of the candidate. Competent judicial authorities issued the certificate entitling the candidate to conduct civil cases. Trial lawyers' assistants (clerks), with higher education diplomas, were under no obligation to be verified[39].

Over time, private defenders established their position and became a team of judicial substitutes in lower order cases. This group, consisting largely of the secretaries in peace courts, deposed writers and judicial officials, did not establish self-governing bodies, and therefore were not a subject to corporate disciplinary control. Private defenders were mostly appointed to carry out simple cases in small towns, where there was a shortage of sworn lawyers[40]. Under current legislation, they performed before the peace courts, as well as before the general courts. Some of them also were recruited from the assistants of sworn lawyers[41]. Women were not allowed to work as a judicial defender[42].

According to the authors of judiciary acts, assistants of sworn lawyers, preparing to receive proper certificates, conducted cases of office's customers under the guidance of a sworn lawyer. The five-year application process included the period during which the candidate held a job in court or judicial departments that required the acquisition and application of legal knowledge in practice[43].

[32] H. Cederbaum, *id.*, p. 12; see also: Ju. Łubszczew, *Adwokatura w Rossiji*, 2002, p. 8.
[33] *Sudiebnaja rieforma…*, *supra,* p. 323-324 (art. 355); see also: *Podręcznik dla sądów gminnych Królestwa Polskiego*, edit. W. Miklaszewski, A. Okolski, S. Budziński, 1876, p. 179 i 181.
[34] *Sudiebnaja rieforma…*, *id.*, p. 328-329 (art. 383-384, 387-389).
[35] *Id.*, p. 329.
[36] A. Korobowicz, *Reforma sądowa w Królestwie…*, *supra,* p. 121; zob. też: *Sudiebnaja rieforma…*, *id.*, p. 330 (art. 395-398).
[37] *Sudiebnaja rieforma…*, *id.*, p. 330-331 (art. 400-406).
[38] *Sudiebnyje ustawy. Uczrieżdienije sudiebnych ustanowlienij*, *Swod zakonow Rossijskoj Impierii*, vol. XVI, part I, [Sankt Peterburg] 1912, http://www.pravo.gov.ru/, p. 59-62 (art. 406^{1}-406^{19}).
[39] A. Stawski, *id.*, p. 12.
[40] D. P. Baranow, M. B. Smolenskij, *Adwokatskoje prawo (adwokatskaja diejatielnost' i adwokatura w Rossiji)*, 2002, p. 57-58.
[41] A. Korobowicz, *Reforma sądowa w Królestwie…*, *supra,* p. 120.
[42] *Sudiebnyje ustawy. Uczrieżdienije sudiebnych ustanowlienij…*, *id.*, p. 60 (art. 406^{19}).
[43] E. Waśkowski, *Organizacija adwokatury. Oczerk wsieobszcziej istorii adwokatury*, 1893, p. 108-109.

Due to specific socio-political situation, the number of applicants did not increase even years after the introduction of the judiciary reform, as the set rules of court did not include the assistants of sworn lawyer. „The authors and editors of court laws sought to maintain continuous […] contact between the Magisterium and the Palestra". Still, "political and legal peculiarities of Russian life caused no ongoing relationship, but rather a conflict between the Magisterium and the Palestra, which became hostile camps in the struggle for political freedom and citizenship. Communication had been broken right at its beginning". Decreasing number of assistants of sworn lawyers did not result in undertaking remedial action. Representatives of this group "[…] *de iure* still remained without regulations, the act predicted the sole category of legal representation - namely a sworn lawyer"[44].

Councils of sworn lawyers had not been established in all the major urban centers. First three of them were created only in Saint Petersburg, Moscow and Kharkov. The formation of new legal profession institutions was hampered in 1875 under the provisions of the 5th of December 1874, which suspended the relevant regulations of court laws court of 1864[45]. According to the authorities, establishment of local governmental institutions representing smaller environments of defenders did not guarantee that the structures operating in their disciplinary courts would result in objective judgments. Another councils of sworn lawyers were not established until 1906 in the judicial chambers of Kazan, Novocherkassk, Odessa, Saratovsk, Irkutsk and Omsk[46]. Włodzimierz Spasowicz, a sworn lawyer, stressed the need for the development of local government structures in 1890. He sought the imminent creation of independent legal profession structures in Riga, Rewal and Mittawa judicial province.

Small changes in the organization of legal profession, as well as the status of sworn lawyers were introduced in the period of counter-reforms during the reign of Alexander III[47]. The Minister of Justice, Count Konstantin von der Pahlen, Interior Minister Dmitry Tolstoy[48] and Konstantin Pobedonostsev prepared the foundations of the judicial counter-reform. Year 1889 was significant for the system of sworn lawyers organizations and brought new regulations, including a temporary ban to appoint branches of councils of sworn lawyers[49]. Simultaneously, the disciplinary authority of these entities was reduced by providing county governors with the powers to file the complaints on the activities sworn lawyers practicing in a particular district, which could be redirected to the prosecutor acting in the competent District Court[50]. What is more, the reform introduced the procedure that was significantly hindering the acceptance of non-Christian candidates into the ranks of sworn lawyers, mainly the representatives of the Jewish population. According to the provisions, these people were deprived of the opportunity to become sworn lawyers and private defenders. In exceptional circumstances, the Minister of Justice, allowed a candidate in question on the list of sworn lawyers and private defenders by presenting this decision to relevant Council of Sworn Lawyers and competent judicial authorities (Peace Congresses, District Courts and Court Chambers)[51].

In the 1890s the Ministry of Justice also developed projects reviewing existing legal acts. Ministers Nikolai Manaseina[52] and Nikolai Mouravieff[53] reviewed the plans to limit the autonomy of legal profession councils and increase their dependence on the judicial power. Finally, unrealised projects indicated that the essence of the changes should lay not in weakening the relationship between councils and the courts, but on the contrary - in establishing this relationship. This close connection between the two institutions was supposed to ensure their proper functioning. On the other hand, the committee functioning since April 1894 under the initiative of Nikolai Mouravieff, proposed opinions on the establishment of new legal profession councils in Judicial District Chamber of Vilnius, Kiev, Warsaw and Tiflis. The institution, called Mouravieff's Commission, functioning until 1899, was composed of senior government officials and lawyers such as Anatoly Koni and Nikolai Tagancew. The plans submitted by the members of this political-expert group were not introduced into practice[54].

Besides the changes proposed by the tsarist administration in the field of legal profession and its principles, the development of the French and English provenance concepts on the ethical legal profession code ignited a discussion about the needs to strengthen the role and development of the rules of professional conduct in Russian legal representation[55]. Eugeniusz Waśkowski promoted the project to codify the basic regulations in this area. His views on the requirements and moral obligations faced by the lawyers strengthened the identity of Vilnius Palestra in the interwar period[56].

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[44] A. Stawski, *id.*, p. 6.

[45] *Sudiebnaja rieforma…*, s. 324 (art. 357).

[46] A. Korobowicz, *Reforma sądowa w Królestwie…*, *supra,* p. 120, 125.

[47] A. S. Smykalin, *Istorja sudiebnoj sistiemy Rossiji*, Moskwa 2010, p. 101-103.

[48] *Pahlen von der Konstantin Iwanowicz*, [in:] D. N. Sziłow, *id.*, p. 489-490; see also: *Tołstoj Dmitrij Andrejewicz*, [in:] D. N. Sziłow, *id.*, p. 659-660.

[49] *Sudiebnyje ustawy. Uczrieżdienije sudiebnych ustanowlienij…*, *id.*, p. 55 (komentarz do art. 366).

[50] I. A. Christoforow, *«Kamien' prietknowienija»: probliema admimistratiwnych rieform posliedniej czietwierti XIX - naczala XX ww*., [in:] *Administratiwnyje rieformy w Rossiji: istorija i sowriemiennosct'*, edit. R. H. Bajguzin, 2006, p. 237; see also: A. N. Bochanow, *Impierator Alieksandr III*, 1998, p. 429.

[51] B. W. Wilenskij, *id.,* p. 57.

[52] N. A. Troickij, *Adwokatura w Rossji i politiczeskie procesy 1866–1904 gg.*, 2000, p. 59; see also: *Manasein Nikołaj Auksentjewicz*, [in:] D. N. Sziłow, *id.*, p. 395-396.

[53] *Murawiew Nikołaj Walerianowicz*, [in:] D. N. Sziłow, *id.*, p. 443-444.

[54] W. N, Babienko, *Istorija sudiebnoj własti w Rosiji IX - naczało XX w. (riefieratnyj obzor),* [in:] *Istorija sudiebnych uczrieżdienij Rosiji,* edit. Ju. S. Piwowarow, 2004, p. 155

[55] E. Waśkowski, *Osnownyje woprosy adwokackoj etiki*, 1895, p. 1-2.

[56] Lithuanian Central State Archive, Lithuania, Vilnius (LCSA), F. 175, Ap. 2, VI B. 3, *Życiorysy Panów Profesorów, Docentów, Zastępców Profesorów Wydziału Prawa i Nauk Społecznych Uniwersytetu Stefana Batorego w Wilnie*, c. 18; see also; O. Ja. Pergament, *Obszczestwjennyje zadaczi adwokatury. Publicznaja lekcija*, 1905, p. 10.

4. Sworn lawyers in the province of Vilnius Court Chamber

Political issues conditioned, in limited scope, the introduction of judicial reforms from the 20th November 1864 in western provinces of the Russian Empire[57]. In the appeal regions of: St. Petersburg, Moscow and Kharkov the first self-governing legal profession councils were established. In Vilnius, on the other hand, the legal profession, deprived of independent representative bodies in the form of the sworn lawyers, became closely linked to the justice system and remained dependent on the decision of Chairmen of the Judicial Chamber of Vilnius[58].

The need to create legal profession institutions in the cities of Vilnius and Warsaw was emphasised by local legal circles long before the establishment of the so-called Mouravieff's Commission. In Vilnius, a lawyer Restytut Sumorok took such initiative[59]. The complex political situation in the Russian Empire shattered plans for major reform of the judicial apparatus, as well as the establishment of self-governing legal profession bodies in the capital of Vilnius governorate. Defenders partitioning at that time, became only a substitute of a corporate institution[60]. From the initiative of Restytut Sumorok, Vilnius Lawyer's Commission was created with government's consent, as a body supposed to "[…] roughly resemble legally forbidden lawyer's council". The General Assembly of Judges of the District Court in Vilnius confirmed the statute of this Commission on 2nd May 1887. Among its members, next to Restytut Sumorok, there was Miron Wygodzki, a lawyer from Vilnius, who also supported the idea of assistance loan register within the organisation. Responsibilities of the Dean of the Commission were held in turn by: Tadeusz Buyko, one of the defenders in a very famous case of the peasants of Kroż[61] - Michal Węsławski[62], Marian Strumiłło and Restytut Sumorok.

The establishment of few court chambers, with the councils of sworn lawyers functioning within them, led to excessive concentration of defenders in some urban centres. This situation forced a wide range of plenipotentiaries to seek more lucrative cases requiring much lower qualifications. Many dealt solely with locating the subjects belonging to the mass of succession, with the property sales, not being interested in representing the parties in civil or criminal cases. This led to decrease in standards and - as stated by Eugeniusz Waśkowski – "brokerage activities" of such proxies, associated with a trivialization of tasks faced by the legal profession. Besides, failure to set lawyer's council, including the Chamber of Judicial Vilnius, made it impossible for independent self-government professional institutions to function[63].

The Lawyer's Commission was therefore a representation of Vilnius. The activities of this quasi self-governing institution were manifested by elections of local authorities organized annually within the Palestra. Only sworn lawyers were entitled to vote then, excluding the assistants. During the vote of 24th of February 1913, the electoral lists contained the names of new, young candidates. The decision was interpreted as a sign of internal revolution. Political moves were designed to target two experienced members of the Commission. First, a Member of the State Duma, Nathan Friedman, who led the office in Panevezys[64], was accused of arrogance and failure to meet the standards of professional ethics. The second candidate, Adolf Zmaczyński lost, because - as he put it - Michał Römer was ignoring collegial relations. Finally, Restytut Sumorok, Miron Wygodzki and Marian Strumiłło were elected. Witold Abramowicz[65] was new to this group, representing a younger generation of lawyers of Vilnius's sworn lawyers[66]. Term of the Commission was established for one year. In the subsequent elections the 9th of March 1914, Lithuanian lawyer Jonas Vileišis received a mandate for the first time[67].

Lawyer's Committee, when deciding on entry to the list of sworn lawyers, issued only opinions about the candidate and directed them to the appropriate authority - the Chairman of the Court Chamber in Vilnius. The final decision was taken by the representative of Vilnius Regional Court in Lawyer's Commission empowered to deal with these cases[68]. Despite the limited ability to influence the process of dealing with such requests, Vilnius's lawyers attempted to influence its course. A legal trainee, also known as futurist poet, Jerzy Jankowski[69] faced the unfavourable position of environment. The lawyers Stanisław Bagiński and Witold Abramowicz formed a coalition hatched against his candidacy in November 1911. Jerzy Jankowski's opponents considered him as keen on ventures and an "ethically uncertain" person. They invoked the events of the past that were subject to the dispute resolved in a duel of honour. The

[57] [L. Sumorok], *B. P. Miron Wygodzki*, [in:] „Wileński Przegląd Prawniczy", 1938, no 4, p. 93-94.
[58] M. Tarkowski, *Adwokatura wileńska w latach 1918–1922*, [in:] „Palestra", 2009, no. 7-8, s. 188.
[59] A. Parczewski, *Kronika. Ś. p. Restytut Sumorok *29 V 1854 – 11 V 1929*, [in:] „Rocznik Prawniczy Wileński", 1929, no. 3, p. 933-934.
[60] [L. Sumorok], *B. P. Miron Wygodzki…*, *supra,* p. 94; zob. też: A. Korobowicz, *Wpływ czynników pozaprawnych….*, *supra*, p. 76.
[61] L. Sumorok, *Obrazki z niedawnej przeszłości*, [in:] ,,Wileński Przegląd Prawniczy", 1935, no. 10, p. 332-333.
[62] P. Dąbrowski, *Narodowa Demokracja byłego Wielkiego Księstwa Litewskiego. Studium z zakresu myśli politycznej i działalności obozu narodowego na ziemiach litewsko-białoruskich w latach 1897–1918*, 2010, p. 198.
[63] W. Miklaszewski, *id*., p. 115, 117-118.
[64] LCSA, F. 133, Ap. 2, B. 498, *Podanie* z 24 września 1919 r. Leona Słonimskiego. APA Leona Słonimskiego, c. 3.
[65] Lithuanian Library of Academic Science, Lithuania, Vilnus (LLAS) ,, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 24 lutego (9 marca) 1913, c. 58; see also: LCSA, F. 133, Ap. 2, B. 870, Postanowienie Komisji Adwokackiej z 22 września 1904 r. APA Witolda Abramowicza, c. 5; LCSA, F. 133, Ap. 2, B. 870, Podanie Witolda Abramowicza z 21 stycznia 1921 r. APA Witolda Abramowicza, c. 7.
[66] Z. Solak, *Listy Michała Römera do Ludwika Abramowicza z lat 1908–1938. Cz. II: lata: 1918–1928*, [in:] *Rocznik Biblioteki Naukowej PAU i PAN w Krakowie*, edit. K. Grodziska, vol. XLV, 2000, p. 333.
[67] LLAS, F. 138, Vnt. 2231, M. Römer, *Dziennik*, vol. IV, 25 stycznia 1914 – 4 marca 1915, zapis z 24 lutego (9 marca) 1915, c. 31.
[68] LCSA, F. 133, Ap. 2, B. 495, Informacja przedstawiciela Sądu Okręgowego w Komisji Adwokackiej o wpisie na listę adwokatów Marina Strumiłło z dniem 20 marca 1896 r. APA Mariana Strumiłło, c. 16.
[69] P. Majerski, *Jerzy Jankowski*, 1994, p. 12.

case concerned an insultulted editor responsible for ,,Kurier Wileński" - Ludwik Abramowicz, who refused to accept the article by Jerzy Jankowski. The conflict led to a duel. Abramowicz chose Bronisław Krzyżanowski as his second. For this reason, he was required to submit a document to the Lawyer's Commission demonstrating the proceedings of honour. Without waiting for the final outcome of the case, other Vilnius's defender, lawyer Tadeusz Buyko refused Jerzy Jankowski to become an applicant in his office[70].

On the other hand, Michał Römer, after completing five years of the application in October 1913, submitted a request to the Lawyer's Commission for assistance in obtaining the certificate entitling the holder to conduct cases as a private defender. The Vilnius's lawyer faced a need to hold to confidentiality procedure that he characterised in the following words: "[…] in early autumn I filed an application to the District Court for a certificate of the right to pursue civil cases [...] The certificate was paid with a special tax of 75 rubles [...]"[71]. The request was rejected on the grounds of political "disloyalty" of the candidate. The young applicant decided to seek advice from the members of the Lawyer's Commission, Miron Wygodzkiego and Witold Abramowicz[72]. At the same time he had a reflection on this negative decision, he believed that "[...] refusal was already a foregone conclusion, and based on some vague information [...]". Also asked rhetorically: "[...] whether [...] the work in ,,Gazeta Wileńska" or any other news about my person caused this effect"[73]. Sworn lawyer's assistant thought about the visit and the presentation of the problematic issues in front one of the prominents of Vilnius[74]. He learned at a meeting with a lawyer Miron Wygodzki that the decision in his case was based on political reasons[75]. Finally, he met with kindness of Alexander Meysztowicz, a member of State Council, who told Michał Römer to proceed to the governor of Vilnius and file an application for a certificate of orthodoxy in his office[76].

The Lawyer's Commission was supposed to focus on the proper training of legal professionals during applicant studies. Legal trainees gathered for classes in civil and criminal law. The leading language was Russian. Seminars in the first part were led by a lawyer Nathan Friedman, the theme of the course included issues concerning the rights of peasants. Tadeusz Wróblewski was a lecturer of criminal law in 1912[77].

5. Conclusions

Regardless of the tasks carried out by the Lawyer's Commission in Vilnius, it remained an institution without the characteristics of a professional self-governing organization. Lawyers of North-western governorates of the Russian Empire were recruited mainly from people of Polish origin, and did not receive approval to establish self-government until the fall of the Empire. In this sense, sworn lawyers in Vilnius, worked on different terms than lawyers practicing in the other areas of Russia. The legal status of the Lawyer's Commission in Vilnius, which was not self-governing, differed significantly from the legal characteristics of Council of Sworn Lawyers in St. Petersburg or Moscow. The end of the First World War and the rebirth of the Polish Republic changed the political conditions in the lands of the former Grand Duchy of Lithuania. In 1920, self-governing Council of Sworn Lawyers in Vilnius was established. Note, however, that it acted on the basis of the Russian provisions, which had its origins in the court laws introduced by Alexander II in 1864. The first Bar in Vilnius operating under Polish law was established in 1923[78].

[70] LLAS, F. 138, Vnt. 2228, M. Römer, *Dziennik*, vol. II, 17 sierpnia 1911 – 28 grudnia 1912, zapis z 26 października (8) listopada 1911, c. 71.
[71] LLAS, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 10 października (23) października 1913, c. 286.
[72] LLAS, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 11 października (24) października 1913, c. 287.
[73] LLAS, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 12 października (29) października 1913, c. 288.
[74] *Id*., c. 288.
[75] LLAS, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 16 października (29) października 1913, c. 292.
[76] LLAS, F. 138, Vnt. 2230, M. Römer, *Dziennik*, vol. III, 29 grudnia 1912 – 24 stycznia 1914, zapis z 7 (20) stycznia 1914, c. 375.
[77] LLAS, F. 138, Vnt. 2228, M. Römer, *Dziennik*, vol. I, 1 stycznia 1911 – 16 sierpnia 1911, zapis z 13 (26) lutego 1911, c. 44
[78] LCSA, F. 127, Ap. 1, B. 17, Lista dwudziestu adwokatów z 11 grudnia 1920 r. Kancelaria prezesa Sądu Apelacyjnego w Wilnie. Teczka nr 24/1920 r. O utworzeniu Rady Adwokackiej przy Sądzie Apelacyjnym w Wilnie, c. 3; see also: Dziennik Praw Państwa Polskiego, nr 22, poz. 75, Warszawa 1918, p. 180.

The Treatment of Nuda Pacta in Byzantine Legal System*

*Theodore I. Kazazakis***

Abstract

The Roman law of obligations is characterized by its rigidity. Despite the incorporation of new exchange forms, the Roman system of contracts, throughout its history and evolution, remained unchanged and always moved around the necessity to abide by legal formalities. This note is concerned with a sub-category of "pacta", the so called "nuda pacta", which were not enforceable due to the principle: "ex nudo pactio non oritur actio." However, the principle of non-enforceability of "nuda pacta", which was initially maintained in the Byzantine legal system, progressively did not correspond to the practical needs and was found to be inconsistent with the legal thinking of that time. The aim of this note, dealing with the treatment of "nuda pacta" in Byzantine legislation and generally in Byzantine legal thought, is to show the systematic effort of the Byzantines to formulate a complete definition of "nuda pacta", but basically their tendency to abandon the rule ex nudo pacto non oritur actio, which paved the way for the formulation of the modern theory of conventions.

Key words: *Nuda pacta; non- enforceability; Byzantine legal system; abandonment of the rule ex nudo pacto non oritur action; modern theory of conventions.*

1. Introduction

The contract and a line of fundamental principles that derive from the dominant position of the contract in the field of transactions law were and still remain the hard core of the law of obligations. The ability to form a binding agreement with only condition being the simple coincidence of the will of two parties constitute a triumph of modern European continental legal civilization, considering the fact that in English law simple coincidence of will is not sufficient – there must be a sealed writing or consideration, that is, some form of exchange.

On the contrary, the Roman law of obligations is characterized by its rigidity. Despite the incorporation of new exchange forms, namely the innominate contracts, the Roman system of contracts, throughout its history and evolution [from the 12 Tables (c. 449 BC) to the Corpus Juris Civilis (AD 529)], remained unchanged and always moved around the necessity to abide by legal formalities. This note is concerned with a sub-category of *"pacta"*, the so called *"nuda pacta"*. All the informal agreements which did not fit within the four consensual contracts mentioned by the Roman law of contracts, sush as *"emptio-venditio, locatio conductio, mandatum or societas"*, were not enforceable due to the principle: "ex nudo pactio non oritur actio." A consensus, which did comply with the roman legal formalities, was not considered sufficient for the birth of contractual commitment. The only protection which was provided for the parties was the ability of the defendant, in the course of the proceedings in iure, to ask for the insertion of an exceptio pacti into the formula. [1]

2. The *nudum pactum* in the Byzantine legal system

As far as concerns the treatment of *nuda pacta* by Byzantine legislation and generally by Byzantine legal thought (starting from the early period of Emperor Theodosius in 438 AC till the last imperial dynasty of Palaiologoi), it should be noted that the Roman rules were repeated. Nevertheless, by taking a closer look, two novel practices can be traced.

Firstly, there is a systematic effort to formulate a complete definition of *nuda pacta*, and, secondly, a tendency may be observed to avoid the legal formalities which characterized the Roman law of contracts. This effort to avoid formalities was expressed through the publication of legislative texts, which were opposed to the Roman maxim *ex nudo pacto non oritur action*, and which simultaneously extended the field of application of

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1 ZIMMERMANN, REINHARD, "The law of obligations, Roman Foundations of Civilian Tradition", 1995, p.508

nuda pacta. As Professor Karakatsanis observes, *nudum pactum* was fully given legal effect recognized for the first time in the Byzantine legal system. For him, the abandonment of the rule *ex nudo pacto non oritur actio* began during the Byzantine period and paved the way for the formulation of the modern theory of conventions.[2]

The effort to comprehend and determine the content of *nuda pacta* must not be treated as an isolated incident because it can only be seen as a result of Byzantine lawyers' practice of identifying each institution and defining it. From the study either of *Basilica*[3] or of *Meditatio de nudis pactis*[4], a historian of law can see that the question that occupied the Byzantine legal system was what precisely the nudum pactum was. Of course, it should be noted that the lawyers of that period considered the formulation of a definition for the above term as an extremely difficult task. As the anteccessor Stephan reports characteristically in his comment, which was included in the corpus of *Basilica*: «Εισί τινά αυτόθεν μέν 'ορίζεσθαι μή δυνάμενα, 'εκ δέ τῆς τῶν άλλων χαρακτηριζόμενα διαιρέσεως».[5]

2.1 The nudum pactum in the Corpus Iuris Civilis

The Justinianic perception of *nuda pacta* (which was identical to the Roman perception)] was that pacts which were not included in the closed number of the Roman law of conventions, and that did not constitute a praetorian or legitimate pact, were named *nuda* and consequently they were not actionable.[6]

The above perception can be seen through these characteristic provisions of the Corpus Iuris Civilis:

i. «'Ο α'υτός Αύγουστος πρός Νίκαν. Τό σύμφωνον [ό νόμος], 'όπερ 'εξεφώνησας, 'ότε τήν προῖ̃κα 'υπέρ τῆς 'αναθρεπτῆς 'έδιδες, δέον 'ίνα παραφυλαχθῆ. Καί ουδέ δύναται ν' αντίκηταί σοι, 'όπερ είθισται νά λέγηται ***'ότι 'από συμφώνου [ψιλοῦ] δέν γεννᾶται 'αγωγή***. [why is this phrase in bold type? (the same question arises in several places below] Διότι τότε χρώμεθα τῶ δικαίω τούτω, 'ότε τό σύμφωνον γυμνόν 'εστί. 'άλλως 'ότς χρήματα δίδονται καί συμφωνεῖται τι περί 'αποδόσεως αυτῶν, 'ωφέλιμος 'εστίν 'η 'απαίτησις.» (CIC 2,3,10).[7]

ii. «Οι 'αυτοί 'Αύγουστοι καί οί Καίσαρες πρός Ευσέβιον. 'Οπότε θεματίζεις 'ότι μεταξύ 'υμών 'αγράφως 'ήρεσεν 'ίνα αι κληρονομίαι τῶν 'αδελφῶν σου διαιρεθῶσιν 'εξ ίσων μερῶν, καί δύναται ν' 'αποδειχθῆ 'ότι συμβιβασμοῦ 'ένκεν παρενεχώρησεν 'η συμφωνία αύτη, δύνασαι 'ίνα δι' ενστάσεως προστατευθῆς, 'εάν νένησαι. 'άν 'όμως 'ο αντίδικός σου κατέχη, 'οφείλεις 'ίνα νοῆς 'ότι **'εκ τοῦ συμφώνου τούτου ουδεμία 'εγεννήθη 'αγωγή,** 'εάν δι' 'επερωτήσεως μή προυνόησας περί σεαυτοῦ. Καί τῶ 'αντιδίκω σου δέ ουκ 'επιτρέπεται 'ίνα χρήσηται τῶ συμβιβασμῶ, ειμή 'έτοιμος 'εστίν 'όπως 'εκπληρώση τά συναρέσαντα. 'Εδόθη 'εν Θιράλλω ταῖς Καλένδαις τοῦ Μαΐου 293» (CIC 2,3,20)[8]

iii. «Οι 'αυτοί 'Αύγουστοι καί οί Καίσαρες πρός Λεόντιον. **'Εάν 'εδόθη 'επί 'έτη τό διά ψιλοῦ συμφώνου συνομολογηθέν, δέν δύναται [τοῦτο] νά 'υποχρεώση τον συνομολογήσαντα τό σύμφωνον εις παροχήν 'εφεξῆς τοῦ 'αχρεωστήτως καταβληθέντος, ειμή τοῖς συμφωνηθεισιν 'επερώτησις παρενετέθη.** 'Εν Βουρτοδίζη, τρίτη τῶν Νονῶν τοῦ Δεκεμβρίου 294 » (CIC 2,3,28)[9]

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[2] Karakatsanis K. Ioannis, *The legal nature of the legal type of declaration of intent,* publications Ant. Sakkoulas, Athens – Komotini 1980, p. 25-26 and 30, Stathopoulos M., General Law of Obligations, 4th edition, publication P. Sakkoula AE, Athens – Thessaloniki 2004, p. 690.

[3] **Basilica**, (from Greek *basilikos,* "imperial"), is a 9th-century Byzantine code of law initiated by the emperor Basil I and completed after the accession of his son Leo VI the Wise. The Justinian code of the 6th century, augmented by later imperial ordinances, had been the chief law source for the Roman world but was marred by much internal repetitiveness and inconsistency. Conflicting interpretations on how to select and apply elements of Justinian's works had contributed to uncertainty among imperial judges. Emperors Basil and Leo therefore had a commission of lawyers reexamine the code in order to abridge it, to cast out obsolescent, conflicting, and superfluous items, and to arrange the resultant provisions into orderly single titles. Basil's jurists apparently produced 40 books, which were enlarged to 60 under Leo. The Basilica was written in Greek and was as much a collection of canon law as of civil and public law. It was far more systematically arranged than Justinian's code and comprised a single integrated work, unlike Justinian's four works, in which one subject might be treated in various places. The Basilica became the foundation of Byzantine jurisprudence. In the 12th century an index for the Basilica was compiled. Because only about two-thirds of the Basilica survives, the index aids in rounding out knowledge of the contents. See http://www.britannica.com/EBchecked/topic/55131/Basilica

[4] A note is provided for this legal essay elsewhere in this text.

[5] Basilicorum, Liber XI, TIT. I , see Heimbach C.W.E., Basilicorum Libri LX. post annibalis fabroti curas ope CODD. MSS. alusque collatorum integriores cum scholiis edidit, editos denuo recensuit, deperditos restituit, translationem latinam et adnotationem criticam, tom.I., SUMTIBUS AMBROSII BARTH, Lipsiae 1833, p. 560.
Stephanus was an antecessor who taught in Constantinople in the early 540s AD. His lectures on the Digest were the basis for a commentary of which innumerable fragments have been preserved, mainly as scholia in the manuscripts of the Basilica. For further information about antecessor Stephanus and his Digest Commentary, see H. J. SCHELTEMA, "Über die Werke des Stephanus, TR 26 (1958), pp. 5 14 (=Idem Opera Minora ad Iuris Historiam Pertinentia, Groningen 2004, pp. 331 337); TROIANOS S. N., The sources of Byzantine law, publications Ant. Sakkoulas, Athens- Komotini 2011, pp.135-136).

[6] This clause is repeated in "Basilica". For more information, see Maridakis S.G., The Civil Law in the Novellae of Buzantine Emperors, publications Basileiou, Athens 1922, p. 213.

[7] "2.3.10. The same Emperor to Nica. The condition which you prescribed when you gave a dowry to your foster daughter, must be obeyed. Nor can the objection be raised against you, that as is customarily said, no action arises from a pact; for we apply that law when there is a naked pact; but when money is given and some agreement is made as to its return, an action analogous to (utilis) an unjust enrichment action (condictio) lies".

[8] "The same Emperors and Caesars to Eusebius. Since you state that it was agreed among you, without writing, to divide the inheritance of your brothers equally among you, and that it can be shown that the agreement was made for the purpose of compromise, you can, if you are in possession, protect yourself by that defence; but if your adversary is in possession, then you should know that no cause of action arises out of such agreement, unless you have protected yourself by a stipulation; nor may your adversary take advantage of this compromise unless he is ready to fulfill the terms of the agreement. Promulgated May 1 (293), at Thirallus."

[9] "The same emperors and caesarss to Leontius. If what had been agreed to be paid pursuant to a naked pact was (in fact) paid during certain years, this could not obligate him who made the pact to continue in the future to make payments not owing, unless a stipulation was added to the pact.
Given at Burtudizum, December 3 (294).

iv. «Οι ’αυτοί ’Αύγουστοι καί οί Καίσαρες πρός Φωτῖνον. Ει τά σά πράγματα ’έχρησεν ’ή παρακατέθηκεν ’εκείνος, ου ’έν ταῖς δεήσεσιν ’εμνημόνευσας, κατά τοῦ κατέχοντος [τῆ] πρός παράστασιν [’αγωγῆ] ’ή τῆ διεκδικήσει 1 χρήσασθαι δύνασαι. Διότι ’άν μέν συνεφώνησεν [‘ό παραθέμενος] ‘ίνα σοι ’αποκατασταθῶσιν, ει μέν τῶ παραθεμένω διεδέξω, δικαίω κληρονομικῶ τῆ ’εκ τῆς παρακαταθήκης ’αγωγῆ χρήσασθαι ου κωλύεσαι. **Ει δ’ όμως ούτε τῶ πολιτικῶ ούτε τῶ πραιτορίω δικαίω ’εις σέ ‘η κληρονομία ’εκείνου ’ανήκει, νοεῖς ‘ότι ουδεμίαν σύ ’εκ τοῦ συμφώνου ’εκείνου ’εναντίον τοῦ καθ’ οῦ δέεσαι ’αγωγήν κατά το αυστηρόν δίκαιον ’έχεις, ’ωφέλιμος ‘όμως σοι ’ένεκεν τοῦ λόγου τῆς ’επιείκειας δοθήσεται ‘η ’εκ τῆς παρακαταθήκης ’αγωγή.** ’Εδόθη ’εν ‘Ηρακλεία τῆ Πέμπτη τῶν Καλενδῶν τοῦ Μαΐου 293» (CIC 3,42,8,1)[10]

v. «Οι ’αυτοί ’Αύγουστοι καί οί Καίσαρες πρός Μαξινιανόν ’Αγοπόδην. ’Εάν ‘ο δεσπότης τοῦ ’αγροῦ σοι ’επερωτῶντι ‘υπέσχετο δοῦναι ‘όσα ‘υπέρ τῶν μισθωτῶν τοῦ μισθωθέντος κτήματος προκατέβαλες, ‘ο αρμόδιος δικαστής κελεύσει ’αποδοθῆναι σοι. **Διότι ’αν ‘η συμφωνία ’εν τῶ τοῦ συναρέσαντος ‘ορίω ’έμεινεν [’έστη], ’από ψιλοῦ συμφώνου νοεῖς ’αγωγήν κατά τό ‘υμέτερον δίκαιον τίκτεσθαι ου δυνηθῆναι.**» (CIC 4,65,27)[11]

vi. «Οι ’αυτοκράτορες Σεβῆρος και ’Αντωνῖνος ’Αύγουστοι πρός Νίκαν. Τόν ‘όρον, ‘όν είπας ‘ότε τήν προῖκα ‘υπέρ τῆς ’αναθρεπτῆς [’αλούμνας] ’εδίδους, φυλάττεσθαι χρή, ουδ’ ’οφείλει ’αντικεῖσθαι σοι ’εκεῖνο, ‘όπερ ’είωθε λέγεσθαι **‘ότι ’από συμφώνου ’αγωγή ου τίκτεται: διότι τότε λέγομεν τοῦτο, ‘οπότε το σύμφωνον γυμνόν ’εστίν.** ’Εδόθη τῆ ‘εβδόμη τῶν Καλενδῶν τοῦ Φεβρουαρίου 206 (CIC 5,14,1)[12]

2.2 The nudum pactum in Basilica

In Basilica, the Roman rules about *nuda pacta* were repeated.[13] But during that period of time (9th century), the need for changes was obvious. Even during the reign of Justinian, the *’αντικήνσορες* (antecessors), who were responsible for teaching legal science in the Law Schools of Constantinople, Beirut and Rome, understood that the content and basically the function of the Roman rules about *nuda pacta* were unclear and did not provide answers to the practical needs of that time. Through an examination of *Basilica*, the effort of Byzantine lawyers to comprehend *nuda pacta* and to overcome the old-fashioned Roman regulations may be traced.

This effort to define nuda pacta and to overcome the old formalities can be spotted in their comments which were included in *Basilica*:

The antecessor Thalelaios[14], following the Justinianic perception, argues that *nudum pactum* is unenforceable: “Nota, quando locum esse constitution velit regulae, quae dicit, ex pacto actionem non nasci, tunc scilicet, quum nihil ab aliquot datum sit, sed tantum pactus sim, me alicui aliquid daturum vel facturum. Si igitur dixero, me eras tibi quinquaginta daturum, eras me domum tuam aedificatorum, et nulla datio a tua parte in me praecesserit, nulla ex hoc pacto action nascitur, quia pactum nudum est. Hoc autem intellige, quum non donandi causa pactum factum sit, quia tunc ex lege condictio est, sed vel quum putarem, me debere, vel quum putarem, te esse Titium, cui donare volebam. Si vero, ut constitutione positum est, prius aliquid a te datum sit, et postea de his, quae a te data sunt, reddendis convenerit, non est nudum hoc pactum, sed convention est et parit condictionem sive praescriptis verbis actionem”.[15]

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[10] “The same Emperors and the Caesars to Photinus.
If the person whom you mention in your petition loaned or deposited (for accommodation) your property, you may bring an action to produce or for the recovery of the property (vindication) against the possessor. 1. If he had an agreement that the property should be turned over to you, then if you are, by inheritance, the successor in interest of the person who deposited it, you are not forbidden to bring an action on the contract of deposit. But if the inheritance from the deceased does not belong to you, either under the civil or praetorian law, you know that you have no action on the pact against the person, of whom you complain, under the civil law (stricto jure); but an action analogous to that on the contract of deposit lies in your favor because of the equity of the case. Subscribed at Heraclia April 27 (293).”

[11] “The same Emperors and the Caesars to Maximianus Agopodea.
If the owner of the farm promised by stipulation to pay you what you advanced for the tenants of his farm, the proper judge will order it to be paid back to you. But if the contract consists of an informal agreement only (placitum), you know that a right of action could not by our law arise out of a mere pact (294).”

[12] “Emperors Severus and Antoninus to Nica. The condition which you fixed when you gave a dowry to your foster-daughter must be observed; nor can the objection be raised against you that, as is customarily said, no action arises from a pact; for that is the law when there is a naked pact;
Promulgated January 6 (206)”.

[13] [B XI,1,7=D II,14,7] Ulpianus: «Η τοῦ ’εθνικοῦ νόμου εισίν, αίτινες ’ή ’αγωγάς εις ιδικόν ’όνομα μετέρχονται, ’αγορασίαν πρᾶσιν, μίσθωσιν καί ’εκμίσθωσιν, κοινωνίαν, χρῆσιν, παρακαταθήκην και τα παραπλήσια……Τό ψιλόν σύμφωνον ’αγωγήν ου τίκτει,’αλλά παραγραφήν». See Basilicorum Libri LX, Sheltema et Van der Wal, p.626.

[14] Professor of law (*antecessor*) under Iustinianus I, presumably in Berytus, one of the eight addresses of the *Const. Omnem* (ordinances for study brought into force with the conclusion of the Digesta in AD 533), who wrote a Greek paraphrase of the Codex II *Iustinianus*. The work, preserved in the Basilika and their scholia, contains useful information about his teachings on the Codex.

[15] “Note that the law wishes to apply the rule that no action arises from a pact when nothing is given by someone with the exception of saying, “I agree to give or do something to someone at sometime.” Therefore, if I say to you that tomorrow I will give you 50 nomismata, or tomorrow I will build your house, but you did not first give me something, no action arises from this agreement since the agreement is naked. And consider this: if no gift occurs, the [pact] is a *condictio ex lege*, except when I thought that I was in your debt or when I thought that you were Titius, to whom I wanted to give something. But if, as the law decrees, something was first given by you and then an agreement was reached concerning how what was given by you should be rendered, this agreement is not naked but a *conventio*, which does give rise to the *condictio praescriptis verbis*.”.
See Heimbach C.W.E., Basilicorum Libri LX. post annibalis fabroti curas ope CODD. MSS. alusque collatorum integriores cum scholiis edidit, editos denuo recensuit, deperditos restituit, translationem latinam et adnotationem criticam, tom.I., SUMTIBUS AMBROSII BARTH, Lipsiae 1833, p. 650 - 651.

In two comments, which are attributed to the antecessor Dorotheos[16], a different terminology is used. In the comment «'από γυμνῶν συμφώνων» (ex nudis pactis), he states: "Ex nudis pactis nunquam nascitur action. Pactum nudum quattuor modis dicitur; Aut id, quod sine causa factum est, aut quum quis dixit, se dare aliquid vel facere, et datio vel factum non praecessit, aut quum ex intervallo factum est et duriorem continent conditionem, quam id, quo dab initio placuit: ut puta, quum vendidero vel alio modo contraxero nec promisi, me daturum fideiussorem, postea autem me daturum fideiussorem promissero: quod exceptionem quidem reo parit, actionem autem actori non praebet. Nudum etiam est, quod stipulationem non habet".[17] In the comment «τυποῖ τήν 'αγωγήν», Dorotheos broadens his reasoning referring to the "pacta adiecta ex continenti" and to the "pacta adiecta ex intervallo". He states: [Format actionem] " Quamvis pacta nuda ad actionem procreandam non prosint, tamen interdum nascituram actionem formant, et quasi aliam formam ei praestant, ut in bonae fidei contractibus. Solemus enim dicere, pacta bonae fidei indiciis sive contractibus inesse et quasi adnasci. Sed hoc sic intelligendum est, ut, si quidem ex continenti pacta contractum subsecuta sint, tunc actori quoque prosint, transformata ei actione. Si vero ex intervallo post contractum pro actore aliquid convenerit, eiusmodi pactum ei agenti prodesse non potest, quia ex nudo pacto action nasci videretur. Ea enim nuda pacta insunt contractibus, quae ante, quam actiones nascantur, facta sunt, et quasi novam legem actionibus dant, tanquam in initio contractus facta".[18]

The antecessor Cyrillos believed that *nudum pactum* is a pact formed without cause: "Cyrilli. Conventionum, quae iurisgentium sunt, aliae pariunt actiones, aliae exceptions. Quae pariunt actiones, in speciale nomen contractuun transeunt, veluti in emptionem, in locationem et similia. Sed et si causa suest, veluti datio ad dandum, aliquid vel faciendum, quod factum est contractus est, et nascitur civilis action……Si vero causa non subsit, tunc nudum pactum est et actionem non parit, sed exceptionem. Interdum autem actionem transformat. Nam in bonae fidei actionibus pacta in continenti et in utilitatem actoris inita actioni insunt: pacta autem ex intervallo facta non insunt, nec actionem largiuntur". [19]

The scholiast Innominatus states: "Innominati: Si vero promiserim alicui me daturum et nulla causa subsit, eiusmodi pactum nudum est; ex nudis autem pactis nunquam obligatio nascitur".[20] The scholiast Enantiophanus rejects the Roman regulations and he argues that *nudum pactum* is enforceable. He states: "Habes actionem, quae ex nudo pacto nascitur".[21]

Undoubtly, the scholiast Stephanos has given a complete definition of *nudum pactum*: "Si quis igitur quaesiverit, quid sit nudum pactum,dic, nudum pactum esse, quod neque in speciale nomen contractus transeat, neque in eodem genere maneat, quum praecesserit datio vel factum ad dandum aliquid vel faciendum et iusta causa placitis subsit. Hoc est nudum pactum. Nudum igitur pactum, ut dictum est, actionem quidem non gignit, parit autem exceptionem. Nam qui tale pactum impetravit, verbi causa, ne debitum petatur, actionem quidem ullam, si forte pactum violetur, instituere non poterit, quia nudum pactum ita comparatum non est, ut actionem gignat: conventus autem ab eo, quocum pactus est, pacti exceptione utitur. Pactum enim nudum, ut saepe dictum est, actionem quidem non parit, exceptionem autem ei, qui pactum impetravit et contra pactum convenitur, largitur. Interdum au-

[16] Dorotheus (Greek: Δωρόθεος) was a professor of Roman law in the law school of Berytus in Phoenicia. While his date of birth is unknown, he must at least have died before 542. He was one of the three commissioners appointed by the Byzantine emperor Justinian I to draw up a book of Institutes, after the model of the Institutes of Gaius, which should serve as an introduction to the Digest or Pandects already completed and promulgated on 16 December 533. His colleagues in this project were Tribonian and Theophilus; and their work was accomplished in 533 and they were all granted with the highest title *quaestor sacri palatii illustris*. Except for the first code of 7 April 529, Dorotheus participated in the compiling of all Justinian's codes (Institutes, Digest and *Codex repetitae praelectionis*), including the second edition of the Codex Constitutionum (promulgated in 534).

[17] "An obligation never arises from naked agreements. A naked agreement is defined in 4 ways: 1) when the agreement occurs without cause, 2) when someone says that they gave or did something without something first being given or done, or 3) when after an interval of time the agreement incorporates a condition more stringent than what was first apparent, for instance, when I agree to sell or otherwise exchange something without providing a guarantee, but then later I do agree to provide a guarantee, this [later agreement] gives rise to a defendant's exception, but it does not provide a plaintiff's action. An agreement is also naked 4) when it does not contain a stipulation."
See Heimbach C.W.E., Basilicorum Libri LX. post annibalis fabroti curas ope CODD. MSS. alusque collatorum integriores cum scholiis edidit, editos denuo recensuit, deperditos restituit, translationem latinam et adnotationem criticam, tom.I., SUMTIBUS AMBROSII BARTH, Lipsiae 1833, p. 565.

[18] "Even if most naked agreements do not contribute to producing an obligation, sometimes they do frame a future action and, as it were, provide it with another form so that it becomes a good faith action and is included, as it were, among the [other] agreements. But we should think of it in such a way that when agreements follow immediately after the contract, the plaintiff benefits since the action has been altered by this, but if after an interval of time something of the contract is agreed upon by the plaintiff, such an agreement cannot benefit him since the action arises from a naked agreement. For simple agreements are incorporated into the contracts when they occur prior to the actions since they were agreed upon and provide, as it were, a new rule for actions as if they had occurred at the beginning of the contract."
See Heimbach C.W.E., ibid., p. 565.

[19] "The conventions of universal law sometimes give rise to actions, sometimes to exceptions. Those that give rise to actions have a specific contractual name such as sale, hiring, etc. If there are grounds [for an agreement], for instance, a gift [has occurred] in exchange for a gift or action, a contract has been reached and a civil action arises. But if there are no grounds, then it is a naked pact, which does not give rise to an action, but to an exception. However, sometimes [an agreement] alters the action. Pacts which occur simultaneously with the contract are incorporated in the action to the benefit of the plaintiff. Pacts that occur after an interval of time are not incorporated [in the action] nor do they give rise to an action.". See Heimbach C.W.E., ibid., p. 562.

[20] "If there are no grounds, and I declared that I gave something to someone, such an agreement is naked. An obligation never arises from naked agreements".
See Heimbach C.W.E., ibid., p. 562, 565.

[21] "You have an action that arises from a naked pact".
See Heimbach C.W.E., ibid., p. 562, 565.

tem actionem transformat, et quasi novam et naturam tribuit, ut in bonae fidei actionibus. Dicere enim solemus, pacta inita bonae fidei iudiciis sive actionibus inesse videri: in his tamen, non quovis tempore, sed quum pactum eodem tempore, quo contractus, initum est. Tunc enim actori quoque eiusmodi pactum prodest. Nam si ex intervallo, id est, si non eodem tempore eum contractu, sed postea initum est pactum, contractui non inest, neque actionem transformat, neque valent pacta, si quis actione experiens his uti velit, hoc est, parti actoris non prosunt, neque utilitatem ei afferunt agenti ex eo contractu, quem postea pactum subsecutum est, et non in continenti initum, ne ex nudo pacto action nascatur. Etenim pactum ex intervallo factum actionem non transformat. Si quis dixerit, actori pacta ex intervallo facta prodesse, nihil aliud dixisse videtur, quam ex nudo pacto nasci actionem: quod absurdum et adversus omnem legum distinctionem est. Hoc enim certum est, per pacta ex intervallo inita actionem in utilitatem actoris non transformari. Tunc, igitur, ut dictum est, nudum pactum transformat actionem, quum eodem tempore cum contractu initum est".[22]

Generally, until the 10th century, the meaning of *nudum pactum* was fluid and was altered under the pressure of practical needs. Sometimes it was extended with a view to include all the actionable pacts and sometimes it was limited only to the pacts which are equipped with an objection (exceptio pacti). Indeed, the extension of the adjective *nudum* to the actionable pacts shows that the expression *nuda pacta* is identical to the informal consensual conventions.

2.3 The nudum pactum in other Byzantine legal sources

There is also discussion of *nuda pacta* in other legislative texts and legal works, which were written from the 10th to the 14th century. Comments about *nuda pacta* may be found in the *Synopsis Basilicorum maior*[23], in *Peira*[24], in *Synopsis de Legibus* of Michael Psellus, and in *Hexabiblos* of Constantine Armenopoulos. From the sum total of comments, we can conclude firstly that a pact which was not included in the category of recognised conventions or in the category of praetorian or legitimate pacts, was named *nudum pactum*. Secondly, that pacts which are formed at a later stage than the initial contract (*pacta adiecta ex intervallo)* are par excellence *nuda pacta* and, thirdly, that uncertainty prevails among the majority of historians about the role of *pacta adiecta in continenti,* which were pacts made at the same time as the contract. As a direct result, the *pacta adiecta in continenti* sometimes are considered to be *nuda* and sometimes not.

"Meditatio de nudis pactis" is a monograph written by John Xiphilinos or Constantinus Nicaeus in the middle of 11th century.[25] In this monograph, a historian of law can find important clues about the practical use of *nuda pacta*, due to the fact that

[22] See Heimbach C.W.E., ibid., p.560- 561.
"If someone asks for the definition of a naked pact, tell him that a naked pact does not have its own contractual name and is not of the same genus as a contract, [which requires] a prior gift or action in exchange for another gift or action and has an underlying cause that is fair to its parties. This is the naked pact. Therefore, the naked pact, as has been said, does not create an action, but gives rise to an exception. One who enters a pact in which the debt is not demanded cannot bring an action if the pact is broken since a naked pact by definition cannot give rise to an action. But a defendant sued by his contractual party has made use of an exception. For the naked pact, as has often been said, does not give rise to an action but provides the defendant who has entered the pact an exception. But sometimes it alters the action and gives it, as it were, a new nature, as in the case of good faith actions. We generally say that the agreements that have occurred seem to be incorporated in good faith actions. In these instances, it is not because they occurred, but because the pact was simultaneous with the contract. Then the pact benefits the plaintiff who is bringing the action. Because if a pact is made after an interval of time, i.e., if it is not simultaneous with the contract but is rather subsequent to it, the pact is neither incorporated in it, nor does it alter the action, nor is it valid should someone attempt to bring an action on its grounds, that is, it does not benefit the party of the plaintiff nor aid him who moves the action regarding the contract, which the pact followed upon later and was not simultaneous with, so that an action might not arise from a naked pact. And so the pact that occurs after an interval of time should not alter the action. If someone says that the plaintiff is benefited by agreements that occurred after an interval of time, all he is saying is that an action arises from a naked pact. This is nonsense and contrary to the [entire] division of laws. It has been agreed that an action arising from pacts that occurred after an interval of time is not altered to the benefit of the plaintiff. Therefore, as has been said, the naked pact alters the action when it is simultaneous with the contract."
It would be very interesting to compare this definition with the one which the Montpellier law teacher Placentinus states in his "Summa Codicis": "pactum nudum, …….pactum nudum dicitur quod ab omnis sollempnitatibus iuris est destitutum, id est, sollempnitate verborum que solet attendi in stipulationibus et conceptione litterarum, quando scilicet cyrographum non intervenit nec aliud instrumentum quo nudum pactum confirmaretur. Et nudum similiter dicitur a causa que pottest sufficere ad perfectam obligationem, ut cum do ut des….item nudum dicitur a forma negotii, ut quandoque negotium non incidit in certum nomen contractus….item nudum dicitur a rei interventu, ut cum non intercedit res que possit suo interventu perfectam reddere causam obligandi, ut in mutui datione. Item nudum a continentia, quoniam, si in continenti post contractum pactum aditiatur, ex precedenti obligatione vires trahit, ut videatur inesse contractui." See Dilcher Hermann, *Der Typenzwang im mittelalterlichen Vertragsrecht*, 77 ZSS, p. 276 sq.

[23] The work represents an alphabetical summary of the so called basilicas. It is divided into a religious manner and the 24 letters (στοιχεῖα) of the Greek alphabet, which in turn (one to 72) are divided. The title marked with a category typically contains one or more removed from the *basilicas* chapters in the text (with precise indication of places), sometimes there are also made notes. M*aior synopsis (Basilicorum)* is the most commonly recorded collection of secular law from the Middle Byzantine era. Some manuscripts contain valuable Scholia. The *synopsis (Basilicorum) maior* itself as well as the archetype of its annex may arise from Nikephoros Phokas (963-969), Symeon Logothetes and the time of the Emperor.

[24] *Peira* ("experience") is a compendium which was published by one of the colleagues of Eustathios Rhomaios (975-1034), a senior judge at the imperial court, after selecting some parts of his work and arranging them by subject in 75 titles. The *Peira* was intended as a textbook. It contains "in a loosely associated progression, precepts, definitions, and solutions to problems from all spheres of civil and criminal law" (D. Simon), and its compiler tried to deduce general rules that governed Rhomaios' decisions. The *Peira* remained a popular book until the late Byzantine period, and was often cited by later Byzantine legal scholars. See Simon, Dieter, "Peira". In Kazhdan, Alexander. *The Oxford Dictionary of Byzantium*. New York and Oxford: Oxford University Press. p.1617 and Simon, Dieter, "Rhomaios, Eustathios". In Kazhdan, Alexander. *The Oxford Dictionary of Byzantium*. New York and Oxford: Oxford University Press. p. 1793, Zachariae C.E. a Lingenthal, *Jus Graecoromanum- Practica ex actis Eustathii Romani*, vol. I, Leipzig 1856–1884, p. 244.

[25] According to researchers, "Meditatio de nudis pactis" was written in the end of 1047 A.D. when Constantinus the Gladiator was Emperor. See Zepos J. and Pan., Jus Graecoromanum – Αυξημένον Πρόχειρον, 7th Book, publications George Fexis and Co, Athens 1931, Introduction (without numbers of pages).

it is written by a judge, who writes to his colleagues in order to persuade them about the accuracy of his opinion in litigation between an abbey and a Byzantine official.[26]

The litigation was based upon a contract formed between the official and the abbey. According to this contract, the official promised to pay a sum of money to the abbey on the basis that the abbey would provide food and shelter to him and other people (which are not named), while it was stipulated that in no case would the authorities of the Abbey would ask them to become monks.[27]

In accordance with this contract, the official paid the agreed sum of money and stayed with the other people in the abbey for years without any problem. By a subsequent agreement, the official promised to pay more but then he did not comply with his contractual obligations because he claimed that the subsequent agreement was a *nudum pactum* and consequently was not binding and enforceable.

The abbey appealed to the Imperial Court demanding the Court to declare that the agreement was enforceable and furthermore to force the official to pay the agreed sum of money.[28]

The author of *"Meditatio de nudis Pactis"* based his arguments on the comments of the scholiast Stephanus.[29] According to him, the court should focus on the second pact and examine whether it was formed before or after the implementation of the first contract. If the second pact was formed before the payment, or after the payment but before the entry of the official and his group of people into the abbey, or after their entry but before the fulfilment of abbey's contractual obligations, then this pact should be considered as a *"pactum adiectum in continenti".*[30] Consequently, if the abbey sued for the additional amount of money, which the official had promised, they would win the action because the second pact as a *"pactum adiectum in continenti"* would have altered the nature of the initial contract, and would have created new contractual obligations. However,

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[26] « Ει' μέν δι' έριν τινά καί δυσμένειαν, 'ή καί φιλοτιμίαν, 'ή καί άλλην αιτίαν ουκ ευπρεπῆ, 'ή καί 'ως μεμισθωμένος τινί πρός τήν παροῦσαν προήγμαι γραφήν, 'ὦ φίλοι συνδικασταί, ουδέ μακροτέρας 'άν 'ίσως 'ηπόρουν συγγραφῆς …..μόνου δέ δικαίου ζῆλος προς το εγχείρημα συνεκίνησε, καί τό βούλεσθαί με διδάξαι τους αγνοοῦντας τήν τῶν πάκτων διαίρεσιν» (Προοίμιο και Παράγραφος 1).
"If I was led to this present indictment on account of some quarrel or hostility, or ambition, or some other dishonorable reason, or even if I had been hired by someone, I would not have hesitated, my dear fellow judges, to extend my text … but the zeal for justice alone challenged me to this endeavor as well as my desire to teach those who do not know how to distinguish between different pacts" (Foreword and Paragraph 1).
See Zepos J. and Pan., Jus Graecoromanum – Αυξημένον Πρόχειρον, 7th Book, publications George Fexis and Co, Athens 1931, p. 365

[27] See Troianos Spyros, The Byzantine Law sources, second edition revised, publications Ant. N. Sakkoulas, Athens – Komotini 1999, p. 213.
Τίτλος VII, χωρίο 3: « Δόσεως γάρ χρυσίου γεγενημένης πρός τήν μονήν, 'επί τῶ τους δεδωκότας μένειν τε παρ'αυτῆ 'επίσης τοῖς 'άλλοις, καί λαμβάνειν 'ρητά τινά, καί μη καταναγκάζεσθαι θάτερον τούτων 'αποκείρεσθαι, μέχρις 'άν αυτός βουληθῆ, συνέστη κομβεντίων 'ιουρισγεντία 'ήτοι συναίνεσις φυσική καί νόμιμος, 'επί ευλόγω τῶν συναρεσάντων αιτία, 'εφ'ᾗ καί 'η πραεσκρίπτις βέρβις παρέχεται».
In English, "After gold was given to the monastery in order that those who had given it might remain in the monastery as the others and agree to certain terms and not be forced to become monks without their consent, a contract of *ius gentium* has been concluded with the free and legal consent of the parties, based on a reasonable cause which is also protected by the *actio praescriptis verbis*".
Τίτλος VII, χωρίο 8: «Τότε γάρ χρυσίον προσήνεκται τῆ μονῆ, καί οι δεδωκότες παρ' αυτῆ προσελήφθησαν, καί τοῖς 'εν ταύτη μονάζουσι συνηνώθησαν».
In English, "Then the gold was given to the monastery and those who had given it entered inside and they were united to the monks living there".
Τίτλος VII, χωρίο 9: «'Ητε τῶν συμφωνηθέντων δίδοσθαι καταβολή διά τῆς 'ετησίας δόσεως τήν ενέργειαν 'έσχηκε, καί ουδέν τῶν δεδογμένων 'ατέλεστον 'υπολέλειπται».
In English, "And the payment of the amount agreed upon was made annually and no obligation was left unfulfilled".
See Zepos J. and Pan., p. 373 και 374.

[28] See Monnier Henry, Έtydes de Droit byzantin, Introduction de N. Svoronos, Variorum Reprints, London 1974, p. 165-166.

[29] Introduction: «καί το βούλεσθαί με διδάξαι τούς αγνοῦντας τήν περί πάκτων διαίρεσιν» και «Διά βραχέων 'ως οιόν τέ τά τοῦ σκοποῦ 'εκθήσομαι, ουκ 'εμόν τι προφέρων διδασκάλιον, ουδέ 'ερμενείαν παρεισάγων διατάξεσι καί 'ρήσεσι νομικαῖς, διανοίας 'ανάπλασμα, ουκ' οιδ' 'ηστινοσοῦν καί ειπεῖν χρή. 'αλλά ταῖς τοῦ μεγίστου καί διασημοτάτου διδασκάλου καί νομοθέτου Στεφάνου μεθόδοις κατακολουθῶν, καί νομοθεσίαις».
In English, "and my desire to teach those who do not know how to distinguish between different pacts" and "I will reveal my intention as briefly as possible, neither offering my own teaching, nor introducing an interpretation by means of legal rules and sayings, [nor attempting] to recast its meaning, about which I do not know what to say. But [I am] following the methods and legislations of our greatest and most famous teacher and legislator Stephanus."
See Zepos J. and Pan.,p. 365.

[30] Τίτλος VIII, προοίμιο: «Καί τό 'ειρημένον τοίνυν σύμφωνον, τό μεταξύ τῆς μονῆς καί τοῦ πρωτοσπαθαρίου, ει μέν μήπω τοῦ χρυσίου παρά τούτου τοῖς μοναχοῖς δεδομένου προβέβηκεν, 'ή κάν τοῦτο 'εδέδοτο, τοῦ 'ανθρώπου μηδέπω πρός τήν μονήν εισεληλυθότος 'ή τῆς τῶν σιτηρεσίων καί 'ρογῶν δόσεως 'έτι 'ενηρτημένης, είχεν 'άν 'ισχύν τινα καί 'ενέργειαν, καί τοῦ πρωτοσπαθαρίου κινοῦντος 'εκ τῶν προγεγονότων συμφώνων κατά τῶν μοναχῶν, 'ώστε πρός πέρας 'αχθῆναι τά συναρέσαντα, παραγραφή 'εκ τούτου 'αντέκειτο τῶ 'ενάγοντι, καί ουκ 'ηναγκάζοντο οι' μοναχοί 'ή προσδέξασθαι τοῦτον 'εν τῆ μονῆ, 'ή διδόναι αυτῶ 'άπερ 'επηγγείλαντο, πρό τοῦ κομίσασθαι καί αυτούς τά 'επ' αυξήσει τῶν προτετυπωμένων συμφωνηθέντα δι' αυτοῦ παρέχεσθαι πρός τήν μονήν.».
In English, "The aforementioned agreement between the monastery and the protospatharios would still have some force and effectiveness, even if it had been reached before his payment of the gold to the monks, or if it was given before his entry in the monastery or if the providing of food and shelter [by the monastery] was still pending. And when the protospatharios filed suit against the monks based on the previous agreements in order to demand their enforcement, an exception from this was brought against the plaintiff and the monks were not forced to either accept him into the monastery or to give him what had been promised before they received [from him] the [more excessive than usual amount] in exchange for his entering the monastery.
See Ζέπων Ιω. και Παν., Jus Graecoromanum – Αυξημένον Πρόχειρον, Τόμος Έβδομος, εκδοτικός οίκος Γεωργίου Φέξη και Υιού, Αθήνα 1931, σελ. 375[the underlined words are not needed]

because of the complete execution of the first agreement, the second pact was a *"pactum adiectum ex intervallo"* and as a result it was not enforceable. [31] It was a *nudum pactum*.

2.4 The enforceability of nuda pacta

The principle of non-enforceability of *nuda pacta*, which was maintained in the Byzantine legal system via the Justinianic legislation and the *Basilica*, did not correspond to the practical needs of the 10th and 11th century, but it was also found to be inconsistent with the legal thinking of that time. The consequence of the above situation was the contestation of the rule *ex nudo pacto non oritur actio*, which was expressed by the publication of the 72 *Νεαρά* of Leo VI. With this imperial law, the steps that had started through the creation of praetorian and legitimate pacts were continued.

According to the text of this statute, there were some people who argued that each pact which did not include *πρόστιμον*, namely a penal clause, constituted a *nudum pactum*. It was also said that a written agreement where a cross had been incised on the document and for the observation of which witnesses had been put under oath in the name of God, was likewise argued by some to be a *nudum pactum.*

The emperor Leo VI opposed this opinion. He legislated that each pact, where the cross had been incised on the document or there is reference to the name of God, is not *nudum pactum* but it is wholly valid and effective. Simultaneously, it was accepted as enforceable and actionable even if it did not include any penalty as a sanction for potential breaches.

This rule is in complete opposition to the formalist rules of Justinian's legislation, which was repeated in the *Basilica*. At the same time, we reach the conclusion that during the 10th century and henceforth not only did an explicit perception of the meaning of *nuda pacta* not exist, but also that the scientific theory of that time was altering under the pressure of practical needs and the different ideology of the Empire's subjects.

In the Eastern world, the formalism of the Roman law about contracts was something inconceivable. It was difficult to accept that the validity of the contracts depended on the observation of legal formalities. Since the *constitutio Antoniniana,* the law of the Greek-speaking provinces of Asia Minor had been governed by forming contracts in writing, in which the words: *"'επερωτηθείς 'ωμολόγηκα"*(when asked, I replied) were inserted. The necessity of written type was attributed in every contract. It was the popular perception that each pact, which was formed in writing, was effective and bound the contracting parties.[32]

The rules of Leo VI were also repeated in the *Hexabiblos* or *Πρόχειρον Νόμων* of Armenopoulos (1345 A.D.). The commentator upon the provision informs us that: «'η νεαρά αύτη ουχί τά παράνομα κυροῖ σύμφωνα, είπερ 'εν 'ονόματι τοῦ θεοῦ γένοιτο ('εκεῖνα γάρ καί ούτως ουκ 'έρρωται), 'αλλά τά μεν 'έννομα μέν, ψιλά δε, 'άπερ εισί τά χωρίς 'επερωτήσεως καί προστίμου γενόμενα. Διό καί φησί. Κάν μηδείς λόγος προστιμήσεως συνεγέγραπτο. Τοῦ γάρ νόμου τά ψιλά σύμφωνα μή στέργειν κελεύοντος, 'η νεαρά αύτη καί ταῦτα στέργειν παρακελεύεται, ει γε μόνον 'επ' ονόματι τοῦ ζῶντος θεοῦ γένοιτο. Τοιαῦτα δέ 'έστιν οἷα τά παρ' 'ημῖν ταβελλιωνικά, 'ά τήν 'αρχήν 'εκ τοῦ 'ονόματος τοῦ Πατρός καί τοῦ Υιοῦ καί τοῦ 'Αγίου Πνεύματος 'έχουσιν».[33]

His last thoughts prove that, in the period when Constantine Armenopoulos lived (AD 1320–1385), each written pact was acceptable as valid and actionable if it included an invocation of God. From all that has been said, it becomes clear that if the invocation of God constituted the sole condition for the enforceability of the pact, then the rule *ex nudo pacto non oritur actio* is undermined, and the next step is the acceptance of freedom of contract, in other words the acceptance that an agreement on its own (solo consensu) is sufficient to generate an enforceable contract.

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[31] Τίτλος VII, χωρίο 13: « 'Εμοί μέν ουν δοκεῖ, καί πᾶσι τοῖς συναιροῦσί μοι, μηδέν τούτων 'εξεῖναι γίνεσθαι μετά τόν 'απαρτισμόν τοῦ συναλλάγματος καί τήν τελείωσιν. Μήτε αυξάνειν, μήτε μειοῦν τά προβεβηκότα, 'άπερ κατά φύσιν τοῦ συναλλάγματος 'ο νόμος είρηκε».
In English, "It seems to me then, and to all those gathering with me, that none of these things can happen after the completion and finalization of the contract. What occurred before cannot be increased or decreased, just as the law has stated concerning the nature of the contract.
See Ζέπων Ιω. και Παν., ό.π., σελ. 374.

[32] See Maridakis S. G., The Civil Law in the Novelae of Byzantine Emperors, publications G.I. Basileiou, Athens 1922, p. 214 και Velissaropoulou – Karakosta Ioulia, Reasons of liability – Historical Birth and Modern Doubt of the sources of contractual commitment, publ. Ant. N. Sakkoulas, Athens – Komotini 1993, p. 207 – 208.
A proof for the fact that the written type or the presence of witnesses were the main form of forming a contract is the Novela of Empress Eirini and the following provisions of "Ecloga":
*Τίτλος 3, χωρίο α΄: « Περί καταγραφείσης προικός καί μη 'επιδοθείσης, καί περί δικαίου προικός»
*Τίτλος 4, χωρίο β΄: «Περί δωρεών απλών 'ήγουν 'απευντεῦθεν 'ήδη χρήσεως καί δεσποτείας πραγμάτων 'ή δεσποτείας αυτῶν μόνον, 'ή μετά θάνατόν τισικαταλιμπανομένων, καί περί αιτιῶν, 'εξ ὧν αι τοιαῦται δωρεαί 'ανατρέπονται».
*Τίτλος 9, χωρίο α΄: «Περί πράσεως καί 'αγορασίας 'εγγράφου καί 'αγράφου».
*Τίτλος 10, χωρίο α΄, « Περί δανείου 'εγγράφου καί 'αγράφου, καί τῶν διδομένων 'επ' αυτοῖς 'ενεχύρων».
*Τίτλος 13, χωρίο γ΄: «Περί μισθώσεως».
See Zepos Io., *Βασιλικά*, Τόμος Πρώτος, Βιβλίον 1-12, Athens 1910, p. 729 και Zepos Pan., *«Η παράδοσις δι' εγγράφου 'εν τῷ Βυζαντινῷ καί Μεταβυζαντινῷ δικαίω»*, in the Honorary Volume of Constantine Armenopoulos, p. 206 and Monferratus G. Antonius, *Ecloga Leonis et Constantini cum Appendice*, Typis Fratrum Perri, Athenis 1889, p. 15, 16, 26,27, 33.

[33] "This regulation does not ratify the illegal pacts, if they are concluded in the name of God, but those which are legal but also naked formed without any stipulation and penal clause. That is why it states even if no penal clause was forecasted. Because the law may order not to accept naked pacts but this regulation accepts them as legal if they were concluded in the name of God. These are the notary's written agreements which have as a preambule: in the name of the Father, the Son, and the Holy Spirit."
See Armenopoulos Constantine, *«Πρόχειρον νόμων ή 'εξάβιβλος»,* by Constantine G. Pitsakis, editions Dodoni, Athens 1971, p. 60-61.

Some Legal and Practical Aspects of the Process of Colonization and Expatriation in the Territory of Macedonia and Kosovo: 1912–1941

Sami Mehmeti, Bekim Nuhija***

Abstract

After the First World War in the territory of Macedonia and Kosovo intrusive and large-scale forced deprivations of private property were carried out with the aim of changing the ethnic structure. As a consequence of laws pertaining to the agrarian reform, a considerable mass of land belonging to the Albanian population of Macedonia and Kosovo was forcefully expropriated and allocated to Serbian peasants coming from Montenegro and Serbia. These actions succeeded in spreading uncertainty among the local landowners, many of whom sold out their property for symbolic prices just to avoid further persecution. The new ownership structures contributed furthermore to the forced displacement of the Albanian population.

Key words: *Macedonia; Kosovo; colonization; agrarian reforms; expatriation; Turkey.*

Introduction: The Aftermath of the Collapse of Ottoman Empire

After the Balkan wars, the Slavic population in the region of Macedonia and Kosovo gained power and tried to revenge for their perceived exploitation against the local non-Slavic population.[1] This atmosphere of revanchism the Serbs considered as a correction of a 'historical injustice' that took place from the end of the 17th century and all the way to 1912 when the ethnic structure of Kosovo and parts of Macedonia was changed in favor of non-Slavic population.[2] This population was regarded as an Ottoman remnant and its expatriation from the newly occupied territories was a part of the implementation of the 'de-Ottomanization' process.[3] The fall of the Ottoman Empire by the majority of the Muslim population in Macedonia and Kosovo was felt as a collective tragedy and one of their options was to migrate from their homeland and settle in Turkey because according to their religious beliefs living under the rule of 'infidels' was prohibited.[4]

The occupiers under the banner of installation of a new legal order exploited the chaotic situation created after the Balkan wars especially in the area of real property. These actions ignored the agrarian relations and property rights established during the Ottoman rule and affected lives of hundreds of thousands of Albanians and a few thousand ethnic Turks. The Serbian government promised that it will solve the agrarian problem and that it will abolish feudal ownership and the duties that derived from it, and it will recognize the right of ownership over the land that they cultivated. However, it prohibited its courts to register any land until the issuance of a land certificate for that property (*tapu*). It formed a committee that was authorized to recognize the ownership of the property of Albanians only in cases they had certificates issued more than fifty years ago and that were verified by the Register (*Defterhane*) in Istanbul, otherwise their real estate was ordered to be registered as state ownership.[5] These actions succeeded in spreading uncertainty among Albanian landowners, many of whom sold out their property for symbolic prices just to avoid further persecution.

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1 Christians living in the Ottoman Empire were considered to be under the protection of the state. Their lives and property were protected by the state and they enjoyed religious freedom. In turn, the they had to pay a special tax. Under the Millet system, the Christians were treated as second class citizens. Before the *Tanzimat* reforms of 1839 they were subject to several restrictions: the house of a Christian could not be higher than that of a Muslim; Christians were banned from living in certain neighborhoods; they were not allowed to dress like Muslims; they could not carry arms without special permission; they could not serve in the army; a non-Muslim man could not marry a Muslim woman; Christians could not take up employment in the public sector; they could not witness against a Muslim in a court of law; and it was forbidden to toll the church bell loud enough to be heard from outside. Berdal Aral, *The Idea of Human Rights as Perceived in the Ottoman Empire*, Human Rights Quarterly, Vol. 26, No. 2 (May, 2004), p. 475-476.

2 According to Turkish statistics, 912,902 inhabitants lived in the Vilayet of Kosova, out of whom 743,040 were Albanians, 53,396 Bulgarians, 106,209 Serbs, 20,009 Jews and 5,043 Romanies. (ASHRSH, fund MKK. D-7, doc. 707936. Turkish statistics of 1911).

3 Noel Malcolm, *Kosovo: A Short Story*, Harper Perennial, 1999, p. 250-252.

4 Other reasons for migration were fear of retaliation for, rumors about welfare in Turkey, political repression inside the Kingdom of Yugoslavia, social extrusion, cultural neglecting, etc.

5 Dr. Milovan Obradovic, *Agrarna reforma i kolonizacija na Kosovu (1918–1941)*, Pristina, 1981, p. 23-24.

Following the Serbian takeover of Macedonia, on 20 February, 1914, the Serbian government passed the Law-decree on Agrarian Reforms and Colonization in the occupied regions. This decree offered great incentives to draw in new colonists, which besides the allocation of property exceeding 5 hectares for a family, granted additional 2 hectares for each male member of a colonist family. Other incentives included the additional assistance through subsidizing in full their relocation, providing construction materials for free, and granting total tax exemption for the colonists. This allocation of the newly conquered and subsequently nationalized land by the state also provided for the transformation of the legal status of such real property from state into private ownership after 15 years of their possession and use by the settlers. That decree was in effect until 1919 and it did not succeed to abolish feudal relations.[6]

From 1912 to 1914, Serbia and Montenegro expropriated 381,245 hectares of land in Kosovo and Macedonia. 15,943 families of colonists that settled in Kosovo were granted 228,000 hectares of land.[7] Documents found in the archives of the Yugoslav Federal Secretariat Foreign Affairs in Belgrade, reveal that from November 1912 to March 1914, 239,807 Albanians were forcefully displaced to Turkey. This figure does not include children under the age of 6.[8] The Serb sources say that despite these actions from the Serbian government only a small number of colonists settled. This was because of lack of adequate preparations and resistance from the local population.[9] Moreover, the outbreak of the First World War nullified the symbolic results of colonization.

Colonization (1918-41): The Plan

After the First World War, the newly created Kingdom of Serbians, Croats and Slovenes (KSCS) continued the large-scale colonization that had started shortly after the Balkan wars. At the same time, it intensified the efforts to change the ethnic composition of the newly conquered territories. It realized its objectives through the implementation of an 'agrarian reform'.[10] This was also used as an instrument for expropriation of property of Albanians[11]. The government officials claimed that they were put under pressure by the peasants to who were demanding agrarian reforms. They said that they had no choice but to fulfill their requirements, being afraid social unrests. On the other side, they urged the peasants to seize the land of their feudal masters, and as a consequence compelled the involvement of the government. The implementation of the agrarian reforms in the KSCS began approximately at the same time as in other European countries such as the Soviet Union, Romania, Greece, Bulgaria, Czechoslovakia,[12] and similar efforts were made also in Albania[13].

A manifesto by regent Alexander Karadjordjević from December 1918 called for radical agricultural reforms in the territory of the new state, with the goal of termination feudal relationships and allocation of land to farmers and veterans of war. The process of the colonization was further implemented by various legal acts. On 25 February, 1919, the government of the KSCS passed the Decree on 'Preliminary Regulations on Settlement of Agrarian Relations'. This was the first legal act marking the collapse of the feudal system and the beginning of the great political offensive aimed at the expropriation of the bigger landowners and some of the smaller ones. The provisions of this decree for the next 12 years[14] served as a legal and political program on which the agrarian reform's was based. The law designated non-occupied state land, rural and municipal land as appropriate for colonization. The policy defined regulations accordingly, so that every family would get four or five hectares, and in city areas no less than two hectares. Depending on land quality, there was a possibility of acquiring even more land. The policy benefited colonizers in many other ways: free transportation, usage of state building material such as woods for house building and so on. The colonists after settlement were exempted from state taxes for three years and after 1928 for five years.[15]

From 1921, the Constitution of the KSCS by its Article 37 on the expropriation of property for public interest opened practically the way for the expropriation of the property of the non-Slavic population. Albanians, Turks and other non-Slavic groups were forced to emigrate, mainly due to the land reform,

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6 Dr Milivoje Eric, *Agrana reforma u Jugoslaviji 1918–1941 (Agrarian Reform in Yugoslavia, 1918–1941*), Sarajevo, 1958, p. 140.

7 Dr. Jusuf Osmani, *Kolonizimi serb i Kosovës*, Era, Prishtinë, 2010, p. 62. Haus und Stads Archiv, Politichen Archiv, 24-38-3869, nga Mitrovica-Vjenës, raport, nr. 6/P, dt. 28.02.1914; Sh. Braha, *Gjenocidi serbomadh dhe Qëndresa shqiptare (1844–1990)*, Gjakovë-Tiranë, 1991, fq. 232.

8 Srpska akademija nauka i umetnosti, Odeljenje istoriskih nauka („Dokumenta o spolnjoj politici kraljevine serbije", K.VII Sv.1 Beograd 1980. str.617-618).

9 Dr. Milovan Obradovic, *Agrarna reforma i kolonizacija na Kosovu (1918–1941)*, Pristina, 1981, p. 29.

10 One factor was the aspiration to halt the waves emigration from Serbia and Montenegro to America, by offering them free land near their homes. Another factor was the policy of the punishment of Kacaks (outlaws) by confiscating their property: the most efficient way was through implementing this punishment and distributing their property to colonists. There was another plan (seriously discussed in Belgrade in 1921, but never implemented), to colonize Kosovo with 7,000 Russian soldiers commanded by General Vrangel - a Serbian equivalent of the Ottoman policy of settling Circassian fighters in the strategically important regions. Noel Malcolm, *Kosovo: A Short Story*, Harper Perennial, 1999, p. 278-9.

11 Fatmir Sejdiu, *Reformat agrare si instrument i shtypjes nacionale të shqiptarëve (Agrarian reform as an instrument of national oppression of the Albanians)*, Prishtinë, 2001, p. 55.

12 Josip Vrbusiç, *Agrarna reforma i kolonizacija u Slavoniju i Baranji*, Doktorska disertacija (The agrarian reform and the colinization of Slavonia and Baranya), Pravni Fakultet (The Law Faculty), Osijek, 1986, manuscript, p. 89.

13 Burim Çitaku, Çështja agrare në Parlament 1921–1924, Studime historike nr.3, botim i Akademisë së Shkencave të RPSH-së dhe i Institutit të Historisë (the Agrarian question in the Parliament between 1921–1924, Historical Studies nr. 3, Published by the Academy of Sciences of the Peoples Republic of Albania and by the History Institute), Tiranë, 1974, p. 52.

14 It was in force until 1931, when 'the Law on Agrarian Reform and Colonization' was adopted.

15 Dr. Milovan Obradovic, *Agrarna reforma i kolonizacija na Kosovu (1918–1941)*, Pristina, 1981, p. 44-51.

but also because of oppressive, and sometimes violent measures exerted against them.[16] In order to implement the above mentioned agrarian reform, several decrees were passed, in particular the Decree on the Colonization of the Southern Parts of brought on the 24th of September 1920, the Law on Volunteers, adopted on the 31st of August 1928 and amended on the 18th of September 1930, the Law on the Delimitation of the State Forests and the Law on Agrarian Relations of the 5th of December 1931, amended in 1933. The newly established Ministry for Agrarian Reform (that is, the High Agrarian Trustee Office in Skopje) and the controversial Alliance of Agrarian Cooperatives of Southern Serbia were in charge of their implementation in certain areas of Macedonia and Kosovo.[17]

In contrast to colonization enterprises of that time like Australia, Argentina or Canada the colonization of Kosovo and Macedonia had predominantly ethnic background. In the case of Kosovo, the population of 'endless and sparsely populated areas' was not carried out 'with the goal of working the land, improving the industries and teach the sciences and arts'[18], but with the aim of changing the ethnic composition of population. From a financial standpoint, the colonization in Macedonia and Kosovo was the least expensive, i.e. the state provided every colonist family an amount of 10.000 dinars, in comparison to Canada where the state provided 160.000 dinars to every colonist family, in Prussia 120.000 dinars and in Caucasus 90.000 dinars.[19]

Colonization (1918-45): The Results

During the first years,[20] the implementation of the law in practice was a slow and difficult process. The colonization was characterized by widespread irregularities, poor organization and apparent inconsistency.[21] However, it was a planned colonization: people from Herzegovina, Dalmatia, Montenegro[22] and Southeastern Serbia settled on the states' designated areas, i.e. they did not have the right to choose the location according to their will like the ones that moved in before the First World War. It is evident from the official archive collections that one of the objectives of colonization was to inhabit 'the Southern provinces', i.e. Macedonia and Kosovo, 'with nationally meritorious and verified elements', that include veterans of war, policemen, refugees and party militants, and some retired government officials, bankrupted merchants and adventurers.[23] The allocation of land based according to political parameters was not the only encountered difficulty that worried the colonists. In certain cases, they inhabited unregistered lands, which changed their owners very frequently. This made them particularly vulnerable to intimidation, especially before local or national elections.

The colonization of Kosovo and Macedonia made discontented both the state and the colonists. The most discontented was the native population.[24] Even the governmental officials who took place in this process during the mid-thirties avowed that settling Serbs among half a million Albanians was a completely unsuccessful. The Albanian villagers were distrustful of government actions and considered them as a threat to their very existence.[25] On the other side, many colonists had the opinion that the government had mislead them. They requested the land that the government had pledged to them as a reward for their participation in the armed struggle against the Albanian rebels (Kacaks). During the first years of coloniza-

16 According to a report published in Italy, from January to February of 1919 Serbian troops had killed 6,040 people and destroyed 3,873 houses. In April of 1921, the Albanian Government informed the League of Nations that from the beginning of that year 2,000 Albanians had been killed in Kosovo. A document by the Committee of Kosovo in 1921, estimated that 12,371 people had been killed, 22,110 were imprisoned and nearly 6,000 houses were burned. Noel Malcolm, Kosovo: A Short Story, Harper Perenial, 1999, p. 285-289.

17 Dr. Jusuf Osmani, *Kolonizimi serb i Kosovës*, Era, Prishtinë, 2010, p. 65.

18 Constitution of Argentina, 1853, Article 25.

19 AJ, 38-716-895, Vreme, 25. 10. 1937. Vladan Jovanovic, *Tokovi i ishod kolonizacije Makedonije, Kosova i Metohije*, 3 Tokovi istorije (Currents of History), 2006, p. 40.

20 In 1919 only 33 families settled in Kosovo, and in 1920 the number was 321. AJ, 96-21-71, Izvestaj Vrhovnog agrarnog poverenistva u Skoplju.

21 According to the magazine 'Agrarni Pregled' no. 1/1924, the colonization had started before the agrarian reform, and then they went hand in hand, instead of agrarian reform starting first. It was implemented without a plan, without any meaning, without organized institutions and without financial means. The magazine calls the Agricultural Administration incompetent and ignorant. It claims that there was speculation with the land because 40% of the land had not been granted to the farmers, but to different kinds of speculators and parasites. See. Dr. Jusuf Osmani, *Kolonizimi serb i Kosovës*, Era, Prishtinë, 2010, p. 82.

22 The hilly Albanian settlements were primarily colonized by Montenegrins, because it was believed that they were mentally and culturally most similar to Albanians.

23 The colonists were systematically armed from the storages which belonged to the Agrarian Offices, since they were frequent victims of Kachak attacks. During the chases after the armed rebels, the government carried out uncontrolled repression over entire villages, which brought additional uneasiness amongst all classes of citizens.

24 The magazine „Police" no. 3-4 of 1922, published a text from the mayor of Gracanica, in which he showed that a large number of colonists lived comfortably in small towns. According to him, the colonist actually were not farmers but merchants, craftsmen and clerks. According to him, the colonists by renting the land to local farmers had become 'the new aghas' or landlords. As a consequence, the agrarian reform did not eliminate feudal relations, but it reinstalled them. The only difference was that Serbs aghas replaced old Turkish ones. Dr. Jusuf Osmani, *Kolonizimi serb i Kosovës*, Era, Prishtinë, 2010, p. 81.

25 The Yugoslav administration demonstrated a lack of tolerance through political misuse of Muslim priests and schools, and especially in terms of relation towards Muslim property. The properties of Muslim religious communities and charitable foundations were confiscated as well. Some mosques and graveyards were turned into army warehouses, gardens and homesteads. Yugoslav Department of Religions interdicted such usurpation, but their colleagues from the Ministry of agriculture usually evinced dissent. As an evidence for this stands the complaint of the Turks and Albanians of Yugoslavia filed in 1930 at the League of the Nations. In order to exert stricter state control over the Muslim religious community, its administration was centralized in 1930.

tion, the state could not guarantee them the personal security because it did not control the whole territory and there were attacks from local rebels. Local authorities regarded the colonists with suspicion as well. Clerks, based on political grounds, continually intimidated them with expulsion, especially before elections.[26] The government also took advantage of the presence of the colonists when it tried to intimidate the local population. Throughout the process of colonization, there was no consistency, since the institution that was entitled to implement it was susceptible to mismanagement and corruption. As the compensation that the landowners received was unjust, the disillusioned colonists increasingly became a knotty problem for the state bureaucracy.[27]

According to Jacques Anselm, almost 65% of colonists from Kosovo and Macedonia returned to their homeland by 1928. Many colonists illegally sold the allocated land by the state and went back to their places of origin.[28] They also employed some legal tricks by negotiating and concluding 'cession contracts' with buyers of the land. These contracts contained clauses on the purchase of debts owed to the agricultural community exceeded actual. The village of Brvencia in the Tetovo area was inhabited by Serb colonists who were specialized in the trade of state land.[29] These developments resulted in some substantial revisions in the legislation concerning colonization. A legal act adopted in 1927, expressly prohibited trade with the state land and prescribed that any colonist who relinquished his entitlements over state lands in favor of a local would be criminally prosecuted. Meanwhile, the decision which granted them the title over land was annulled and the land was returned to the state authorities.

According to the official data of the Yugoslav Ministry of Agriculture, from 1919 until 1940, 17,607 families or 87,743 persons were settled in the 'southern regions': 78,692 were Serbs (89.68%), 8,811 Croats (10.04%) and 240 Slovenians (0.27%). From religious perspective, 82,388 were Orthodox (93.89%) and 5,355 were Roman Catholics (6.1%).[30] On the other hand, according to the data of the High Agrarian Trustee Office in Skopje, in 1940 in the 'southern regions' there were 1,078 colonies which included 19,508 colonist families. Jovan Trifunoski mentions that in the late 1930s' there were 110 new settlements in the territory of Macedonia, that included over 6,000 households and up to 40,000 settlers.[31] If we count in also the families of native inhabitants who were given land, then around 48.000 families were directly included in the agrarian reform and colonization. Up to 75% of the total expropriated landmass in Yugoslavia was in Kosovo and Macedonia; 192.000 hectares were expropriated only in Kosovo and that affected more than 62.000 families. The colonists settled on a total landmass of 167.351 hectares.[32]

Expatriation

After the agrarian reforms abolished the feudal relations, the majority of Muslim landowners in Kosovo and Macedonia did not have sufficient incomes, and they had two alternatives: to practice craft or commerce, or to migrate to Turkey. A large number of them chose to became artisans and tradesmen. Meanwhile, a small number sold the remaining of their property and migrated to Turkey.[33] In Turkey they continued to live as introvert groups that preserved their traditions and did not mix with the local population. A lot of immigrants from urban areas did well in trade and crafts, and some of them gain important positions in the public administration and the military. In contrast to them, immigrants from rural areas were granted free lands near the Sea of Marmara, but they were marshy and barren.[34]

The creation of the Turkish 'nation state' in 1923 facilitated the emigration of large masses belonging to the oppressed Muslim minorities as the policy of the Turkish Republic was that of 'bringing home' all people of 'Turkish origin or conscience', irrespective of their newly acquired citizenships after the recent border changes in the Balkans. The idea of expatriating Yugoslav Muslims to Turkey was constantly suggested from Turkey, which was planning to inhabit the deserted areas in the far east of the country, and possibly use the immigrants from the Balkans in the fight against the Kurds. The kingdom of Yugoslavia made a huge efforts to prevent the development of national consciousness or nationalism among the local Albanians and Turks and changed their denomination simply into Muslims. As the royal dictatorship was proclaimed on the 6th of January 1929, all Albanian and Turkish political and cultural activities were banned, their already restricted rights and freedoms were all abolished and all newspapers published in Turkish were also closed.[35]

One of the most important contentious issues between Turkey and Yugoslavia was the expropriation of the property by the Yugoslav authorities. In 1929, upon the intervention of Turkey,

[26] Besides the 'agricultural' colonization there was an 'administrative' colonization. The majority of the clerks in the public administration were Serbs.
[27] Dr. Milovan Obradovic, *Agrarna reforma i kolonizacija na Kosovu (1918–1941),* Pristina, 1981, p. 95-99.
[28] Vladan Jovanovic, *Tokovi i ishod kolonizacije Makedonije, Kosova i Metohije*, 3 Tokovi istorije (Currents of History), 2006, p. 41.
[29] Id. p. 32.
[30] AJ B, Ministarstvo Agrarne Reforme Kraljevine Jugoslavije, 96-21-69, Spisak kolonija na teritoriji Juznih krajeva 8.IV.1940.
[31] Jovan F. Trifunoski, *Megjuratna kolonizacija Srba u Makedoniji, Beograd*, 1991, str. 12-14.
[32] An average of 8.45 hectares of land was granted to every colonist family, but there were many cases where a family was granted 45 hectares of land. AJ B, Ministarstvo Agrarne Reforme Kraljevine Jugoslavije, 96-15-51; 96-15-55.
[33] The colonization process provided by the Yugoslav government was also sturdily aimed to speed their migration. It was a double-sided connection: Serbian indigent settlers needed free plots of ground that had to be abandoned, or purchased by the government.
[34] Vladan Jovanovic, *In Search of Homeland? Muslim Migration from Yugoslavia To Turkey 1918–1941*, Tokovi istorije, 2008, 59-60.
[35] The political activity of the Turks grouped around the "Cemiyet" Party established by the Muslims around 1920s, ceased to exist in the 1930s as the party was banned since it had supported Croatian leader Stefan Radic. The religious and cultural pressures on the Turks, accompanied by the political turmoil between the Croats and the Serbs, as well as the economic hardships prolonging after 1933, forced many of them to emigrate to the newly created Turkey. Thus a second wave of emigration started in 1936-37 and continued until the outbreak of the Second World War.

the Yugoslav authorities halted the expropriation process and advised that the owners should apply for land certificates at the pertinent government offices in their cities. However in spite of this, the Yugoslav policy of forcibly expatriating Albanians and Turks continued unabatedly. As a continuation of this policy, in 1938 the Turkish-Yugoslavian Convention Regulating the Emigration of the Turkish Population from the Southern Serbian region of Yugoslavia was compiled, according to which 'the Muslim Yugoslavian citizens' were forced to leave their lands. Turkey undertook to receive 40,000 Muslim families or 200,000 individuals within next six years. The outbreak of the Second World War prevented the implementation of the treaty.

According to the official data 21,500 Muslims emigrated to Turkey and 1,350 to Albania until 1935. Another public source offers cumulative figures of about 19,278 persons who had left Yugoslavia and emigrated to Turkey from 1927 to 1939. Statistics periodicals indicate that Muslim migration from Yugoslavia towards Turkey comprised 13,678 persons during 1930s. Moreover, emigrants from Macedonia and Kosovo made a fifth of all Yugoslavs who emigrated in European countries, which was the consequence of fluid migration towards Turkey. A half of all Yugoslav Euro-emigrants emigrated from Macedonia and Kosovo, mostly to Turkey, in 1934 only.[36] According to Turkish research 5,894 people emigrated from Yugoslavia to Turkey between 1923 and 1949 as permanent (official) immigrants. In addition, 111,318 people arrived in Turkey as free immigrants[37]. According to other sources from that period, a total number of 269,101 people emigrated from Yugoslavia to Turkey between 1923 and 1960, which amounts to 22.4% of all Turkish immigrants in that period. Another source claims that a total number of 305,158 people have emigrated to Turkey during the Turkish republican era. As a consequence of emigration and colonization of the Albanian land, a significant change of the ethnic structure of population resulted in the interwar period. While the Albanians comprised 90% of population in these regions in 1912, they came down to 70% in 1941.[38]

Conclusion

In all agricultural societies, the political stability and the economic development depends on the regulation of agrarian issues, especially if the society is multiethnic. The colonization in Macedonia and Kosovo from 1918 to 1941 was specific in comparison to other parts of Yugoslavia because its goal was not to address the economic needs of the local population, but to achieve a political ambition, i.e. to change the ethnic composition of the area. The process was implemented in three phases. The first phase (1918-21) included the colonization that was implemented according to the 'Preliminary Regulations on Settlement of Agrarian Relations' and the Decree on the Colonization of the Southern Parts. In this phase every colonist was granted a plot of land according to the ability of cultivating it. Land was allocated to everyone who agreed to settle irrespective of their profession. In the second phase (1921–1931) the colonists were granted mainly non-arable such as grasslands, forests and derelict land. In the third phase (1931–1941), according to the Law on Agrarian Relations the colonists were entitled to arable land that was forcefully expropriated from Albanian villagers. At the same time, thousands of Albanians emigrated to Turkey. This was fostered by a series of agreements concluded by the Yugoslav and Turkish authorities. However, these developments did not completely achieve the goal of having a major change of the ethnic structure of the population.

[36] Vladan Jovanovic, *In Search of Homeland? Muslim Migration from Yugoslavia To Turkey 1918–1941*, Tokovi istorije, 2008, 64-65.

[37] Omer Lutfu Barkan, *Turkiye'de Muhacir Iskâni ve Bir Kolonizasyon Plânina Olan Ihtiyac*, Istanbul Universitesi Iktisat Fakultesi Mecmuasi-- Settlement of immigrants in Turkey and Colonization. Our need to achieve measurable outcomes-in Turkish, The Journal of the Faculty of Economics of the University of Istanbul Vol. X, No: 1-42 den Ayri Basim), Istanbul, 1951, p. 4.

[38] http://www.kosova.com/arkivi1997/expuls/chap2.htm#n9

Evolution of Pension Legislation in the UK in the Twentieth Century (Historical and Law Aspects)

*Vladimir Safonov**

Abstract

Subject of study the historical evolution of British pension law and liberal model in the twentieth century until the period of last reforming. According to the author the absence of clear constitutional guarantees of the pension right in the UK and other European countries has been the serious factor in the formation multisectoral model. In the future, this situation prevents a more effective reform and the protection of rights of the elderly. The author identifies the main stages of British pension legislation and uses techniques compare pension models in Europe and U.S.

Key words: *universalism as main Idea citizen rights; Public Law and Private Law principles in U.K.; liberal variant of social security; Evolution of Beveridge model to hybrid system; voluntary savings schemes in Europe.*

In European jurisprudence questioned the constitutionality of social rights as fundamental human rights and the corresponding obligation of the state. In accordance with this approach, claims on guaranteed pensions with egalitarian and redistribution schemes contrary to nature of law as the embodiment of legal equality and justice. Right to a pension is considered as "the right based on the law» («entitled right»), but allegedly contradicts the basic constitutional principles[1]. As pension systems operate for a long time, the right to a pension is considered as "the right based on the statutes» («legal rights» or «entitled right»), but allegedly not in accordance with the basic constitutional principles.

With such view acceptable and have more legitimacy private pension funds operating by applying the principles of private insurance. With regard to public pension funds (funds operating on the principles of enforcing payment of insurance premiums, guaranteeing safety and reallocation of funds received from the elements and adjustment on a mandatory basis), it is proposed to reform them in the direction of increasing the retirement age, reduce pension costs. Such views are everywhere, including in Eastern Europe, often accompanied by a denial of the legal nature of the former pension legislation.

Another point of view is the recognition of pension rights as constitutional rights, and its supporters argue that these rights are subject to judicial protection. The government is obliged to implement its social function, not only on the basis of "legal rights", but on the basis of the constitutional duties of the state to ensure "the common good» (common good, general welfare). State sets limits to economic behavior of citizens, property owners, "if such regulation is necessary for the common good. Since time immemorial in England it was customary to establish such rules"[2]. Authors of scientific papers refer to the historical experience, when they were created very successful pension system. This article focuses on the formation and development of the pension system in one of the European countries in the twentieth century. *The purpose of this article define the major trends of pension legislation and the right to pension for elderly in history of the UK.*

Movement for recognition of social responsibility of the British state is associated with the adoption of the Poor Law in 1834 (New Poor Act). The purpose of this Act – promote employment for reduction of poverty with not isolation poor[3]. And so far the British pension model, according to most authors, referred to as the "liberal" model[4]. It is not only because the rul-

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1 Мамут Л.С. Социальное государство с точки зрения права // Государство и право. 2001. № 7. С. 7.

2 Фрайотт С. Социальные и экономические права в США: где искать / Конституционный принцип социального государства и его применение конституционными судами: сборник докладов. М., 2002. С.16.

3 About impact ancient Poor Law see: King D. In the Name of Liberalism: Illiberal Social Policy in the U.S.A. and Britain. – N.Y., London, 1999. p. 14, 68, 226.

4 Question about models in science remains controversial, but the authors note the difference between the German (corporate or industrial) and British (liberal) model. See more: Rodger J. From a welfare state to a welfare society. The changing context of social policy in a postmodern era. Basingstoke and London. Macmillan Press. 2000. P.65-67; Esping-Andersen G. The Three Worlds of Welfare Capitalism. Cambridge. Polity Press. 1990. P.4-5.

ing principles of private law. This refers to the share of each of the three levels of pension payments (government pension insurance, corporate insurance and private pensions (individual, voluntary insurance))[5]. British model inherent in a considerable weight of private pension plans and related funds. However, the British government played an active role in coordinating different types of assistance.

Pensions in the UK began in the early twentieth century. Of particular importance was the Act "On pensions for the elderly» (Old Age Pension Act 1908), in which MPs approved the proposals of the commission headed by Prime Minister David Lloyd George. Law introduced the payment of pensions from the age of 70 from general tax revenues, besides introduced the insurance tax. Lawmakers rejected the basic ideas implemented before in Germany and partly in United States - from the creation of a pension fund with autonomous status, functioning on the basis of preliminary assessments and in accordance with professional employment. This Act of Parliament in the original version has the idea of "universalism" of pension policy, according to which the beneficiary must hope not only to the state but also on their personal efforts on personal savings.

In the English literature indicates that the main and additional legal restrictions in Act had two goals[6]. First, encourage employees to their own efforts, and possibly to participate in a system of private insurance; secondly, to mitigate the discontent of the workers and their desire to participate in the strike struggle; no coincidence additional restrictions on the right to retire in the spirit of the famous "poor laws" were the definition of "behavioral test» («test for good character»[7]).

Such coordination function of the state determined the greater integrity of the pension system in the UK for decades to come[8]. On the other hand funding from general revenues could not solve the basic problem of pensions. British lawmakers refused to progressive taxation in the social security system. Tax was levied on a flat rate, which explains the development of trends in funding pensions to a minimum[9].

Since the law National Insurance Act 1911 insurance tax was levied not only for pension benefits, but for unemployment benefits in case of occupational injuries and then the other sectors of social payments. English system integrity has been questioned in terms of formation of the fund.

In 1924 the Labor government proposed by J. Macdonald, and Parliament approved supplement to pension legislation. Amendments to the law in 1908 - old-age pensions have been extended to widows and minors.

In the 1920-30s changing social welfare system, which is based not only support the ethnically-British family, but also the multidimensional nature of support. Changes in UK pension legislation in 1920–1930-ies. (including held in 1924 MacDonald government) had a palliative nature, have not led to a significant expansion of the system and increase coverage. During this period, the fact remains unsatisfactory coverage of the various categories of workers, and pensions do not provide a living wage. Such manifestations exacerbated by the lack of funds in the years of participation in the Second World War. Government and Parliament of Great Britain found it necessary to change the system and the adoption of a new plan for social assistance.

In December 1942 was presented Report by the Royal Commission, chaired by Lord William Beveridge: «Social Insurance and Allied Services»[10]. Even before the approval of the report at the Parliament on the initiative of coalitional government wartime in accordance with the provisions of the so-called "White Papers" were taken to make payments. According to the commission, Lord Beveridge, the adoption of a nationwide system that operates using a preliminary deposit would reduce the increasing costs forced the poorest segments of the population.

1946 National Insurance Act - introduced contributory State pension for all. Initially Pensions were £1.30 a week for a single person and £2.10 for a married couple. Pensions paid from age 65 for men and 60 for women, effective from 1948[11]. All accepted program had to act by a single scheme and funded to the same standards. General Fund (National Insurance Fund), including plans for pensions, unemployment and health care since 1948, formed by three actors - workers, employers and the government out of general revenues (general revenues) in equal shares, one-third of funds received.

Policies no forget social spending program government charity. New programs are intended for people of retirement age who did not have the right to receive a pension for National Insurance. Such programs have acted earlier, while under the control of local authorities. In 1948, the corresponding program in law 1948 Assistance Act were centralized, and in a sense, nationalized (unlike the U.S., where such programs remain under the control of authorities in the states), the efforts of the Labor Government.

Taken place consensus on the nature of national social policy. It is equally important that the proposals were adopted in the form of Acts of Parliament and approved by all major political forces. Adopted laws were not just an extraordinary nature, but were due to the new principles, it is named for the first time in Britain: principles **Welfare State**[12]. English author said that

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5 Minns Richard. The Cold War in Welfare: stock markets versus pensions. London. 2001. p.10-12; Constructing the public-private divide. Historical perspectives and the politics of pension reform. Abstract. [электронный ресурс] – режим доступа: http://www.ageing.ox.ac.uk/files/ working paper_102.pdf.

6 For those who constantly was changing their place of work, for antisocial persons, for living in places of public charity, etc. Coverage (about 500 thousand recipients) was totally inadequate. Comparing Welfare State / Ed. by A. Cochrane, J. Clarke and Sh. Gewirtz. London: Sage, 2001. P. 33.

7 History of Pensions http://www.pension100.co.uk/historyofpensions/timeline.htm

8 Comparing Welfare State… Op. cit. P. 33.

9 Comparing Welfare State… Op. cit. P. 33.

10 Social Insurance and Allied Services. Report by Sir William Beveridge. American Edition. – New York: The Macmillan Company, 1942.

11 History of Pensions http://www.pension100.co.uk/historyofpensions/timeline.htm

12 In contrast to the title «warfare state», adopted in Nazi Germany definition of the economic model of the mobilization type, including elements of nationalization of the social sphere. About the differences between British and American models of social security and social policy see: Skocpol Th. Social Policy in United States / Princeton, N.J., 1995. The success of the British social programs, many authors explain, among other reasons, emergency, in accordance with the Marshall Plan, the economic support of the UK from the U.S..

British pensioners provide guarantees of state support. Implement the concept of universalism assumed by the implementation of this Act[13].

Actions of Labor government in 1946–1948, were in line with the Keynesian theory encourage consumer ability and facilitate economic growth. In turn, this approach was supported by the experience of social and pension regulation 1900–1930-ies., consent of the main political forces, including the part of the Conservatives, the creation of a centralized system of social assistance[14].

So, **at the first stage** of the pension legislation (1908–1948) English MPs confirmed and clearly marked a decisive role in the formation of the state pension system. Unlike the U.S., where during the war has been a trend clotting legislative activity in the social sphere (there showed activity mainly executive power), in the UK the situation during wartime characterized by an open public discussion of social problems and public consent among conservatives and trade unions with labor movement[15].

The result is own Britain (universalist) model. According to the authors of the laws, low basic pension will lead to aspiration accumulate funds for retirement through private funds, which level of profitability higher. The English system was inclusive and universal.

Essential component universalism was to provide employment. With universalist viewpoint high level of employment (again prevailing view of male employment in industrial sectors) will ensure the completion of the pension fund and an increase in pensions[16].

In **the second phase**, in 1950–1960-ies UK pension system is divided into the basic state pension, pension through state welfare National Assistance) programs and private pensions. Dissatisfaction caused a low level of basic pensions. Therefore, the goal of the British Government in these relatively well (in terms of economic growth) years has been improving the level of pensions for workers receiving medium and high salary. To this end, in addition to the basic pension legislation were introduced pension linked to salary levels through increased contributions and generally called supplementary pensions (Additional Pension Benefits). The most common proved one of the options such pension - "Pensions, depending on salary and related charges» (State-Earning Pension Related Scheme - SERPS). Plan SERPS by Act of Parliament in 1975 (Social Security Pensions Act)[17] took effect on in 1978, and provided for older people paying in the range between the cost of living and average wages.

During 1970-ies time of the economic depression, begins the **third stage** of development of pension legislation. Questioned, as at the end of the second stage, becoming the basis of the universalist model and its core ideas of the minimum basic income[18].

Government developed a large number of options for reform in order to save budget and implementation of the concept of self-help. Prior to the 1970 share of pension expenditures in total expenditures of the state was relatively low (3-4%), then spending over 9% of GDP[19].

Projected 2050 pension costs in the UK and in other EU countries on average grow to 20.8% of GDP[20]. One of the main ways the reform (and it has spread to other European countries) was forced development of private pension insurance systems and hybrid pension schemes[21].

Accumulated funds are invested not in government securities with reliable guarantees, but with a low yield, and in private enterprises and banks with high yield. But here there is a threat guaranteed returns and proper management of the direction of private foundations by governmental bodies. Experience shows that for private schemes, autonomous from the state, need some degree of state control in a different form. Hence, expressed desire to retain the mixed pension system, limited only by their some partial improvement.

In this regard, one of the key reform strategies across Europe was the use of incentives: incentives work, saving, late retirement. Institutional incentives provided by the new rules, rights and pension formulas aimed at solving pension issues in the long term.

By the early 1980s the UK pension system contains basic and secondary state, non-state components[22]. The basis of the system - the basic pension designed to ensure pensioners living wage, and supplementary pensions[23], primarily pension scheme SERPS. In the interaction of these particular components (levels) conceal specific contradiction of the British system.

Scheme SERPS, was an attempt to implement and strengthen private-item in the state system and is quite consistent with the stated at the beginning and middle of the twentieth century, the goal of universality, to a certain extent contributed to the development of pension rights and the rights of its legitimacy as "earned and acquired", allowing to receive a pension corresponding labor efforts.

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[13] King D. In the Name of Liberalism ... Op. cit., p. 234.

[14] Ihori T., Tachibanaki T. Social security reform in advanced countries: Evaluating pension finance. London. New York: Routledge.2002. P. 165.

[15] Comparing Welfare State. Op. cit.,.P.37.

[16] Gordon L., Clark A., Munnell H., Michael J. The Oxford Handbook of Pensions and Retirement Income. Vol. 13. Oxford. 2006. p. 59.

[17] SSP Act 1975 [Электронный ресурс]. Режим доступа http://www.legislation.gov.uk/1975 [дата обращения 20.04.2014]

[18] The third phase given the lack detailed analysis of the current reform, that will be the content of a new article [The author].

[19] Backer G., Bispinck R., Hofmann K. Sozialpolitik und soziale Lag in Deutschland. [Electronic resource] - режим доступа: http://www. sozialpolitik-aktuell.de/2003, свободный доступ [дата обращения 20.09.2011]

[20] Günter R. Alterssozialpolitik & Einkommens sicherung in Alter. 2012. [Electronic resource] - режим доступа:., свободный доступ [дата обращения 12.04.2011].

[21] Holzmann R., Palmer E., Robalino D. Nonfinancial Defined Contribution Pension Schemes in a Changing Pension World / Gender, Politics, and Financial Stability. World Bank. Vol. 2. – 2012. – P.182-185.

[22] Level of old-age insurance companies and individual pension plans (both are on a voluntary basis)

[23] Sometimes supplemental wrongly named pensions through welfare under the Act of 1948 as amended (National Assistance Act 1948).

Legitimacy of reform justified ideas of creating a new state going to replace «welfare state» and called «workfare state». Methods of new phase to a certain extent reflect and former English and experience American improvement of social security by "compulsion to work" (the concept of «workfare state»).

On the other hand, the preservation of the state pension, funded mainly by the egalitarian principle, cannot talk about the right to retire as a completely legitimate, from the standpoint of English common (private) law[24].

In addition, the right to a pension depends on the changing economic situation, the availability of budgetary resources and the policy of the authorities. Consequently, the state can arbitrarily improve or worsen the conditions for seniors that does not fully correspond the concept of rights as inalienable guarantee as fundamental constitutional rights.

Not quite legitimate (in terms of the constitutional guarantees of social protection) and the system of autonomous, non-governmental funding. Here, the state should abandon guarantees fixed pensions, which puts pensioners dependent on the effectiveness of management of private pension funds[25]. Especially because the state prior to the reign of Margaret Thatcher's government did not pay enough attention to reform of non-state pension level [26].

European authors unanimously marked the fact that the main feature of the British public pension is the "basic" value guaranteed by the state in a relatively low amount (Beveridge model). More value pension in Germany (occupied or state-corporate pension) is not the only difference. German public pension does not contradict the contractual basis with elements of social partnership. In Germany, the model is based on the indisputable recognition of the constitutional obligation of the state to enact appropriate legislation in order to maintain basic living standards. In accordance with the German legal tradition issue of constitutional recognition of the right to retire as a subjective right upstaged view of the special significance of positive binding law. Specific universalism German pension system does not contradict and accruing benefits on the basis of labor input (contributory principle). German system does not opposed contractual and regulatory principle ideal of social partnership. Attractiveness of the German model is associated with the declared purpose of providing a high level of wages and compensation after the retirement age[27].

So, in the UK throughout the twentieth century, a key feature of the pension policy has been a gradual, evolutionary nature of the changes, the high degree of flexibility of the British state and the ruling class on issues compromises with strong trade union movement. The legislator took into account the major role of hired male workers. Finance security of pensions expected to be not only by the state but by the workers themselves. That interconnectedness goals and means to achieve, not just the state's role as coordinator of all areas of social policy is the basis for understanding the English of the universal model.

English model differs from the U.S. model, where social support is provided through various channels (federal and state) and type of assistance (assistance to many categories of beneficiaries for specific schemes). In Britain (and the U.S.) in the literature often talk about the liberal model of social security and of the difference between this model from continental European countries.

Operation of the liberal model in these countries does not mean lack of it within the state pension insurance. In Britain, as in the U.S. (Social Security Program) is a program of public pensions remains a major component of the model and leads to reach participants.

The maintenance of the pension models of these countries its mixed character, the integration of public and private law principles of its functioning. This means that government programs are private legal methods, criteria for the appointment of social benefits and sizing (rejection of egalitarianism, contributory principle, the autonomy of management in the budget process). And, on the other hand, private pension funds operate not only under state control, but also for schemes approved by the Parliament, in order to maintain of certain guarantees for participants.

Concluding the review of trends in the pension legislation should be made positive historical experience to create centralized systems of mandatory pension guarantees not only in the continental European countries, but also in the UK and USA. Where pensions initially restricted to certain professional fields (such as "Bismarck model" in Germany), it has become available to the whole working population. In Anglo-Saxon countries after expanding coverage of pension guarantees and increase the size of the pension benefits system has become exhaustive system of protection of the population in older age[28].

Ongoing reforms do not mean the abolition of pension rights as constitutional law; pension system guarantees the dismantling of pension schemes. However, the most important issue is the system to protect the rights of pension recipients. In the British legal system, as in the U.S., the emphasis appears to deny the pension rights as fundamental constitutional rights. Although such a relation to the right to a pension system does not preclude the adoption of the state pension insurance, this negative is reflected on the methods and focus of the reform.

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[24] Comparing Welfare State … Op. cit.p.41.

[25] Some examples of inefficient management of pension funds taken place in European countries. Similarly in control of most of the Russian Federation in corporate funds for various reasons did not ensure their profitability and even maintaining funds in line with inflation.

[26] Clark T., C. Emerson. The Tax and Benefit System and the Decision to Invest in a Stakeholder Pension. London. Institute for Fiscal Studies Briefing. 2002. Note 28.

[27] Formoredetails:http://www.mayerbrown.com/files/Publication/4e6cee2d-0935-463a-87b1-24c8b23c739b/Presentation/PublicationAttachment/4e22630c-7c70-4ef3-8990-7f6a3ff0dd10/NEWSL_GERMANY_MAY09_GERMAN_PENSION_SCHEME_ALERT.PDF

[28] Gordon L., Clark A., Munnell H., Michael J. The Oxford Handbook of Pensions and Retirement Income. Vol. 13. Oxford. 2006. P. 33-35.

Seniors' Role in Society in the Period between the Middle Ages and the 20th Century – Selected Aspects

*Jaroslava Vítová**

Abstract

Successful aging is an important issue which must be discussed and presented. The article deals with seniors' role from the Middle Ages till the 20th century. It reflects the economic aspects of aging and the problematic of the elderly being dependent on economically competent members of society. Limited material conditions of families haven't provided the elderly with safe aging. The economic development caused detachment between the places where people live and where they work. This means that the conditions of taking care for the elderly are getting worse and worse. Even modern technologies cannot change the fact that we can't take care of the old members of our families. The life of a single person in the society has been changing constantly, so have the conditions of living. The attitude of the society towards the elderly has been changing as well; from showing respect to segregation. The article focuses on the role of an old person and reflects the historic and economic development.

Key words: *senior; age; human society; economic development.*

Introduction

The demographic development of society is predetermined to pay an increased attention to the issue of ageing, but it is also necessary to analyse the elderly from all possible aspects. The grounds which enable us to draw several theories and methods of social work are arising from philosophy which reveals thoughts and considerations related to the concept of being human. At the same time, it is essential to observe the psychological aspects of old age as well as sociological relationships at an economic level. A closer look into history might be helpful in order to trace the life of an individual which is dependent on other economically self-sufficient members of the society at that time. We shall provide evidence of the status of people on the background of economical facts from the Middle Ages to the beginning of the 20th century.

Old age and economic conditions of society

Throughout the history of the human race, there was a large number of different scenarios of approaches to the ageing members of the society. Some systems showed respect to old people. However, it is necessary to bear in mind that old people of those times were not actually old from our point of view. Our concepts about old age are significantly different. On the one hand, old people were appreciated for their wisdom; on the other hand, they were set apart from the society as useless for being economically unproductive. The essential fact is that, particularly in times of low economic prosperity, the original cause is based on the commonly shared opinion that old age is awful and being old also means being poor, humiliated and neglected. And from poverty leading to a state of madness, distress and degradation, there is only one step taking us to the conclusion that old age is a misery.[1] The aged members of society were often considered as those who did not contribute but wanted to take. They were perceived as people who were taking the scraps of what others possessed. The economic maturity of society had a significant influence on the specific lives of people and thus affected the approach towards old age.[2]

In every society, whether rich or poor, the inner differences were noticeable. Particular persons belonged to different social classes and therefore had a different approach to the instruments of production. As a result, some of them were poor, others well-off, or significantly rich, in relation to a poor, average or prosperous economy. [3]

A different life might have been lived by a wealthy old person who managed to assure a comfortable life even during unfavourable times, in contrast to the majority of poor people when the old were striving to ensure basic living under a form of a contract with younger members of their families. This was

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1 HAŠKOVCOVÁ, H. *Fenomén stáří.* 2nd ed.. Praha, 2010. 365p.

2 HORSKÁ, P., KUČERA, M., MAUR, E., STLOUKAL, K. *Dětství, rodina a stáří v dějinách Evropy*. Praha 1990.

3 HAŠKOVCOVÁ, H. *Fenomén stáří*. 2nd ed. Praha, 2010. 365p.

rather difficult in times when even the latter were short of the essentials. The obligation to look after the older members of the family was mostly based on the handover of their property to the young.

However, every society had to deal somehow with the problems of the poor, the miserable, the sick and the old. Therefore, according to its economic possibilities, the society was striving to ensure at least the basics.

Times of Peace and War

In times of peace and quiet and economic bloom, old age was nearly considered as an idyllic period of life. But as soon as times of war and suffering arrived, accompanied by economic and spiritual poverty, those who were not able to look after themselves, or were in need of others, were excluded and ostracized by society. Such misfortune also affected other disadvantageous groups, not only old people. Children and the old were always dependent on the contributions made by the productive class. In case of war, it was always necessary to set the main priorities. If men are were in the battle field, women become responsible in order to secure the family, whereas the boys were supposed to be potential warriors and girls could help their mothers in looking after the household, which meant that children were preferred to old people. They were not repelled and were welcome to *"eat from the same dish"* because they represented a remarkable support for the aforesaid activities. Old people were tolerated if they represented some kind of support and background for other members of the family. In times of war the value of life was generally reduced in a significant way. That is why the value of life of an old person was not worth anything. The main strategy was to live and fight, to fight and survive. Nobody took care of old people during the times of war and no one shed a tear over their miserable plight.[4]

In the 16th and 17th century the number of beggars increased remarkably. In 1630 one quarter of Parisians was beggars. The same ratio could also be found among the other inhabitants of the country. Similar example of poverty and poor conditions could be seen in England, Holland and Switzerland in the 16th century:

„When the rich could not get rid of the beggars, who besieged their houses and wandered on the paths and through the woods in gangs, they held hunts for these poor wretches without home "

One of the reasons causing the poverty of masses could be blamed on wars. The world wars of the 20th century are considered by many to be the top of the impoverishment and misery of the European countries. However, wars during feudalism were even more devastating. In the history of the European feudalism there was nothing worse than the Thirty Years War:

„About two quarters of the population disappeared and the poverty of those who survived was immeasurable. Five sixths of the villages in Germany were destroyed. We can read about one Palatinate village that was plundered twenty-eight times in two years. In Saxony packs of wolfs were wandering around the area because one third of the land in the north was abandoned." [5]

Price Revolution

The aristocracy, who had abandoned their own farms in the 12th century, preferring pecuniary rent, found out in the 16th century that their decision was rather unfortunate. So, once again they maintained their own farms. Where possible, noblemen came back to their estates, renewed and extended their courtyards, forming the dependency of their tenants. They also tried to do the farming on their estates by means of labour. This was exactly the in Europe after the Thirty Years War. A similar development of court farming could be observed in the west part of the Elbe Valley, in Prussia, Poland and other neighbouring countries. However, conditions developed differently in the west. The liberation of farmers in the Middle Ages advanced so far that it was not possible to renew labour anymore. The aristocracy was either obliged to pay for work, or to give up its farms. The first of the aforesaid options was chosen by the English aristocracy, the second one was followed by the noblemen in France where the farming on a small scale was predominating, with the difference that instead of the fixed annual rent, only a part, generally one half of crops, was required. The gap between Western Europe and its remaining parts increased from the 16th century on. Nevertheless, all these countries had a common pattern which meant that the aristocracy lost its military importance caused by the development of arms, abandoned its knightly style of life and strove for multiplying its rents. A knight became either landowner or a clerk.[6]

The unusual influx of silver into Europe caused a remarkable price rise, not only for sellers of particular goods, but also affecting the prices of all goods. It was a real price revolution which could be seen only three or four times in the last one thousand years in the world's history. In the year 1600, the prices of goods doubled in comparison with the year 1500, and they were tripled by the end of the year 1700. Complaints regarding high prices were heard significantly and urgently since 1530s. The price of land had increased as well. In general terms, it is possible to say that the price of agricultural products increased more than the price of industrial goods, and the price of everyday products was superior to luxury goods. However, the most important fact was that the price of labour, i.e. wages, remained at the same rate, far from this rise in the prices of goods.

Gold and silver became cheaper and more affordable since they were mined in America from exceptionally rich sources by the use of cheap labour of bondsmen and slaves. Production conditions remained generally the same and therefore it was necessary to pay more gold or silver during conversion, i.e. a higher price. Chronicles of the majority of Western European countries provide us with reports on impoverishment and poor conditions of the inhabitants living in the 16th and 17th centuries. However, these phenomena were invoked not only by the *"price revolution"*, but also by the entire decline of the social system.[7]

In the area of agrarian relations, the most remarkable modification was noticed with regard to smallholders who did not supply the market with their products, and were often obliged to do la-

4 HAŠKOVCOVÁ, H. *Fenomén stáří*. 2nd ed. Praha, 2010. 365p.
5 BÍLÝ, J. *Homo oeconomicus evropského feudalismu*. 1st ed. VIP Books, Praha, 2001. 527p.
6 MATOUŠEK, O. et al. *Základy sociální práce*. 1sted. Praha: Portál, 2001. 312p.
7 BÍLÝ, J. *Homo oeconomicus evropského feudalismu*. 1st ed. VIP Books, Praha, 2001. 527p.

bour or do additional domestic crafts on a small scale. The biggest transformations in towns can be observed with regard to the middle class depending on wages and also to the small-scale craftsmen and guild masters, who seemed to be independent, but in reality were already forced to work for middlemen and manufactures.

The specific conditions of each country brought significant modifications to this situation. Everywhere, however, wage reduction and an increase in revenues and discrepancies between the rent of land and feudal allowances were leading to the reinforcement of social antagonism. The struggle for wages between labour and capital began. It was a struggle between the lord – owner and the peasant – tenant, who understood all the advantages of land possession in a modern way. The struggle for a piece of land intensified similarly to the struggle for the transformation of a feudal tenement into a free and private ownership. The whole process of this conflict, lasting for almost three centuries, depended on the particular rate of social classes and was thus solved differently in every country. What were the consequences of such a rise in prices? It meant *"either tightening the belt, or striving for higher wages in order to cover increasing expenditures",* or to become a beggar. All the aforesaid matters took place in history as a result of price revolution.[8]

The impoverishment of people was remarkably observed in England where land owners hedged their properties which were intended for sheep breeding. The tenants were, for the sake of land integration, expelled by the owners using different tricks in order to get rid of them. The poor were thus deprived from their pastures. This fact led to their destruction. Unfortunate tenants, whose lands were needed by their landlords, became just some of the many other homeless persons.

The Role of the Family

The family has always fulfilled its reproduction and social functions. However, its economical, emotive and educational role varied significantly throughout history.

The traditional European family accomplished primarily its direct economical functions, i.e. its members lived and worked together in order to be able to make their living. This was more or less the case of the farmer's family requiring the contribution of all its members where children had their function as additional labour support. The advantage of such a family was a reliable and efficient exchange service between family members and generations. Children and seniors were as dependant members tolerated providing that their labour potential was used to the maximum of their abilities. As previously stated, children represented an obvious perspective because they became economically sufficient in time; the old members were paid in return for the education and food they provided while they were young. The mace of this economic government was handed over from generation to generation. The eldest son was usually the successor of the farmer. The essential fact is that this scenario could be easily implemented because the work place and home of all family members was concentrated in one place.

The reproductive function of the family was in this context natural, where a child represented security for the future. A family usually had more children because of the high infant mortality rate related to the large number of illnesses and diseases meaning that many children did not survive to the adult age. It may also be the reason why we often read of little emotion being shown towards children. On the other hand, the attitude of adult children towards their elderly parents was based more on gratefulness than on love. It was important for an old person to perform a specific role within a family due to their abilities. They still belonged somewhere and were accepted positively or were at least tolerated. However, this model did not work during the years of war or bad harvests. In principle, the process of ageing was related to the activity of old people. They remained active until their last moment because

they had to or were just willing to do so. *"Elderly people either stayed alive or they died".* Their death was often anticipated by some *"quick"* disease.[9]

The essential fact affecting family integrity was caused by the necessity to survive and by its close relation to the land representing basically the only source of living. Yet, the difficult economic situation of the productive generation often precluded those who were dependant, i.e. children and the old, to ensure their needs. The life of a farmer's family in the past did not exactly represent a source of joy and happiness. However, it is necessary to realise that the concept of the family, as it was understood in the past, was preceded by its perception which happened a century before, when the family, as an economic society, also included members who were not blood related, which is a very important fact because these people might have worked for the old people as their servants.

The fact is that if the middle generation wanted to take care of its elderly family members, the situation was easier because there was no distance barrier between parents and children. In relation to the status of elderly people in the family, it is necessary to emphasize that the world started to change considerably at the beginning of the 19th century. In connection with the industrial revolution and the scientific revolution, the enhanced development of production was the main reason for the concentration of people into towns. Everyone who saw better opportunities in life in modern factory production headed to the town. The consequence of centralization of the economic production potential in towns caused the detachment of people's home from their workplace. This was the case of young people whereas the ageing and elderly people stayed in the country, abandoned by their family members on whose support they relied. The traditional model of the European rural family was slowly but steadily in decline.[10]

Comments on the history of social services

The oldest organized help for people in need was provided by the Church in response to the unsatisfactory situation of the population struggling with famines and pandemics. The Church established its institutions in the proximity of monasteries and churches, securing the necessary care for the poor, crippled and

[8] BÍLÝ, J. *Homo oeconomicus evropského feudalismu*. 1st ed. VIP Books, Praha, 2001. 527p.
[9] HAŠKOVCOVÁ, H. *Fenomén stáří*. 2nd ed. Praha, 2010. 365p.
[10] HAŠKOVCOVÁ, H. *Fenomén stáří*. 2nd ed. Praha, 2010. 365p.

orphans. Hospitals (from Latin *"hospitale"*) were in most cases built along pilgrim paths because their original function was to shelter devoted pilgrims (from Latin *"hospes"* – guest). Town hospitals were later focused on taking care of the poor and sick. Their constantly increasing number in the 13th and 14th century was the main cause for the fact that the Church was only being able to look after the neediest. Although medieval philanthropy did not have an inconsiderable extent and *"the fact that rich medieval burghers obliget their to regular care for the poor or directly bequeathed sums of money to the needy was not an exception",* the most reliable means in order to acquire immediate support was house to house begging for alms. The amount of beggars thus increased noticeably.[11]

During the Renaissance, a key role was gradually played by a new social class – the townsfolk, who partially took over the philanthropic initiatives belonging exclusively to the scope of the Church. Organized health care developed simultaneously with the origin of townsfolk administration. The number of beggars led to a later attempt by the municipal councils to divide them into *„resident"* and *„non-resident",* where the latter were expelled. The resident beggars were allowed to be concentrated in the areas where beggary was tolerated, e.g. in the proximity of churches and hospitals. Those who gathered illegally in areas restricted for beggars with permission encountered repressive measures such as whipping or even amputation of the hands.

From the second half of the 18th century, European society went through a large number of changes both in social and economic spheres.[12] At that time efforts to build refuge and medical establishments could be observed. By the end of the century, the Catholic Church lost its privileged position in the care for the poor due to the influence of enlightened reforms., So-called *"parish poorhouses"* were established on the basis of the modifications implemented by Joseph II. These institutions became the grounds for *"the public pauperism"*. They were financed through public and heritage donations (e.g. heritage of individuals, legal portions of the inheritance of clergy men, percentages of the profits made during philanthropic events, and even from the returns of pecuniary sanctions imposed by the municipality).

Later, the property of parishes was transferred to the relevant municipal poor fund and the poor law from 1868 amended the liability of a municipality to take care of its residents should the latter fall into poverty. In the 19th century the development of towns spread significantly due to the industrial revolution. However, this fact also led to the impoverishment of a wide number of citizens. It was only at the beginning of the 20th century that the random and chaotic care of the poor transformed into organized schemes. New patterns of impoverishment and varying features of the life of the citizens imposed by industrialization inspired new forms of social work. A noticeable innovative tendency was symbolized by an effort of the helpers to become better acquainted with what was necessary, and to help the people in need more efficiently. There was a predominating opinion that one simple donation contributed to the person who asks for help randomly but did not eliminate the poverty and helped the particular person only temporarily. Society started to realize gradually that the person in need being in the role of *„an applicant"* is its role and that the short-term change of the conditions of an individual cannot eliminate the causes of the poverty.[13]

Municipal finances, the status of municipalities

„Complying with the idea of solidarity, and the mutual support of people living in the same territory and dependant on each other in terms of their interests and needs, the municipality gathers them all and takes care of them by making mutual sacrifices leading to the harmonic union of all its interests resulting from the local and collective inhabitation". This definition of the municipality was stated by the administrative tribunal on 5th May 1923. This statement filled a gap with regard to the administrative system which did not contain better and more specific definitions of the municipality in terms of an economic subject.

The municipality as the most basic level of the municipal authority is intended to provide common needs and interests of its inhabitants within the specific territory where the latter is not provided by the district, country or state.

By determining the aforesaid task of the municipality, the result is that common needs have to be met at its expense, eventually at the expense of superior entities unless the latter have an interest in the fulfilment of these needs, e.g. with regard to education etc.

When and how the municipality should comply with these new liabilities is stated both by the necessity of needs and its financial capacity depending on the financial capacity of the citizens, i.e. the possibility to make sacrifices which can be restrained by the necessity of the individual needs of each citizen of the given municipality, since nobody can contribute that much without threatening his own existence, or by the interest of the municipality taking care of favourable conditions with regard to its contributor so that he is not exhausted as the only source of income.

The development of municipalities also multiplied their liabilities towards almost all fields of their scope as an independent entity (culture, health care, social matters, etc.), which meant that a long time before 1914 there was an urgent need to modify the financial system of autonomy municipalities.[14]

Discussion

The economic conditions of society significantly influenced interpersonal relationships and the status of individuals in the difficult social system. However, favourable material conditions of the families did not assure a safe retirement. This aspect is also the case in contemporary society. The changes caused by economic development, the separation of the domiciled from the workplace, represents basically the deterioration of conditions providing sufficient care of the oldest members of the family.

[11] HAVELKOVÁ, H. *Dimenze "gender" ve vztahu soukromí a veřejné správy*. In Sociologický časopis 1,1995, p 25-38.
[12] MAUR, E. *Počátky demografického přechodu v Evropě*. In: Svatava Raková – Christian Lequesne: *Jakou Evropu ohlašovala bitva u Slavkova?* Praha 2006.
[13] HAVELKOVÁ, H. *Dimenze "gender" ve vztahu soukromí a veřejné správy.* Sociologický časopis 31, 1995, p 25-38.
[14] ČESKOSLOVENSKÁ VLASTIVĚDA, svazek šestý Práce, SFINX, Praha, 1930.

The current distances between family members might even be considered extreme. The lack of possibility of looking after elderly parents cannot be changed even not by the use of the latest technologies.

Difficult times regarding the status of elderly family members in society were always accentuated during times of war. People fight and kill each other in order to ensure their living, homes, assets as well as other matters relating to their place in the world. Extreme conditions and situations require the assessment of priorities during all periods. The only matter which changes is the scale and reflection of different values.

An old person living in the country was forced to contribute actively to the economy of the family. He did not lose his importance; he just changed his roles within a family scale according to his abilities. He thus contributed actively until his death. The key to the current concept of the care for seniors is in dealing with the following expressions such as activity, independency and self-sufficiency.

In every period and in every society we can find the rich and the poor. Society has always strived for the necessity to provide at least basic care for the poor and needy. The status of municipalities gradually acquired its importance and the development of the necessary help was more or less observed. This situation remained constant until different forms of social work were introduced. The importance of communities, systematic regional work, and the interconnection of particular social services on the basis of awareness for needs within a particular area represents a crucial point for our society today.

Conclusions

The main aim of this article is to introduce and show a deeper understanding of history and to reveal some important facts about economic development and sociological concerns from the Middle Ages until the beginning of the 20th century and, at the same time, to investigate the status of elderly people which were dependant on the society. The life of an individual in the society took place in conditions which were changing constantly, whereas the attitude of society towards the elderly was influenced as well, from understanding and respect to complete segregation. The issue of successful ageing becomes a key moment in our lives today within its every aspect.

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Wolfgang Höhne

1914 – Das zwiespältige Jubiläum. Über die Ungereimtheiten im Gedenken an den Ersten Weltkrieg

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Es war der amerikanische Historiker und Diplomat George F. Kennan, der als erster, auf den Ersten Weltkrieg bezogen, von der „great seminal catastrophe of this century" sprach, von der „Urkatastrophe des 20. Jahrhunderts" also. Sie hatte den Keim gelegt für die nächste Menschheitskatastrophe, den Zweiten Weltkrieg. Der Friedensvertrag von Versailles von 1919 hatte keine Befriedung schaffen können. In seinem Artikel 231 stand zu lesen: „Die alliierten und assoziierten Regierungen erklären und Deutschland erkennt an, dass Deutschland und seine Verbündeten als Urheber für alle Verluste und Schäden verantwortlich sind, die die alliierten und assoziierten Regierungen infolge des Krieges, der ihnen durch den Angriff Deutschlands und seiner Verbündeten aufgezwungen wurde, erlitten haben." Alle Versuche Deutschlands, wenigstens diese Bestimmung einer Differenzierung zuzuführen, waren fehlgeschlagen. Die Sieger bestanden auf der bedingungslosen Unterwerfung. Mit schrecklicher Hellsichtigkeit konstatierte einer der Sieger, Marschall Foch: „Das ist kein Frieden. Das ist ein Waffenstillstand auf 20 Jahre".

Doch warum war es soweit gekommen? Gerade unter diesem Aspekt hätte dieses „Jubiläumsjahr" 2014 von besonderem Interesse sein können und sollen. In der Tat erzeugte der Jahrhundertrückblick vielfältige Erinnerungen an Stellungskriege, an die bis dahin ungekannte und unvorstellbare Technisierung kriegerischer Auseinandersetzung, an das millionenfache Sterben, an bedrükkende Einzelschicksale. Doch wo war die Diskussion über die Ursachen dieser Katastrophe, über den Weg in den Krieg? Sie fand nicht statt, kam jedenfalls viel zu kurz, und so droht die „Urkatastrophe" des vergangenen Jahrhunderts, deren Auswirkungen bis in unsere Gegenwart reichen, verschüttet zu werden.

Dieser Entwicklung will der Autor mit seiner Monographie entgegentreten. Sein Buch befasst sich mit dem Weg in den Krieg, mit den vielfältigen „Beiträgen" aller Seiten, mit den Schritten aller Beteiligten „am Rande des Abgrunds" und in die Verderbnis und kommt zu einer radikal neuen Bewertung hinsichtlich Verursachung und Schuldfrage: Nicht das Deutsche Kaiserreich treffe die Hauptschuld, sondern ganz überwiegend Frankreich und seinen „Sekundanten" Russland und England. Hat die moderne Geschichtswissenschaft die Alleinschuld des Deutschen Kaiserreichs, wie sie im Versailler Vertrag festgeschrieben war, überwunden und ist um ein differenziertere Bewertung bemüht, so nimmt der Autor in aller Deutlichkeit, zuweilen polemisch, doch immer vor dem Hintergrund nachprüfbarer geschichtlicher Vorgänge gegen Frankreich Stellung. Das mag ihm den Vorwurf des Revisionismus eintragen. Doch dieses Verdikt greift bei einem Wissenschaftler, der sowohl deutsche als auch französische Wurzeln hat, zu kurz. Die radikale Umbewertung der Kriegsschuldfrage ist indes nicht neu, aber eine möglicherweise erstarkende Entwicklung der neueren Geschichtswissenschaft. So kam Niall Ferguson (*The Pity of War*, 1998) zu dem Ergebnis, die britische Politik treffe die Hauptschuld an dem Weltkrieg.

In insgesamt 22 Kapiteln breitet der Autor einen verblüffenden Detailreichtum aus. Er befasst sich zunächst mit der „historisch gewachsenen" deutsch-französischen „Erbfeindschaft", deren Wurzeln er bis in die Zeit des Sonnenkönigs zurückverortet und die zu einer traditionell offensiven Rheinpolitik Frankreichs führten mit dem Ziel, linksrheinisches Gebiet zu beherrschen. Die Verluste im Gefolge des Scheiterns Napoleons führten sodann zu der offensiven Politik Napoleons III. und der aus der Sicht Frankreichs katastrophal geendeten Auseinandersetzung 1870/71, deren Revision von da an die französische Außen- und Bündnispolitik beherrschte und die gleichsam nicht nur eine conditio sine qua non, sondern geradezu ein obsessives Motiv dafür war, einen weiteren Krieg mit dem Deutschen Reich anzustreben. Man mag dem Autor nicht folgen wollen, wenn er die Behauptung aufstellt, dass die Franzosen nach 1870 das blieben, „was sie auch vorher schon immer gewesen waren: Die größten Kriegstreiber in Europa" und der Kriegbeginn sei letztendlich, aus deutscher Sicht, allenfalls ein Präventivschlag gegen ein Überrolltwerden aus zwei Richtungen - das Russische Reich war mit seiner Mobilmachung und seinen Angriffsbemühungen vorweggegangen. Doch der Weg in den Krieg wurde von allen Großmächten Europas gepflastert und insbesondere der französische Anteil wird möglicherweise noch immer unterbewertet.

Das Buch liest sich flüssig, gerade auch, weil es auf Fußnoten verzichtet. Das mag an heutigen Methoden gemessen unwissenschaftlich sein – oder auch wohltuend – blickt man etwa auf Theodor Mommsens *Römische Geschichte* zurück. Zahlreiche weiterführende Hinweise siedelt der Autor jedoch direkt im Text an; das Buch soll zum Nachdenken und Nachprüfen anstacheln.

Seine Sprache ist unkompliziert, zuweilen an die Umgangssprache angelehnt. Auch das mag man gegen ihn einwenden, doch ein wirklich stichhaltiges Argument gegen seinen „Reader" ist es nicht. Diese Argumente lassen sich nur finden, wenn man sich auf das Buch einlässt und sich in das Ereignis-Labyrinth begibt, an dessen Ende der Krieg mit seinem millionenfachen Leid wartete. Fragt sich aus heutiger Sicht, warum diese „Urkatastrophe" vier lange Jahre andauerte, nachdem schon nach der Marne-Schlacht 1914 von deutschen Militärs die Befürchtung geäußert wurde, dass der Krieg verloren sei. Eine deutsche Friedensoffensive 1917 wurde von den Alliierten zurückgewiesen. Keine der Kriegsparteien wollte jedoch nachgeben. Jede wollte einen „Siegfrieden". Das ist ihre eigentliche Schuld.

Der Autor äußert die Befürchtung, dieser wichtige historische Termin werde im „moralischen Morast der andressierten Betroffenheit" versinken, „wo zwar viel gejammert, aber nichts erklärt" werde. Sein Buch hat bei allen Einwendungen, die man ihm entgegensetzen mag, das Potential, die Diskussion der Ursachen und der Schuldfrage, wohl eines der schwierigsten Ereigniskomplexe in der neueren Geschichte, neu und hell anzufachen. Dies ist umso mehr vonnöten, als die Herausforderungen, die damals das Handeln der Politiker und die Erwartungshaltung der Bürger bestimmt haben, nach wie vor lebendig sind und auf die europäische wie auch auf die Weltpolitik Politik einwirken.

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Marotta, Valerio/Stolfi, Emanuele (a cura di)

Ius controversum e processo fra tarda repubblica ed età dei Severi. Atti del Convegno (Firenze, 21-23 ottobre 2010). Collana "Fra oriente e occidente" (diretta da Orazio Licandro e Giovanni Luchetti)

Rom: L'ERMA di BRETSCHNEIDER, 2012, 414 S.

Der von *Emanuele Stolfi* und *Valerio Marotta* herausgegebene Florentiner Tagungsband beleuchtet in zwölf Beiträgen aus verschiedenen chronologischen wie thematischen Perspektiven das vielschichtige Phänomen des *ius controversum*[1] in den zentralen Jahrhunderten der römischen Rechtsgeschichte.

Nachdem die römischen Juristenpersönlichkeiten, ihre (individuellen)[2] Profile, Methoden und Argumentationstechniken in den letzten Jahrzehnten zunehmend ins Zentrum romanistischer Forschungen gerückt sind und die Überwindung eines vermeintlich „klassischen Ideals" zu neuen Erkenntnissen geführt hat, stellt sich die von *Andreas B. Schwarz*[3] bereits im Jahr 1951 aufgeworfene Frage nach den römischen Juristenkontroversen[4] heute unter neuen Aspekten. Der vorliegende Tagungsband leistet dazu einen wichtigen Beitrag.

Bereits im Vorwort des Bandes werden die Entscheidungen der römischen Juristen als „tutte produttive di *ius* ma inevitabilmente non sempre dello stesso tenore" beschrieben. Das *ius controversum*, welches nach der grundlegenden Schrift von *Mario Bretone* auftritt, „when a legal question receives more than one answer from the experts, and it gives rise to different, objectively relevant, points of view within the system"[5], galt in Rom als ‚Motor' der fachlichen Auseinandersetzung um die beste, die gerechteste[6] Lö-

1 Der rhetorisch vorgeprägte Begriff ‚*ius controversum*' kommt zwar in der nichtjuristischen römischen Literatur vor, gehörte jedoch nicht zum Wortschatz der römischen Jurisprudenz.

2 Zur Frage nach der ‚Individualität' der römischen Juristen siehe *Baldus, Christian/Miglietta, Massimo/Santucci, Gianni/Stolfi, Emanuele* (Hrsg.), Dogmengeschichte und historische Individualität der römischen Juristen. Storia dei dogmi e individualitŕ storica dei giuristi romani. Trient 2012.

3 *Schwarz, Andreas B.*, Das strittige Recht der Römer. In: *Flume, Werner/Niedermeyer, Hans,* Festschrift für Fritz Schulz zum 70. Geburtstag Bd. II, Weimar 1951, S. 201-225.

4 Zum *ius controversum* siehe vor allem *Bretone, Mario*, „Ius controversum" nella giurisprudenza classica. Rom 2009; *Milazzo, Francesco* (Hrsg.), Ius controversum e auctoritas principis. Giuristi principe e diritto nel primo impero, Atti del Convegno internazionale di diritto romano e del IV Premio romanistico «G. Boulvert» (Copanello, 11-13 giugno 1998), Neapel 2003; *Paricio, Javier,* Notas sobre el *ius controversum* en la jurisprudencia romana. In: Seminarios Complutenses de Derecho romano. Bd. 22 (2009), S. 543-553 und *Cantarone, Pasqua,* Ius controversum e controversie giurisprudenziali nel II secolo a. C. In: *D'Ippolito, Federico Maria* (Hrsg.), φιλία. Scritti per Gennaro Franciosi. Bd. I, Neapel 2007, S. 405-463. Speziell zum *ius controversum* bei Gaius siehe *Brutti, Massimo*, Gaio e lo *ius controversum*. In: Annali del seminario giuridico (AUPA), Bd. 55 (2012), S. 96 ff.

5 Siehe *Bretone, Mario*, "Ius controversum", zit., Abstract, S. 1.

6 Vgl. den berühmten Ausspruch des Celsus in D.1.1.1 (Ulp. 1. inst.): „*ius est ars boni et aequi*".

sung des Einzelfalles. Da frühere Entscheidungen von Juristenkollegen nach römischem Recht keine Präzedenzwirkung entfalteten und auch bereits anerkanntes *ius receptum* unter gewandelten Umständen (wieder) zu *ius controversum* werden konnte, verfiel die fachliche Diskussion und Argumentation unter den römischen Juristen keiner dogmatisierenden Erstarrung, sondern blieb über Generationen hinweg dynamisch.

Wie dieser vielschichtige Entwicklungsprozess im Einzelnen verlief, insbesondere welche Rolle die überlieferten Schulengegensätze sowie die *auctoritas* einzelner Juristen bzw. des Kaisers dabei spielten und in welchem Maße das *ius controversum* die römische Rechtssicherheit beeinflusste, ist Gegenstand des vorliegenden Tagungsbandes.

1. *Carlo Beduschi* (Il *ius controversum* fra razionalitŕ e giustizia, S. 1-36) untersucht das Wesen des *ius controversum* innerhalb der beiden operativen Phasen des römischen Formularprozesses, der prätorischen *iurisdictio* und dem *iudicium* des *iudex* bzw. *arbiter*. Aufbauend auf sprachphilosophischen Überlegungen (siehe insbesondere „V. La dimensione linguistica dell'esperienza ed il suo assetto grammaticale") und unter Abgrenzung zur Perspektive der Rhetorik stellt der Autor die logisch-systematische Tragweite des *ius controversum* für die römische *prudentia (iuris)* dar. Wie er anhand des bekannten Beispiels der spätrepublikanischen Juristenkontroverse zum *partus ancillae* belegen will, bestand eine wesentliche Funktion der *controversia* (im strengen Sinne des ‚*contra vertere*') darin, Raum für die fachliche Auseinandersetzung unter den Juristen zu schaffen und diesen für die Entwicklung und Überprüfung juristischer Entscheidungskriterien (*rationes decidendi*) zu nutzen.

2. *Remo Martini* und *Stefania Pietrini* (Casi di *ius controversum* nella testimonianza di Quintiliano, S. 37-60) gehen in ihrem gemeinsamen[7] Beitrag von der für die rhetorische Sicht auf das *ius controversum* interessanten Quellenstelle 7.6.1 in Quintilians *Institutio oratoria* aus, mit welcher dieser seine Abhandlung der vier *status causae legales* (*scriptum-voluntas*, *leges contrariae*, *syllogismus* und *amphibolia*) eröffnet. Anhand des *status scriptum-voluntas* stellt Quintilian dort mit den Worten „*Scripti et voluntatis frequentissima inter consultos quaestio est, et pars magna controversi iuris hinc pendet…*" einen ausdrücklichen Bezug zum *ius controversum* her und vergleicht dieses mit den Schulkontroversen der Rhetoren. Wie *Pietrini* unter Vergleich mit juristischen Quellen plausibel macht, lassen sich viele der im Anschluss von Quintilian aufgezählten Beispiele zu den *status legales* auf das römische (oder griechische) Recht und auf typische Juristenkontroversen zurückführen und insoweit von rein fiktiven Schulfällen der Rhetoren unterscheiden.

3. *Letizia Vacca* (Controversalitŕ del diritto e impianto casistico, S. 61-75) vertieft in ihrer Abhandlung das Verhältnis zwischen *ius controversum* und kasuistischem Rechtsdenken der Römer. In ihrer Stellungnahme zu dem wegbereitenden Aufsatz „Das strittige Recht der Römer" von *Andreas Schwarz*[8] würdigt die Autorin das Verdienst der neueren romanistischen Forschung, die dynamische Verbindung zwischen dem *ius controversum* und der sich am konkreten Fall orientierenden römischen Rechtspraxis erkannt und das „begriffsjuristische" Verständnis der Pandektenwissenschaft überwunden zu haben. Da kein Fall wie der andere ist, sei es letztlich Aufgabe der römischen Juristen gewesen die Fakten des konkret zu entscheidenden Falles zu bestimmen und mit bereits entschiedenen Sachverhalten auf Gemeinsamkeiten und Unterschiede hin zu untersuchen („tecnica del *distinguo*"). Diesen heuristischen Argumentations- und Wertungsprozess in seinen ursprünglichen Bezügen zum konkreten Fall nachzuvollziehen, sieht die Autorin vor dem Hintergrund der justinianischen Überlieferung, welche aus Gründen der Rechtssicherheit vorwiegend „risultati ‚scientifici'" und kaum *dissentiones* im Einzelnen überliefert habe, jedoch zu Recht als problematisch an.

4. *Aldo Petrucci* (Disciplina processuale delle *negotiationes* e *ius controversum*, S. 77-95) analysiert das *ius controversum* anhand verschiedener Quellenstellen zur *actio exercitoria*, *institoria* und *tributoria*. Wie der Autor feststellt, gab es zur Frage, ob ein von einem *magister navis* aufgenommenes *mutuum navis reficiendae causa* noch unter dessen *praepositio* fiel und der *exercitor* dementsprechend haftete, sehr wahrscheinlich eine Juristenkontroverse, zu der *Petrucci* im Wesentlichen zwei Entscheidungslinien (‚correnti') ausmacht, die einerseits von Ofilius, Pedius und Ulpian, andererseits von Julian und dessen Schüler Afrikan vertreten wurden[9]. Unterschiedliche Rechtsansichten beziehungsweise mögliche Ansätze dazu zeigt der Autor auch hinsichtlich der Frage nach dem Ausmaß des Schutzes Dritter auf, welche im Zeitraum zwischen Tod des Geschäftsherrn und Antritt der Erbschaft durch dessen Erben mit einem eingesetzten *institor* Geschäfte machten[10], sowie zur Frage, ob die *actio institoria* einen „carattere ‚bidirezionale'" hatte, sodass mit dieser auch zugunsten des Geschäftsherrn gegen den Dritten geklagt werden konnte[11]. Abschließend stellt *Petrucci* Quellen vor, in denen eine Juristenkontroverse zur Frage der möglichen Erweiterung des Anwendungsbereichs der *actio tributoria* anklingt[12].

5. *Massimo Brutti* (Il dialogo tra giuristi e imperatori, S. 97-204) untersucht das *ius controversum* im Dialog zwischen römischer Rechtswissenschaft und Kaiserherrschaft. In chronologischer Reihenfolge von *Augustus* (III.) bis *Caracalla* und *Alexander Severus* (XV.) zeigt der Autor anhand diverser Textstellen auf, wie die Kaiser Juristenautoritäten ihres Vertrauens konsultierten und mit diesen in einen konstanten Dialog traten, welcher zu einer fruchtbaren wechselseitigen Beeinflussung der Entscheidungen führte. Wie *Brutti* ausführt, diente die Konsultation der *iuris prudentes*, welche unter Hadrian zur festen Institution des *consilium principis* wurde, zwar dem kaiserlichen Machterhalt, ließ jedoch keine Hierarchie zwischen den *constitutiones* und der *interpretatio* der Juristen aufkommen. Es zeige sich vielmehr deutlich, dass die kaiserlichen Entscheidungen „assumendo in pieno il linguaggio e le nozioni della giurisprudenza" (S. 130) wesentlich an denen der Juristen orientiert blieben und – wie der Autor an einem Beispiel von Julian und Hadrian (VII.) aufzeigt – sogar von diesen korrigiert werden konnten.

[7] Die §§ 1-3 stammen von *Martini*, § 4 von *Pietrini*.
[8] Siehe bereits Fn. 3.
[9] Siehe die beiden Quellenstellen D.14.1.1.8-9 (Ulp. 28. ad ed.) und D.14.1.7 pr. (African. 8. quaest.).
[10] Siehe die Quellen D.14.3.5.17 (Ulp. 28. ad ed.) und D.14.3.17.3 (Paul. 30. ad ed.).
[11] Siehe einerseits die Quelle D.14.3.1 (Ulp. 28. ad ed.) a. E. und andererseits die Quellen D.19.1.13.25 (Ulp. 32. ad ed.) und D.46.5.5 (Paul. 48. ad ed.).
[12] Siehe im Wesentlichen die Quellenstellen D.14.1.1.20 (Ulp. 28. ad ed.) und D.14.1.6 pr. (Paul. 6. brev.) sowie D.14.4.1.1 (Ulp. 29. ad ed.).

6. *Francesco Amarelli* (I giuristi e il potere: i *consilia principum*, S. 205-212) beschreibt in seinem Beitrag, wie die Verleihung des *ius respondendi ex auctoritate principis* und die Aufnahme ausgewählter Juristen in die kaiserlichen *consilia* zunehmend, insbesondere unter Hadrian, zu verstärkter kaiserlicher Kontrolle und zum Ende des (kontroversen) Juristenrechts führten. Durch die gezielte Eingliederung sowohl sabinianischen als auch prokulianischen Gedankenguts in den Kreis der Meinungen etwa habe der Kaiser juristische Differenzen neutralisieren und übereinstimmende Entscheidungen weitgehend sicherstellen können. Das *ius controversum* oder zumindest die Erinnerung daran auszulöschen sei jedoch selbst Kaiser Justinian trotz seiner Autorität als Gesetzgeber nicht gelungen.

7. *Patrizia Giunti* (*Iudex* e *iurisperitus*. Alcune considerazioni sul diritto giurisprudenziale romano e la sua narrazione, S. 213-251) geht in ihrer Abhandlung, deren Schwerpunkt auf der Bedeutung der *responsa prudentium* liegt, von der bekannten Quellenstelle Gai.1.7 aus, in der Gaius die Juristenresponsen zu den Quellen des römischen Rechts zählt. Im Verhältnis von *iudex* (*iudicare*) und *iurisperitus* (*respondere*) sei es letztlich das an den *iudex* gerichtete *responsum* des Juristen gewesen, auf dessen *auctoritas* der Richter, welcher in Rom als *iudex privatus* gerade kein Rechtsexperte sein musste[13], die Legitimation seiner Entscheidung gestützt habe: „ed č da questa dinamica che la logica del sistema fa scaturire la ‚vincolativitŕ' del responso, una ‚vincolativitŕ' che nasce dal confronto tra due realtŕ incomparabili: da un lato l'*auctoritas*…personale del giurista…; dall'altro lato, l'incompetenza del *iudex*…" (S. 226 f.).

8. *Andrea Lovato* (Quando la *disputatio* si fa genere letterario: la testimonianza di Ulpiano, S. 253-285) untersucht in seinem im Wesentlichen auf die *libri disputationum* des Ulpian gestützten Beitrag den Begriff der *disputatio* im Hinblick auf ihren terminologischen Gebrauch in den Quellen – insbesondere in Abgrenzung zur *controversia* –, ihre literarische Form – speziell die *libri disputationum* – und, was sich nur noch indirekt erschließen lässt, den möglichen Ablauf einer mündlichen *disputatio*. *Lovato* nimmt an, dass die Sprache des mündlichen Diskurses in der schriftlichen *disputatio* Niederschlag gefunden hat und untersucht die Quellen dementsprechend auf Flexionsformen der Worte „*proponere*", „*quaerere*" und „*dicere*" (S. 272 f.). Unter Zitierung von *Raggi* kommt er zu dem Ergebnis, dass damals wie heute Bedarf an Büchern bestanden habe, welche (juristische) Probleme und nicht dogmatische Konstruktionen hervorbringen – an Büchern, die das Recht wie eine „enorme palestra di opinioni" (*Raggi*) darstellen, nicht wie „un diritto perfetto, in cui tutti i particolari si legano tra loro in una visione organica perfetta, senza la minima sbavatura" (*Raggi*).

9. *Emanuele Stolfi* (*Dissensiones prudentium*, dispute di scuola e interventi imperiali, S. 287-338) beginnt seine Untersuchung mit der unerschöpflichen Digestenstelle D.1.2.2 (Pomp. lib. sing. ench.)[14], in der Pomponius die *dissentiones prudentium* als zentralen Aspekt der *scientia iuris* der Kaiserzeit behandelt. In diesen *dissentiones* sieht *Stolfi* den gemeinsamen Nenner der pomponianischen Darstellung der Schulengegensätze zwischen den ‚*sectae*' der Prokulianer und Cassianer einerseits und der Verleihung des *ius respondendi ex auctoritate principis* durch den Kaiser auf der anderen Seite. Der Autor stellt eine „connessione stringente, quasi «necessaria»" (S. 314) zwischen der kontroversen Struktur des *ius*, welches „*venit compositum a prudentibus*" (D.1.2.2.5)", und den kaiserlichen Eingriffen fest und untersucht diesen Befund anhand der gaianischen Aufzählung der *responsa prudentium* (Gai. 1.7), welche Gaius auch als „*sententiae* [«elaborate *ex auctoritate principis*»] *et opiniones eorum quibus permissum est iura condere*" beschreibt. Auf diese Weise gelingt es *Stolfi* die verschiedenen Blickwinkel von *Enchiridion* und Institutionen des Gaius zu verdeutlichen.

10. *Livia Migliardi Zingale* (Realtŕ provinciale egiziana e documenti della prassi, S. 339-356) untersucht in ihrem Beitrag die Prozesspraxis in der ägyptischen Provinz während des Prinzipats anhand diverser papyrologischer Quellen, u. a. zu Entscheidungen des römischen Juristen *Lucius Volusius Mecianus*, welcher um 160 n. Chr. (siehe vor allem P. Oxy. III 653) das ranghohe Amt des *praefectus Aegypti* bekleidete. Nach Bekräftigung der inzwischen überwiegenden Ansicht, wonach es in der Provinz Ägypten weder einen Formularprozess noch ein generelles Edikt gab, analysiert die Autorin das Verhältnis des *praefectus Aegypti* zu den *prosphonéseis* der sog. *nomikoí*, der lokalen Experten ägyptischer *nómoi*, welche jener – wie diverse Quellen belegen, insbesondere im Bereich der Rechtsnachfolge von Todes wegen sowie in familienrechtlichen Konstellationen – bei seiner Entscheidungsfindung zu Rate zog.

11. *Valerio Marotta* (La *recitatio* degli scritti giurisprudenziali: premesse repubblicane e altoimperiali di una prassi tardoantica, S. 357-385) beschäftigt sich in seiner Untersuchung mit dem Einfluss des *ius controversum* auf die sog. „Rezitationspraxis". Entgegen der vor allem auf *Fritz Schulz* und dessen Vorstellungen zur literarischen Überlieferungsgeschichte zurückgehenden Ansicht, nach welcher diese Prozesspraxis erst in nachklassischer Zeit bestanden habe, vertritt der Autor die Auffassung, dass sie bereits vor dem 3. Jh. n. Chr. entstanden sei. Wie *Marotta* anhand diverser rhetorischer Quellen und unter Hervorhebung des schriftlichen Überlieferungsweges der Juristenresponsen belegt, machten bereits Redner zur Zeit Ciceros von der *lectio* juristischer Texte vor Gericht Gebrauch. Im Falle einer *dissentio* sei der *iudex*, was der Autor u. a. mit Gai.1.7 belegen will, zwar frei gewesen zwischen den *sententiae* der Juristen zu wählen, jedoch sei er in jedem Fall an eine der vorgebrachten Meinungen gebunden gewesen und habe nicht über diese hinausgehen dürfen.

12. *Pietro Cerami* (Il ‚*ius controversum*' nello sguardo dei moderni, S. 387-414) unterstreicht in seinem Beitrag den bedeutenden Wendepunkt, welchen die Studien von *Andreas B. Schwarz* und *Max Kaser* in den letzten siebzig Jahren romanistischer Forschung zum *ius controversum* darstellen. Nach erfolgreicher Abkehr von der Vorstellung der ‚Fungibilität' der klassischen römischen Juristen und von der Pandektisierung des Rechts sei das *ius controversum* zunehmend ins Interesse romanistischer Forschung geraten, was

[13] Hieran erinnert die Autorin mit Gellius' *Noctes Atticae* (12.13) ausdrücklich.

[14] Vgl. frühere Studien, auf welche der Autor hier teilweise Bezug nimmt: *Stolfi, Emanuele*, Il modello delle scuole in Pomponio e Gaio, SDHI Bd. 63 (1997), S. 1-106; Studi sui «libri ad edictum» di Pomponio Bd. I. Trasmissione e fonti, Neapel 2002 sowie Bd. II. Contesti e pensiero, Mailand 2001; ‚Plurima innovare instituit'. Spunti esegetici intorno al confronto tra Labeone e Capitone in D.1.2.2.47 (Pomp. lib. sing. ench.) in Studi G. Nicosia Bd. VIII, Mailand 2007, S. 57-95.

der Autor u. a. mit drei bedeutenden Kongressen zu diesem Themenkreis sowie der zunehmenden Behandlung des *ius controversum* in der Lehrbuchliteratur zum römischen Recht belegt. Der Autor, welcher die Bedeutung und die geschichtliche Entwicklung des *ius controversum* in kritischer Auseinandersetzung mit *Schwarz* unter verschiedenen Aspekten – insbesondere auch für den Bereich des *ius publicum* (S. 400 ff.) – untersucht, hält die beiden dem reversiblen Binomen *ius controversum – ius receptum* innewohnenden Elemente der „certezza" und „concretezza" letztlich für „fundamentali e complementari valori della vita del diritto" (S. 413).

Der vorgestellte Tagungsband bietet dem Leser einen hilfreichen Querschnitt zum aktuellen Forschungsstand über das *ius controversum* aus italienischer Perspektive. Die kritische Auseinandersetzung mit der Erscheinung eines „der grundlegenden Probleme nicht nur des römischen Rechts und seiner Geschichte, sondern des Rechts aller Zeiten und so auch der Gegenwart"[15] gibt neue Anregungen und rückt das dem Wesen des römischen Rechts immanente Phänomen des *ius controversum* erneut in den Fokus romanistischer Forschung.

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[15] Siehe erneut *Schwarz,* Das strittige Recht der Römer, zit., S. 225.

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Andrzej Chwalba

Samobójstwo Europy. Wielka Wojna 1914–1918
(Suicide of Europe. Great War 1914–1918)

Kraków: Wydawnictwo Literackie, 2014, 647 p., ISBN 978 83-08-05303-4

The 100th anniversary of the first global conflict in history, that falls on the turn of July and August 2014, constitutes an ideal opportunity to ponder over the event that decided the fate of millions. The conflict which lasted over four years and ended in November 1918 is unanimously considered the spark that ignited the fire of such critical events of the 20th century history as the October Revolution, the domination of the United States of America, the triumphant, but at the same time tragic advance of the German national socialist movement and finally, the restoration of Polish independence, followed by another fall after just two decades of freedom. The perspective of those 100 years that have passed since the outbreak of the Great War encourages historians to approach the global conflict either monographically or syntactically. Professor Andrzej Chwalba chose the latter variant. His compatriots mostly recognise this established professor of history at the Jagiellonian University as the author of exquisite syntheses of the Polish (*Historia Polski 1795–1918, III Rzeczpospolita*) and global history (*Historia powszechna. Wiek XIX, Historia powszechna 1989–2011*). His newest book, *Samobójstwo Europy. Wielka Wojna 1914–1918 (Suicide of Europe. Great War 1914–1918)*, literally "the Europe's suicide. The Great War of 1914–1918", whose significantly shortened version has been translated into English and is available as *1914–1918. An Anatomy of Global Conflict*, places Andrzej Chwalba among the most prominent Polish historians of the First World War – Jan Konstanty Dąbrowski and Janusz Pajewski, whose studies were developed over a decade ago, before and after the Second World War respectively. Thus, it was about time that a new study on the First World War was written. Indubitably, the Great War gives rise to far less prominent emotions in the contemporary reader than the history of the 1939–1945 conflict. After reading *Samobójstwo Europy*, perhaps few people will have changed their minds on the matter. It is without doubt, however, that they will have had the understanding of why the *guns of August* fired in 1914 and the Armistice at Compičgne in November 1918 mean more to Western Europe than 1st September and the capitulation of Berlin in May 1945.

As his long-standing readers may have already expected, the newest book by Andrzej Chwalba constitutes not only a rich body of knowledge about the past, but also, most importantly, a brilliantly told history. In this matter, the Cracow historian, originator of conventions for foreign researchers of Polish history, as one of the very few Polish explorers of the past, becomes part of the best trends of British and American historiography, whose characteristic feature is interesting and compelling narrative. This makes reading the 600 pages of academic writing a real adventure, a journey back to the very disturbing events that took place 100 years ago. In 2014, when once again, after many years of peace, the east of the European continent rang with gunfire that spilled blood of soldiers and civilians – *vide* Ukraine – reading a book that depicts how suicidal the belief in one's own strength and the opponent's weakness can be, seems to be not only beneficial, but even compulsory. This concerns not only scientists, most of whom are avid readers of the *Journal of European History of Law*, but also the youth, which, sadly, pays less and less attention to the understanding of the past.

When discussing the reviewed work, one can instantly observe that the Polish version of the book (my copy was hard-covered and I strongly advise the reader to opt for that one) was published after exceptionally careful proofreading. Throughout over six hundred pages only a few typing errors can be found. Since his first synthesis of Polish history after the partitions, Andrzej Chwalba has been consistent in his approach to historic events from multiple perspectives. As a result, we get to know the history of the First World War not only through the prism of serious politics and military struggles, but also from the point of view of society, economics, culture and custom. The book is comprised of nine chapters, whose capacity is fairly diverse. The first, almost 80-page-long chapter entitled "The War Starts" contains the analysis of international situation in the years immediately preceding the outbreak of the conflict, the story of the assassination of Archduke Franz Ferdinand in Sarajevo, the war objectives of individual states, the Dual Alliance and the Triple Entente as well as the answer to the question: Could the war be avoided? The vastest, second chapter of the book, titled "Land Warfare", comprises a disproportionally large fraction of the text. It is further divided into eleven subchapters, mostly describing military action at the western and eastern front in subsequent years of the conflict. In the third chapter, Chwalba described manoeuvre, trench, alpine, landing and secret operations, propaganda and psychological warfare. The fourth chapter presents the fate of a soldier from the perspective of the injured and the captured, deserters and victims, as well as forms of their commemoration (cemeteries, tombs of the unknown soldier). The next two chapters deal with war at sea and war in the air, respectively. The social dimension of the conflict was depicted in chapter seven, "The Civilians' War", and chapter eight, "The War of the Nations". The lecture is finished with a chapter that provides a balance of the First World War. The content is encapsulated by interesting iconographic material. It comprises of nearly fifty original, very well-matched photographs and seven maps, a list of the most important non-serial studies used by the author, and an index of persons.

Within such a short review, it is impossible to enlist, let alone describe, all the essential problems contained on the pages of this extensive synthesis of an over four-year long military conflict. This is why I shall only present the most important issues raised in the book, hoping that they constitute a sufficient incentive to read this valuable title.

At the very beginning of the book, its author skilfully answers the question: the Great War or the First World War? As he observes, for the French, the British, Belgians and Italians as well as several other nations, the conflict in question has always been referred to as the Great War. This is chiefly because they were the victorious nations. On the other hand, for the Germans, Austrians, Hungarians, Turkish and Bulgarians, the term "First World War" is much more appropriate. In this context, the Polish approach seems to be quite original, as we use both the mentioned terms, none of them evoking particular emotions.

According to Andrzej Chwalba one of the most important reasons for the outbreak of the conflict was the German "escape forward" in the form of starting the war in a moment when the country's obligation towards its citizens by reason of debt could be suspended. This was significant inasmuch as in Germany expenditure on reinforcement in the years immediately preceding the outbreak of the war had already been high enough that they threatened to bring the country to the brink of bankruptcy. Added to this factor was the ill-content of the German people as to their geopolitical position on the European continent, mainly the obsession resulted from being surrounded by Russia and France. For the author of the study, in reality the Germans were not at much risk, but artificially fuelled psychosis had significantly fostered their pro-military sentiments. The outbreak of the conflict was also influenced by the cultural climate of the times. Between 19th and 20th centuries creators and intellectuals succeeded in convincing millions of people that they led a prosaic life which was mainly consumptive, mundane and devoid of sublimity. In their opinion war would ennoble, teach virtue, discipline and obedience as well as change the hopeless life of money-grabbers. Europeans came to terms with the inevitability of an armed conflict thanks to the historical politics of the state, which made use of school curricula and the awareness of the increasing number of subsequent conflicts, especially in the Balkans (pp. 50-57).

The reviewed publication confirms that superpowers which prepared for the war most often saw it as a several-month-long campaign. Thus, as A. Chwalba tellingly remarks, they fed on the illusion of a short-lived war, which was supposed to be settled after a few decisive battles, as was the case in 19th century. One exception was Britain, which had never believed in a swift end to the conflict when preparing her war plans. Part of British analysts expected the conflict to eventually die out and the victory be settled thanks to the British Empire's considerable material resources and the most powerful navy in the world. On the other hand, the hope for swift victory was most visible in German cabinets and army ("Paris for lunch, dinner in St. Petersburg", "Home Before the Leaves Fall"). The quick victory was supposed to be provided by Alfred von Schlieffen's plan, whose final variant was adopted in December 1905. It is significant that it was initiated several months before the retirement of its creator. The document, perfectly known not only to historians, was ideally adapted to the mentality of a German soldier and officer, who were accustomed to detailed instructions. For its implementation and management it was necessary to have an operating and well-expanded railway. Only then was it possible, after previous victory over France on its north-western plains, to transport the German army east by rail and to crash the almost universally disregarded "Russian Colossus with Legs of Clay". This is why Schlieffen, similarly to Moltke (senior) pleaded to build a railway rather than more fortresses, adding that no one was concerned with the number of hostile battalions anymore; what counted was the length of railway tracks (pp. 63-69). However, the other party did not intend to watch Germans arm themselves passively, as we learn from Chwalba's study. This was visible in many fields. To the generally known facts, A Chwalba adds many less known ones, such as the construction of a massive radio station in Babruysk and a receiver station on the Eiffel Tower.

Samobójstwo Europy (Suicide of Europe. Great War 1914–1918) is a synthesis that provides an interesting insight into the public feeling which was predominant in different parts of Europe in the first few weeks of the war. The author stressed that beside pro-military sentiments, perfectly known from numerous photos and popular contemporary texts, there was also another, less known

image of the new war. The former was manifested by crowds of people throwing caps in the air at the sight of soldiers or by thousands of young girls sticking flowers in the tubes of their rifles. Part of the readers will probably be surprised by the statement that the greatest support for war was observed among the men of letters, artists, intellectuals, scholars and students. This is confirmed by reports from the countries which engaged in the conflict. The contemporary surveys allegedly indicated that the vast majority of students were willing and happy to join the army. Great support for the war was also manifested by mobilised civil servants and administration, school and court workers. On the other hand, as A. Chwalba stressed in his compilation, the image that is also dominant in today's media, and I can personally add that this also concerns historical education, had been greatly idealised and biased. The contemporary photographs stored in private collections, as we read in the publication, also document the less optimistic and joyful image. Many of these photographs depict saddened, worried and even frightened soldiers. Those who set out with heavy hearts and negative attitudes did not make it into propaganda images of armies happily matching to war.

As has already been mentioned, the most extensive chapter of A. Chwalba's book is devoted to the course of the war on land. In it, the reader will find hundreds of pieces of information that present the details of military operations on individual fronts of the Great War in a matter-of-fact and colourful way, as is characteristic of the author. It is important to stress here that during the war, the English Crown located her armies in the southern part of the continent for the first time since Waterloo. The author also characterises individual commanders. Thus, we get to know that officer Paul von Hindenburg, born in Poznań, Poland, was a level-headed and determined officer who belonged to the elite of the Prussian army, and whose appearance and height (over 5 ft 10) evoked respect and trust. Conversely, Erich Ludendorff, a difficult man to handle, scruffy and arrogant, easily irritable and lacking the slightest sense of humour, evoked opposite feelings. However, this did not hinder the two German commanders from meeting on 23rd August 1914 at a train station in Hanover, to cooperate exemplarily, and the Germans often referred to them as marriage (p. 127). The analysis of the military situation on the fronts of the global conflict between 1914 and 1918 prompted the author of the book to remind the reader of an ancient and universal truth that collective leadership at war and democracy in trenches is a dangerous illusion, *ipso facto* – utopia. The reader will not be surprised to find this statement in the part describing the situation in the Russian army in 1917 (p. 253).

The pages of the book devoted to the Great War could not lack information concerning the participation of the United States of America. And here, once again, A. Chwalba showed the importance of social issues in his description of the armed conflict. Thus, the reader learns that the USA's participation was quite sensational and, indeed, quite a breakthrough. The author draws a picture of public feeling across the Atlantic Ocean and shows that the Entente enthusiasts had powerful opponents in the form of ten million Americans of German descend (the population of the USA was 100 million at the time) as well as some Irish, Scandinavians and Jews, who were hostile towards Russia by reason of slaughter and anti-Jewish policy. The strength of pro-German lobby in the United States, as we read in the study, was well illustrated by the fact that one year before the outbreak of the conflict the USA published five hundred and twenty two newspapers and magazines in the German language (p. 283). A. Chwalba recalled that the contemporary American president Thomas Woodrow Wilson, as early as in January 1917, i.e. three months before his country's involvement in the war, said that bringing USA to war would be a crime against civilisation.

The attention of most of the readers will probably be drawn to the description of the conflict from the perspective of trenches. A. Chwalba stressed that soldiers detested this form of warfare because they did not like the idea of fighting not only with the opponent, but with rats as well. Indeed a number of soldier reports quoted in the study recall that the number one enemy in the trenches were rats, enemy number two being lice. The trenches were even called "lice land". This is why commanders, such as the British marshal Horatio Herbert Kitchener, used to say that war in trenches was no war. Others openly accused the enemy of hiding in trenches like "browbeaten moles" that refuse to fight like real men. We read in the study that soldiers liked movement and hated motionlessness. They cherished war fought by men rather than anonymous machines (p. 337). However, when it came to spending most of the time in trenches, the command of the fighting armies had to think of organising refreshment spots at the back. It was significant inasmuch as soldiers served on a rotary basis. In the troops of the allies it was common to employ the ternary system, i.e. three days in trenches, three days of training and three days at the back. On the other hand, the German army used a quaternary system whereby the soldiers spent four days in trenches and four days at the back. Thus, during their time of repose the soldiers of both parties would be allowed to go to shops and canteens with warm meals, getting to know foreign cuisine and making use of libraries and public halls. They could paint, sculpt, make shrines and crucifixes from shell fragments. Being at the back also gave them opportunity to catch up on correspondence (p. 349).

War in trenches also meant persistent attempts at destroying the hostile army's defence system. One of the ways to achieve success was digging tunnels under the opponent's trenches. As A. Chwalba emphasised, sometimes the diggers from both sides would meet underground, where they engaged in fights with the use of pickaxes, shovels and spades. One of the most serious impediments when digging under trenches was carbon monoxide. This is why the diggers were accompanied by animals, mostly rabbits and canaries. When they started losing consciousness, it meant that the risk of appearance of this toxic non-organic chemical compound was present. As a certain kind of trench warfare paradox, the study mentions that luckily for the soldiers, the artillery during the Great War was very inaccurate. The numbers speak for themselves. In the years 1914–1918 only two out of one hundred shells would hit trenches directly. This rate improved at the end of the war, where it was no longer two, but four shots out of one hundred. One contributing factor was that quite a few shells did not explode, and the ones that landed in mud mostly increased the number of duds. As a result, it often happened that out of one hundred fired shells almost thirty failed to explode. One paragraph of the study is focused on the aspect of fighting in trenches that probably all of the parties would rather not speak of. It is about losses incurred as a result of friendly fire. According to the estimates of the French army quoted by A. Chwalba in his book, during the

First World War as much as seventy five soldiers could have been killed or injured by their own artillery shells. One of the French officers would allegedly admit that he belonged to the regiment which killed the most Englishmen (p. 353).

Many readers will probably be interested in the description of the Italian front, also called the "mountain war", which constituted a specific form of trench warfare. The author of the study began its description with a highly telling quote, consisting in the prayer of Italian alpine riflemen to almighty God to save them from unbending cold, spinning ground, avalanche, and to direct their steps to safety, protect them from dizziness at ridges, vertical walls and treacherous abysses. The prayer resulted from the fact that the most terrifying enemy on the Italian front was nature itself in the form of the white mass, which would sweep whole platoons without trace, without outcry, noiselessly. Andrzej Chwalba recalled that alpine avalanches were massive because of the enormous amount of accumulated snow. In winter, 1.5 mile above sea level, the layer of snow was 16 ft thick, and less than a mile above, it was almost 30 ft. In such circumstances it is hardly surprising that avalanches constituted death traps that would whist people together with field hospitals, artillery positions, enormous cannons and the whole maintenance staff. That way, only in the County of Tyrol 60 thousand soldiers died or were injured, which constituted twice as much as the victims of gas on the western front (p. 365).

With all certainty, one of the most intriguing fragments of *Samobójstwo Europy* is the sub-chapter titled "The war of the secret services". It is an indisputable fact for anyone who is interested in the history of armed conflicts, that secret service, intelligence and counterintelligence play a very important role. This also applied to the Great War, where they were entrusted with reconnaissance of the opponent's strength and capabilities as well as with spreading disinformation and combating the enemy's intelligence. According to the data quoted by A. Chwalba, between 1916 and 1918 the British secret service acquired as much as 61 per cent of their information on the enemy's military operations from interrogating captives and deserters, and only 18 per cent was obtained from intercepted documents. The most commonly used method was radio tapping, followed by telegraph interception and observation of manoeuvres from balloons and planes. A great portion of the book is also devoted to the use of war pigeons which carried messages. During the war, one pigeon, provided it did not die, could carry thousands of messages. Most of these winged couriers were mobilised by the Germans – nearly 300 thousand. However, it were the French who used them most often and most effectively, with their "army" of 130 thousand birds, of which 20 thousand died during the war. The pigeons were combated with the use of trained hawks. Moreover, their breeders were harassed and some of them even executed, having been accused of intelligence and diversionary activities, as in the case the Belgian resistance movement. The significance of war pigeons is best manifested by a monument of an injured bird that brought the last message from the Vaux fort. Having reached its target, the bird died of gas poisoning. The pigeon was decorated with the National Order of the Legion of Honour and stuffed by the French. Its monument, raised at the end of the war, symbolically commemorates all the courageous French pigeons that died during war as well as their breeders executed by the Germans. One particular British pigeon, Cher Ami, also went down in history as the bird that was used by American troops on the western front. In October 1918 it distinguished itself by delivering a message to besieged soldiers despite gunfire. In recognition of this act, it was decorated, stuffed and transported across the ocean (pp. 375-376).

When describing the struggle between intelligence services, A. Chwalba mentioned numerous examples of hidden messages which were included in innocent-looking weather forecasts or wedding announcement, just to name a couple. He writes that the most popular place where intelligence services met and competed was Switzerland, often referred to as the centre of international espionage, a wondrous corner of Europe, ideal for setting up schemes. The parties to the conflict benefited from the assistance of handsomely rewarded local politicians and agents. The reader will learn about the most famous and indubitably the most comely spy of the Great War, Margareth Geertruida Zelle, also known as Mata Hari (from Indonesian, meaning "the eye of the day"), whose adventure with espionage ended in 1917 when she was arrested and executed by the French. On the day of her death (15th October) the dancer and courtesan, who used to seduce men with her revealing and flamboyant attire, unquestionable sex appeal and erudition, was forty one years old. Enamoured French officers, as we read in the study, entrusted her with valuable information, which she then forwarded to Reich. Her story lives on thanks to films and numerous accounts. To this day she is considered the archetype of all secret agent who acquire their information in bed. In reality, she was more of a rowdy, thrill-seeking woman, who treated her job as entertainment rather than serious profession. She did not understand the mechanisms of ruthless, secret warfare (pp. 389-390).

The study also provides some very interesting information about psychological warfare and propaganda distributed by all of the parties to the conflict. Andrzej Chwalba has no doubt that the most effective propaganda against the enemy was organised by the British. They were the first to have established a psychological warfare centre, where significant role was played by chief editors of the most popular British journals and tabloids. They also created the first War Propaganda Bureau that engaged famous film actors and writers, such as Arthur Conan Doyle, Rudyard Kipling and John Galsworthy. The great scale of the venture was also attested by cooperation of scholars and even children's book writers. Both of the fighting parties worked hard on showing the enemy to their own societies in a negative light, ascribing the worst possible traits to the other party. It was common to present the opponent in a cartoonish and virulent manner. This competition seemed to have been won by the allies, who were able to quote much more examples of barbarity, sadism and cruelty of the "new Huns", as they called German soldiers. According to A. Chwalba, the allies were also much more crafty in this new art of deception. They used various arguments to back up their view of the enemy, as the author describes in the many examples mentioned in the book, one of them consisting of a pamphlet written by one of the French propagandists, which later turned out to be very popular among the French community, stating that an average German produced decidedly more faeces than an average Frenchman, which additionally gave out much more unpleasant odour. Both parties to the propaganda war also readily resorted to calling their opponents offensive names. Thus, for the Germans, the English were a "despicable race of clerks", their minister of foreign affairs – a "common mongrel" and King

George V – a "traitor". It was common to describe opponents in pejorative terms and present them as animals. The Germans depicted French as vainglorious roosters and the Russians as clumsy bears. Berlin and Vienna also "promoted" Russians to the world as primitive, coarse, continuously drunk people, who carried their rifles on strings and walked in old bast shoes. On the other hand, Russia depicted the Germans as dim-witted servants and mindless gluttons (pp. 401-403).

The subject of arms and equipment used by the soldiers was also extensively described in the reviewed study. Particularly, the reader's attention is drawn to fragments, where A. Chwalba shows how the uniforms of individual armies changed throughout the war. In this context, the story of the obstinacy with which the French decided to fight in their traditional uniforms commemorating year 1870, mostly red trousers that were considered the essence of French honour, reads almost like an anecdote. However, their painful experience during war forced them to abandon these "honour trousers". Currently, it is hard to imagine that at the beginning of World War I the French, similarly to Russians and Turks, fought without helmets. And here, again, great losses triggered changes. As a result, Adrian helmets were fervently produced by the river Seine, imitating the helmets worn by Parisian guards with a characteristic crest. The book also features the first use of a flame thrower, introduced by the Germans in 1915. In one of the chapters Chwalba also describes implementation of chlorine gas on the battlefield. The first instance of such usage was on 22nd April 1915 on a 3 mile section of front during the Second Battle of Ypres. The details of this attack as well as information that the Germans used tear gas several months before on the eastern front against Russian troops, are only a fraction of interesting facts that the reader is sure to find on the pages of *Samobójstwo Europy (Suicide of Europe. Great War 1914–1918)*. in this context, Andrzej Chwalba stressed that although the losses incurred by the use of sixty three types of gas – irritating, paralysing and burning – were not as great as e.g. artillery fire (25 thousand gas victims against 91 thousand shell victims), gas still heavily influenced the image of the Great War as a cultural phenomenon, i.e. the sign of downfall of civilisation and the barbarity of Europeans (p. 423).

The fate of soldiers during the war also constitutes considerable part of the book. As A. Chwalba remarks, each of the millions of men who went to war thought of how to achieve victory, how to survive, stay injury-free and not be taken captive. Those lucky ones who did not suffer injury, stayed healthy and did not fall into the enemy's hands were few. This is confirmed by the quoted statistics, which show that the number of the injured in the Great War was twice as high as those killed. According to the estimates, they constituted over 20 million. The long list of the injured comprised soldiers without a leg or arm, shell-shocked, blind, devoid of both legs, both arms, with damaged back, distorted face, often to such an extent that they did not have the courage to return to their families and home towns. In November 1918 it was estimated that there were 280 thousand of the latter. These veterans often lived in isolation, in nursing homes without mirrors until their last day. In 1921 in France the veterans of the Great War who suffered from face distortion established an association which in 1953 still numbered ten thousand members (p. 429). In this context, the author of *Samobójstwo Europy (Suicide of Europe. Great War 1914–1918)* stressed that assistance for the injured in war became a brand new experience, both with regard to the scale and methodology.

The history of the Great War as presented by Andrzej Chwalba also includes facts about commemorating its victims. Death and cemetery reconciled the feuding parties. At military cemeteries of Europe soldiers were most commonly buried regardless of their nationality, among friends and foes, as was the European tradition. Not all soldiers could be buried separately, even under the most modest plaques. This is why they were commemorated by monuments called tombs of the unknown soldier, unprecedented in the European history. The first ones were raised under the Arc de Triomphe in Paris and in the Westminster Abbey in London, setting an example for other nations. Celebrations commemorating anniversaries of the outbreak, the most important battles and the end of the war served a similar purpose. Inspired by the funeral of a fellow soldier, John McCrae wrote a poem which went down in the history. *In Flanders Fields*, for such is the name of the poem, not only commemorated war victims, but also popularised poppies as their symbol. It is by no mistake that every year since 1921 the British have organised the Poppy Day, also known as the Remembrance Day, during which poppy wreaths are placed on graves of the killed soldiers and veterans of the Great War and everyone can carry an artificial poppy flower pinned to their clothes (p. 456).

The reviewed book will not disappoint World War I enthusiasts, who are mostly interested in its course on land and in the air. Naturally, the reader will not find detailed descriptions of weaponry and individual battles. However, they will learn some memorable facts, such as the fact that between 1914 and 1918 merchant fleets of the alliance and neutral states lost 6 thousand ships of the total capacity of 12.5 million tonnes. Out of those, 87.6 per cent were drowned by submarines, 9 per cent by mines and 3.4 per cent by naval surface vessels. Many readers will surely be surprised by the information that at the moment of the conflict's outbreak, few of the soldiers who took part in it imagined that they would become pilots. Ferdinand Foch's opinion that aviation was good sport, but not suitable for the army was quite common at the time. Because of such opinions, in 1914 the French aviation, similarly to other armies, was still in the making. The flying machines made of wood and canvas were treated as harmless gadgets and a source of thrills rather than support in the battlefield (p. 499). As the author remarks, this was not the only opinion that was quickly verified by the war.

When analysing the image of everyday life among civilians during the war, the author of the synthesis stressed that there were two sides to this life, both absolutely true. On the one hand there were those who, just like before 1914, led affluent life, and on the other – thousands of poor, lost, sick and starving people, queuing in enormous lines for various goods. For the former it was natural to spend free time in Parisian, Berlin or Roman cafés to the sound of lively, farcical melodies. For them, the war consisted in filling coffee cups with forbidden, at that time, alcoholic beverages. In the largest European capitals the general public poured into theatres, operas, operettas, cinemas, cabarets and sporting events. People frequented clubs, casinos and dance venues in great numbers, dancing to the rhythm of the fashionable foxtrot and Charleston. There were numerous visitors to European spas and holiday resorts, who had an

entirely different image of war than the poor. Traditionally, the latter felt the consequences of war a lot more acutely. All the more so because the queues and ration stamps took a toll even on neutral states, like affluent Switzerland, which had to introduce and rations of meat, bread, sugar and flour. In order to remedy the situation, people were advised to grow vegetable gardens near houses and work venues. These practices were not always understood by civilians. For example, one British aristocrat could not fathom out why the authorities would advise him to replace his tennis courts with a vegetable garden (p. 547).

One of the descriptions contained in the study clearly implies that the most difficult situation was faced by Russian civilians. Statistically, in 1917 a Russian woman spent forty hours a week queuing, and sometimes she would return home empty-handed. The inhabitants of Russia could not understand why their country, often called the granary of Europe, was starving. This proved that its state structures failed, as opposed to Germany. However, as the author emphasised, the Russian society was also at fault, having had no political and social conditions that would toughen it so that it could rise to the challenges of the Great War. Additionally, each European country was affected by an unprecedented phenomenon, called inflation. As A. Chwalba observed, the situation prompted Europeans to ask questions about when the prices would stop growing. In the everyday life of societies the increasing number of crimes against property and life as well as the scale of offences against strict military regulations was a worrying phenomenon, manifested by the circulation of counterfeit ration stamps on the market. For example, in Greece the number of fake stamps at the end of the war was several times higher than that of genuine stamps, which led to inflation. In the study we read that the Greeks were unquestionable masters of falsification, although they had competition in the Balkans (p. 552).

The reviewed work is characterised by its escape from the Poland-centric view of the Great War. Andrzej Chwalba is right to devote little space in his book to Poland and the Polish, as they played a marginal role between 1914 and 1918. This was mainly due to the fact that independent Poland did not figure on the map of Europe. And frankly, I do not see any implications here, apart from the simple statement that Poland was of marginal significance in the history of the Great War. The above statement is well reflected by the example of an outright defeat of the Polish by Belgians and the French on the pages of propaganda pamphlets published in the United States. As A. Chwalba remarks, the Polish did not become the world's conscience because they were unknown and indistinguishable due to their non-existence on the maps. Although America was populated by millions of people of Polish descent, the name of our country did not evoke positive connotations (p. 560).

The reader will learn that around three million widows mourned the death of their husbands after the conflict and only a part of them remarried. For instance, in Germany it was 40 per cent from 1918 to 1926. The sign of the times was that some of the women, especially working-class, were not eager to remarry, because they did not want to lose the newly-found freedom. Widowhood made it easier for them, although their material conditions often deteriorated. One may observe that as a result of changes brought up by the war, part of women were liberated from constraints imposed by their families, especially fathers and husbands, and became more confident. These changes are well illustrated in the book by a comparison of the situation of young ladies who would not be seen in public places without an escort (with the exception of working-class women and harlots), to the situation of British women after the war, when they began to enter "men's" pubs and sip on beer, causing great sensation which placed them on the pages of tabloids. And although their ties to men were not entirely broken, as feminists in the west of the old continent had hoped, this transition was nonetheless visible and it foreshadowed further changes, which came within several years after the end of the conflict. For instance, in Germany the divorce rate rose significantly. In 1913 there were 27 divorces per 100 thousand inhabitants. Seven years later, this number amounted to 59. The transition, as well as many other social phenomena, was also influenced by the fact that the war forced 10 million people to change their address.

The aforementioned departure of the author from describing events from the Polish point of view does not mean a total lack of native themes. This is mostly visible in chapter "The War of the Nations", in which Chwalba emphasised that the Polish were one of very few nations without their own state, whose elites strongly voiced their independence aspirations. However, even those Poles who lived in such large and multinational superpowers as Russia or Austria-Hungary were reluctant to take any partisan action on a large scale. Andrzej Chwalba believes that such actions were also unforeseen by the governments of these countries, for otherwise they would not have engaged in the conflict. However, despite all expectations, the Great War turned out to be a global conflict not only at the level of states, but also nations, who were internally strengthened in spite of the death of the millions of young men and by serious damage (pp. 581-582). The revival of national ideas was possible thanks to the elites of subjugated nations, who quickly realised that in order for them to benefit from the war, it needed to last long enough to significantly weaken its main parties. The author of the study directs the reader's attention to the fact that few people expected the conflict to be long or to lead to a series of political and social revolutions. As a result, at the end of the war the greatest enemy of the national revolution in Europe were not fallen empires, but revolutionary circles, which promoted international rather than national solidarity of the repressed (p. 618).

The problems described in *Samobójstwo Europy (Suicide of Europe. Great War 1914–1918)* influenced post-war relations among the victors. This was particularly visible in the attitude of the British in 1918, when they called for a quick armistice. By no means was this decision influenced by humanitarian reasons. Instead, it was mainly triggered by the fear of growing importance of the United States and the possibility of French troops marching in Reich, which would significantly strengthen Paris in relation to London. In this context, Chwalba reminded the reader of the words spoken by Winston Churchill, who did not share the opinion that as of 11th November 1918 all wars would end. David Lloyd George agreed with Churchill who stated that "when the war of the giants is over, the wars of the pygmies will begin". By "pygmies" he primarily meant the nations of Central and Eastern Europe, including the Polish.

In the conclusion of the book, Andrzej Chwalba reminded the reader that its two most important fronts (western and eastern)

were located in Europe. This is why the war was rightly referred to as the "European civil war" or the "great war of the white people", as Arnold Zweig used to call it. From the technical point of view it was indubitably a step forward, as it created opportunity for the development of science. In the moral aspect however, as the author tellingly remarks, it was a giant leap back, exerting great influence on the brutalisation of European politics after 1918. The great damage and losses incurred by both sides to the conflict further contributed to this fact. The damage incurred as a result of the First World War reached the enormous amount of 273 billion dollars. A historian will also appreciate the fact that the author emphasised that the war marked the beginning of a new age and its outbreak closed the long history of the 19th century, whose beginning is estimated at the year 1789. As a result, the "belle époque", which was supposed to last forever, ended. The words of a British journalist who wrote in August 1914 that Europe "lost its mind" turned out to be prophetic (pp. 628-629).

To conclude, it is worth emphasising that Andrzej Chwalba's book, *Samobójstwo Europy. Wielka Wojna 1914–1918 (Suicide of Europe. Great War 1914–1918)* is a particularly well-written publication. Its original construction and narration is sure to place it permanently among the acquis of Polish historiography devoted to the First World War. It will undoubtedly be appreciated both by professional historians and the numerous group of those who are fascinated and inspired by the past, as inspiration and reflection constitutes one of the main assets and characteristics of Andrzej Chwalba's book.

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Emanuel van Dongen

Contributory negligence: a historical and comparative study.

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Brill Publishers have recently added a new volume to the series of studies in the history of private law, edited by Remco van Rhee, Dirk Heirbaut, and Matthew C. Mirow. This time it is an inaugural monograph of a young Dutch scholar and legal historian Emanuel van Dongen,[1] based on his doctoral thesis which was defended in June 2013 at Maastricht University.

By examining the phenomenon of 'contributory negligence' on the continent in past and present, the author fills a deplorable gap in the secondary literature, previously investigated chiefly by Peter Aumann (1964) and Klaus Luig (1969) a while ago. In his book the Dutch researcher thoroughly examines the historical development of the rules of delictual liability of the wrongdoer in non-criminal cases when the injured party unintentionally and not always faultily contributed to the occurrence of this damage. In exploring the emergence of the modern concept of contributory negligence on the continent, van Dongen sets out to accomplish two main tasks: 1) to reveal the historical development of possible solutions proposed by legal scholars, legislators, and legal practice in continental Western Europe (starting from classical Roman law), and 2) to evaluate their influence on later (medieval, early modern, modern, and present-day) doctrines, court practice, and legislation (with particular focus on France, Germany, and the Netherlands).

To accomplish this challenging task, the author commits to study a plethora of primary sources of Roman law (modern critical editions of the key legal texts and the additional literary sources), medieval law (carefully selected insightful works of the most influential glossators, canonists, and commentators, including the most important unpublished manuscripts, *consilia,* court reports), early modern treatises (written by notable French, Spanish, Dutch, and German humanists between 1400 and 1600; Dutch elegant school and German *usus modernus* of the late 16th and 17th centuries) and collections of court decisions, and finally, modern and contemporary codified legislation, court practice, and legal doctrine.

Given such a vast range and diversity of the primary sources, an appropriate methodology and the research design become crucial. Van Dongen thinks along the same line with those authors who prefer a searchlight beam to a floodlight projector and deliberately limit their research to a narrower field to cover a vaster time span. Yet, unlike some recent comparative investigations, the author treats the historical vicissitudes of the subject of his investigation not as a side-dish to the presentation of the contemporary doctrine, but as the main course of his book. And the basic assumption behind this is that the historical perspective should lead to

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a deeper knowledge of the examined phenomenon, because the historical solutions have actually influenced the contemporary approach to this subject. Another fundamental assumption is that the main problem of allocating damages in the case of mutual fault is in substance the same throughout history. Hence, the research is designed as historical and comparative at the same time.

The author worked first-hand with the sources (including the medieval manuscripts and the early-printed editions) and accurately described the appropriate methods at the outset of each part of his book. For example, when studying the *Corpus Iuris* he benefits from the text-critical discussion of the Romanists about the inscriptions, interpolations, the merits of the cases discussed by Roman justists etc.; dealing with the sources of the *ius commune*, he takes into account the *sedes materiae*, opinion variations within one school or between the schools of jurists, types of legal literature etc. To forge a common ground for comparison, the author deliberately uses the term 'contributory negligence' as a classification concept presupposing a distinct function. He abstains from studying conceptual or normative issues of the topic. The selection of the sources is justified by the significance of each text for the development of the key problem.

The book unfolds the research in the chronologically organised six chapters. Thematically they are arranged into three uneven parts. Following the introductory chapter, the first part (chapter 2) deals with the relevant rules for the contributory negligence in Roman classical and Justinianic law (according to the modern critical editions of the remaining sources, most notably, the *Corpus Iuris Civilis*), with a foray into Byzantine law (towards the end of chapter 3). The second part (chapters 3 to 5) examines the solutions of contributory negligence within the continental legal tradition from the medieval learned law until the 20th century in the following order: the medieval civil and canon law (*mos italicus*) (chapter 3), the early modern scholarship based on the Roman legal heritage (*mos gallicus*, Spanish authors, Roman-Dutch law, *usus modernus pandectarum*) and on the ideology of secular natural law (chapter 4); the modern and contemporary law with particular reference to the French *Code Civil*, the German BGB, and the Dutch Civil Code of 1992, and the solutions developed on the basis of this legislation in the contemporary doctrine and court practice (chapter 6). The third part offers a necessary summary of the research (chapter 6).

Undoubtedly, van Dongen succeeds in grouping together a plethora of legal views and opinions and sorting them out into two possible solutions of the problem of contributory negligence. The allocation of damages caused by the conduct of both the wrongdoer and the injured party could be solved according to the all-or-nothing rule or through apportionment of damages between the wrongdoer and the injured party.

The first solution goes back to classical Roman law (Pomponius in D. 50.17.203, although originally referring to the law of legacies). The second one began to emerge not earlier than the early modern period and gained its foothold only in the works on natural law by Christian Wolff (1679–1754). Each of the two had their theoretical variants (summed up on pp. 386–387).

The author convincingly presents the long development of the rules on contributory negligence in Western European legal tradition. It turns out to be the story of a rapid receiving of the first (Romanist) solution (following the reception of Roman law) and a rather late, slow and inconsistent acceptance of the second (Wolffian) solution. It is all-or-nothing rule that provided a common foundation for jurists in Western Europe in the past. And it has started to regain its popularity in some cases (such as traffic accidents) nowadays.

A legal historian can only welcome van Dongen's book, since it throws in massive evidence in support of the necessity to investigate the doctrines of the past in the domain of private law. In the face of it one may not ignore the doctrinal changes which took place between the compilation of the *Corpus Iuris* and the drafting of the modern codifications of civil law. At the same time, the book convincingly shows that the range of possible solution of the problem of contributory negligence is quite limited and it was contemplated by various jurists since the dawn of the *ius commune* in Western Europe.

Doing legal history in a broader social context, however, one can't help noticing that the author focuses a good deal more on outlining and describing all possible legal solutions rather than on explaining the driving forces behind them. During the last fifty years or so the community of legal historians developed a strong conviction that law was not an autonomous field within a given human culture. And several research papers went beyond the traditional textual exegesis and ventured into exploring the origins of private law doctrines in philosophy (Gordley), religion (Berman, Strohm), catholic moral theology (Grossi, Decock), conceptualising of public and private (Birocchi).

Regarding the medieval jurisprudence, it would be great to read more about a possible impact on the rules of delictual responsibility produced by the philosophical thought of Aristotle, Thomas Aquinas, Occam, or Duns Scotus, whose legacy remarkably transformed the legal concepts of causation, fault (*culpa*), subjective right, property etc. In the early modern period, the author might have evaluated the impact of the protestantism and the catholic second scholasticism, as well as that of the intensified search for a more coherent legal system, its division into public and private spheres. In the modern and contemporary period politics and other social concern could provide us with a clearer explanation of the legislative initiatives or often unmotivated landmark court decisions. For example, did the Great War exercise any influence on the decision of the Dutch *Hoge Raad* in 1916 to acknowledge contributory negligence of the injured party as a possible ground to diminish the liability of the wrongdoer?

All in all, the book of van Dongen is the product of great effort to accomplish an ambitious and accurately designed historical and comparative research on the rules of contributory negligence. The outcome will be appreciated by both legal historians and comparatists who are interested in the history of private law and the evolution of delictual rules.

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Hermann Baltl - Gernot Kocher

Österreichische Rechtsgeschichte – Unter Einschluss sozial- und wirtschaftshistorischer Grundzüge. Von den Anfängen bis zur Gegenwart

12. Aufl., Graz: Leykam Verlag, 2009, 344 S., ISBN 978-3-7011-0133-7

Das vorliegende Buch behandelt die mehr als 2000 Jahre alte Entwicklung der Rechtsordnung im österreichischen Raum und bezieht sowohl ökonomische als auch soziale Faktoren mit ein. Man kann tatsächlich sagen, dass es sich beim Werk, das in der zwölften (!) Auflage erscheint, um ein Standardwerk handelt. Generationen von Juristen haben mit diesem Handbuch gelernt und sich auf die bevorstehenden Lehrveranstaltungsprüfungen, Seminare und Repetitorien aus dem Kernfach der Rechtsgeschichte Österreichs vorbereitet.

Die bisher letzte und hier besprochene Auflage erschien 2009. Sie spannt den Bogen von der Urgeschichte bis hin zur neueren Rechtsgeschichte. So entsteht ein breitgefächertes und facettenreiches österreichisch-europäisches Geschichtsbild am Beispiel der Rechtshistorie.

Zum Hauptautor: Hermann Baltl wurde 1918 in Graz geboren und studierte in seiner Heimatstadt Graz Rechtswissenschaften. Bereits 1939 erlangte er ohne Dissertation die Promotionsurkunde. Nach dem Ende des Zweiten Weltkriegs lehrte er in seiner Heimatuniversität Verfassungs-, Verwaltungs- und Rechtsgeschichte, aber auch Völkerrecht. Nach der 1946 erfolgten Habilitation wurde er 1961 zum ordentlichen Universitätsprofessor ernannt. Im Jahr 1970 legte er erstmals sein Handbuch zur österreichischen Rechtsgeschichte vor.

In diesen mehr als 40 Jahren wurde das Buch zwölfmal neu auferlegt. Als Baltl 2004 mit 86 Jahren starb, setzte sein einstiger Schüler Gernot Kocher (*1942) das Werk fort. Als Student saß er wohl in vielen Seminaren und Vorlesungen, so dass er bereits von Beginn an die Entstehung der ersten Auflage und die Folgeauflagen begleitete. Markus Steppan, der ebenso in Graz die Lehrbefugnis für österreichische Rechtsgeschichte und europäische Rechtsentwicklung besitzt, hat Kocher unterstützt.

Wenn man Kochers Ausführungen Glauben schenken mag, so gehörte Baltl noch zu jener Generation von Rechtshistorikern, deren Forschungsfelder und -gebiete sowohl sachlich als auch zeitlich sehr breit angelegt waren. Folglich tanzt die zwölfte Auflage nicht aus der Reihe. Sie ist in acht zusammenhängende Kapitel unterteilt worden und so erfährt der interessierte Leser allerhand von der prähistorischen Zeit, dem römischen Reich, dem römischen Österreich, dem Frühmittelalter, dem Mittelalter, der Zeit des Absolutismus bis zur Machtübernahme Maria Theresias 1740, dem aufgeklärten Absolutismus, dem Vormärz, der Zeit von 1848 bis zum Ende der Donaumonarchie 1918 und der Zeit von 1918 bis heute.

Jedes der acht Hauptkapitel wird in fünf bis acht Unterkapitel geteilt. Dazu zählen beispielsweise territoriale und politische Grundlagen, der Landesfürst mit ständischen und sozialen Entwicklungen, Behörden und Verwaltungsapparat, Kirche und Staat, Wirtschaftsverfassung und Rechtsquellen. Randnoten ermöglichen den Studenten oder rechtshistorisch Interessierten gezielter nach einem Thema zu suchen. Einfach ist auch das Sachen-, Ort-, Länder- und Personenregister, durch das das Suchen noch um eine Spur einfacher wird.

Als Idee für die folgenden Auflagen möchte der Rezensent anmerken, dass ein paar grafische Schaubilder oder Landkarten die „Bleiwüste" erheblich auflockern könnten. Gerade ein anschauliches Kartenmaterial könnte die Geschichte im Rahmen der Rechtsgeschichte mehr als nur aufwerten. Demgegenüber vermittelt die Thematik den Eindruck, dass sich bei ihr um eine staubtrockene Materie handelt. Und das ist die Rechtsgeschichte auf keinen Fall; sie gehört zum Menschen und seiner Entwicklung genauso dazu wie die Geschichte und die Rechtssprechung.

Lobenswert hingegen ist die gute und weiterführende Auswahl an (auch alten, aber nicht zu verachtenden) Literaturhinweisen, die etwas außergewöhnlich noch vor dem ersten Kapitel und nach dem gut strukturierten Inhaltsverzeichnis kommen. Vielleicht mag es in den Rechtswissenschaften üblich sein, so ein Buch zu konzipieren. Da der Rezensent aus dem Bereich der Geschichtswissenschaften kommt, ist es für ihn nur etwas seltsam, aber keinesfalls fehlerhaft. Das Wort „ungewöhnlich" würde es eher treffen, aber was ist schon in einem so schier uferlosen Bereich wie jenem der Rechtsgeschichte in ihrem steten Wandel schon „gewöhnlich"?

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Wilhelm Brauneder

Europäische Privatrechtsgeschichte

Wien/Köln/Weimar: Böhlau Verlag (UTB 3487), 2014, 278 S., ISBN: 978-3-8252-3487-4

Der Autor Wilhelm Brauneder (*1943) ist ein bekannter österreichischer Rechtshistoriker. Nach seinem Studium der Rechtswissenschaften an der Universität Wien wurde er 1965 promoviert. Nach dem Abschluss seiner Gerichtszeit war Brauneder beim Bundesministerium für Landesverteidigung tätig. 1967 kam er als Assistent an die Universität Wien. 1971 erfolgte die Habilitation mit der Arbeit *Die Entwicklung des Ehegüterrechts in Österreich. Ein Beitrag zu Dogmengeschichte und Rechtstatsachenforschung des Spätmittelalters und der Neuzeit*. Wilhelm Brauneder fand sowohl im Privatrecht als auch in der Verfassungs- und Rechtsgeschichte die Ausgangspunkte seines wissenschaftlichen Wirkens.

Zum vorliegenden Buch: Es enthält 160 Textseiten. Brauneder schildert in einer kurzen Einführung das Verhältnis zwischen öffentlichem und privatem Recht und darüber hinaus wesentliche Merkmale der europäischen Rechtsgeschichte, des heimischen und deutschen, aber auch des römischen und gemeinen Rechts. Ferner streift er auch sowohl das kanonische Recht als auch das Naturrecht.

In der Vormerkung führt Brauneder an, dass er mit dem Buch eine Darstellung zu Papier gebracht hat, die einem Grundriss gerecht wird. Zugrunde liegt ihm ein Lehrbehelf, der durch annähernd drei Jahrzehnte verschiedene Lehrveranstaltungen zur Privatrechtsgeschichte am Wiener Juridicum begleitete. Am Anfang wollte der Autor sich auf die österreichische Privatrechtsgeschichte beschränken, doch unterlag das Werk einer zunehmenden Ausweitung auf Europa. Handelnde Personen werden knapp erwähnt; wichtiger nach Brauneder seien jedoch die „dogmatischen Beispiele", denn Rechtsgeschichte und die das Rechtsleben betreffende Privatrechtsgeschichte müssen gerade diese untersuchen und darstellen.

In 15 Kapiteln erhält der Leser Einblicke in das mittelalterliche Recht, in das Common Law, in das Recht der frühen Neuzeit, aber auch in das Ius Romano Germanicum, in das skandinavische Recht, in das Naturrecht, die naturrechtlichen Kodifikationen, in europäische Privatrechtsfamilien um 1800 und in die kodifikationsgebundenen Rechtswissenschaften. Brauneder widmet auch den historischen Rechtsschulen, den pandektistischen Reaktionen auf Pandektistik und Germanistik, dem Privatrecht totalitärer Staaten, der De- und Rekodifikation und den europäischen Privatrechtsfamilien um 2000 je ein aussagekräftiges und gut recherchiertes Kapitel. Nach den rechtshistorischen Themenblöcken findet der Leser eine interessante Quellensammlung mit insgesamt 56 Beispielen vor. Auch hier besticht das Werk durch eine große Spannweite der eingeschlossenen Epochen. So werden beispielsweise für das Recht im Mittelalter dogmatische Beispiele für Lebensgemeinschaften, das Ehegüterrecht oder das Erbrecht angeführt. Eine durchaus interessante Quelle über die totalitären Staaten ist ein Auszug aus dem Sozialistischen Zivilrecht der ehemaligen DDR aus dem Jahr 1976. Brauneder führt an, dass er die Quellenbeispiele bis einschließlich dem 16. Jahrhundert der besseren Verständlichkeit wegen mit einer Übertragung versehen hat, das bedeutet, dass der originale Wortlaut der modernen Sprache angenähert wurde. Der Autor gibt des Weiteren an, dass die Quellen nicht nur der zeitgenössischen Untermauerung des Textes, sondern vor allem auch dessen Vertiefung dienen.

Am Ende ist es dem Leser möglich, anhand des durchweg gelungenen Buches eine Genese des Rechtsverständnisses sowie der Rechtsprechung und der Rechtsanwendung in einem europäischen Kontext zu deuten.

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5 Years of the European Society for History of Law

The European Society for History of Law was established in the autumn of 2009 based on the efforts of the legal historians from Brno who discussed their idea to establish such a society with numerous partners and co-researchers from other European countries. The European Society for History of Law brings together all those who are interested in history of law. The founders of the society believed that history of law is inseparable from the general history, history of religions, regional history or, for instance, with economic history. Knowing the history may help better understand the processes which had taken place in the past, for the contemporary codifications valid in the particular European states are the results of a long-lasting historical development.

The European Society for History of Law makes it possible for everyone interested in history of law to understand the historical consequences of the contemporary and future laws. It also mediates and explains the historical approaches to some legal issues and the almost forgotten judicial decisions to the practicing lawyers.

One of the objectives of the European Society for History of Law is to support the research in the field of legal history, Roman law and history of legal thought in various European countries. The society therefore focuses mainly on legal systems and legal institutes, legal structures and prominent persons of history of law, legal science and the history of legal thought.

Members of the European Society for History of Law may also use the society's website to publish their bibliography so that it is available to broad public. The society's website also provide information about the ongoing conferences, seminars and colloquiums concerning history of law and Roman law.

The activities of the society may be divided into three sections: (i) publishing monographs, textbooks, collections of papers; (ii) helping and co-organizing the publishing of the Journal on European History of Law; and (iii) organizing scientific conferences, seminars and colloquiums.

The European Society for History of Law organizes conferences, lectures, seminars, excursions and gatherings for its members. At these events, there are usually discussed the ongoing issues of European history of law and which also provide room for presenting the scientific findings of the legal historians of Europe.

Over the last three years, the society co-organized the following professional events:

- together with the Department of History of State and Law, Faculty of Law, Masaryk University, the society co-organized the *"Scientific Seminar of PhD Candidates of the Department"* (June 2012);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University, the society co-organized a scientific colloquium called *"The State and Legal Relationships of the Czech State and the Holy Roman Empire in the Middle Ages and Their Consequences for Further Development"* (October 2012);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University and the Moravian Land Archive, the society co-organized a scientific colloquium *"The Reflection of German National Socialism in Czechoslovakia and other States of the Central Europe in 1930s"* (February 2013);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University, the society co-organized a scientific colloquium called *"Corruption – Yesterday and Today"* (March 2013);
- together with the Department of Social Sciences, FSv CVUT (Czech Technical University in Prague) and National Trust (Pamatkova komora) a scientific colloquium called *"Jiří z Poděbrad – Visionary"* (May 2013);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University and the Moravian Land Archive, the society co-organized a scientific colloquium *"Clothing in Law"* (May 2013);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University and the Moravian Land Archive, the society co-organized a scientific colloquium *"Czechs and Germans in Interwar Czechoslovakia"* (October 2013);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University and the Moravian Land Archive, the society co-organized a scientific conference *"The Era of Oppression"* (March 2014);
- together with the Department of History of State and Law, Faculty of Law, Masaryk University, the society co-organized a conference *"Sexual Crimes Yesterday and Today"* (April 2014).

The colloquiums that took places in the large hall of the Moravian Land Archive in Brno were well attended; there were numerous participants and lecturers from the Czech Republic. The common conferences and colloquiums are important especially because they bring together the legal historians, general historians and archivists who may discuss the selected issues of both the Czech and Czechoslovakian history of law.

When the European Society for History of Law was established in 2009, the members decided that one of the goals would be to support legal archeology and create a platform for a continuous research. Legal archeology, as one of the historical sciences is a part of legal history although this discipline had almost been forgotten. Over the last several years, the society co-organized several colloquiums on sever-

al selected issues of legal archeology, i.e. *Clothing in Law*. The society plans on organizing a colloquium with a topic *Colors in Law* in 2015.

One of the most important activities of the society is also cooperation with publishing of the peer reviewed Journal on European History of Law (ISSN 2042-6402), in which there are articles in English and German. This journal is also a mean by which the findings of legal history and Roman law are presented to readers from all over the world. The journal is managed by an international council whose members are from ten different European countries.

By looking at the list of authors who published their articles in the last several issues of the journal, we may see that the journal has not only entrenched among the legal historians from Europe, but also among the American historians. Each new issue generates very positive replies from the European top historians, especially from the German speaking countries, which is a great proof of their interest to publish in the journal.

Over the last five years, there were published more than 160 scientific studies in the journal. Aside from that, there were published numerous reviews of legal and historian scientific volumes and news. Some issues of the journal even included a special monothematic appendix, e.g. in No 1/2013, there was a voluminous annex aimed at the papers of the conference *„Historical and Written Constitutions: Past and Present",* which was organized by the Hungarian Academy of Sciences and was held in November 2012.

The European Society for History of Law brings together not only the academics, but also prominent persons from judiciary, especially the Constitutional Court, state attorneys, advocacy or public administration who significantly contribute to meeting the goals of the society.

The European Society for History of Law closely cooperates with the Department of History of the State and Law of the Faculty of Law at Masaryk University. The European Society for History of Law creates a platform for cooperation among the European legal historians and legal and historical research centers concerning, for example, publishing and meeting of the legal historians. The European Society for History of Law has a great potential also due to its locations, i.e. that it is located "in the middle of Europe" and thus it may help to connect legal historians, legal jurisprudence of both the former Eastern Bloc and the countries of the Western Europe.

More information about the activities and goals of the European Society for History of Law may be found at the website www.historyoflaw.eu.

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Tagungsbericht – „Anton Friedrich Justus Thibaut – Bürger und Gelehrter"

200 Jahre nach dem Kodifikationsstreit zwischen Anton Friedrich Justus Thibaut und Friedrich Carl von Savigny fand im Internationalen Wissenschaftsforum in Heidelberg vom 24. bis 27. September 2014 das Symposion „Anton Friedrich Justus Thibaut – Bürger und Gelehrter" statt. Die Veranstaltung hatte zum Ziel, den damals unterlegenen Thibaut aus Savignys Schatten zu befreien, Leben und Werk des Wissenschaftlers kritisch zu würdigen und neue Forschungsperspektiven auszuloten.

Im Eröffnungsvortrag „Anton Friedrich Justus Thibaut – Ein deutsches Gelehrtenleben im Umbruch der Epochen" zeichnete Prof. Dr. *Klaus-Peter Schroeder* (Heidelberg) Thibauts Werdegang von Kiel über Jena nach Heidelberg nach, wo er die Juristische Fakultät reorganisierte und gleichzeitig Zustand und Ansehen der Universität verbesserte. Gemeinsam mit Heise, Martin und später Zachariae prägte er das akademische und mit seinem berühmten Singkreis auch das gesellschaftliche Leben in Heidelberg.

Prof. Dr. *Hans-Peter Haferkamp* (Köln) sprach über „Thibaut und die historische Rechtsschule". Thibaut verweigerte sich entgegen Savigny der reinen Hinwendung zur Antike und warnte vor dem „practischen Ungeschickt bedeutender Theoretiker". Savignys Schüler kritisierten Thibauts Auslegungslehre und warfen ihm mangelndes Systemverständnis vor. Zu Thibauts Lebzeiten war die Diskussion jedoch stets von gegenseitiger Achtung geprägt. Erst nach seinem Tod zeichnete man das Bild eines wissenschaftlichen Scheiterns und verschüttete damit auch Thibauts frühe Leistungen als Dogmatiker.

Thibauts innovatives Lehrbuch untersuchte Prof. Dr. *Gerhard Lingelbach* (Jena) in seinem Vortrag „Thibauts System des Pandekten-Rechts – ‚Vater' der juristisch-literarischen Gattung Pandektenlehrbuch?". Auch wenn die Titelfrage nicht eindeutig mit „ja" beantwortet werden konnte, hielt Lingelbach das „System des Pandektenrechts" doch jedenfalls für richtungsweisend. Die bewusste Neuordnung der Materie und insbesondere die Voranstellung eines Allgemeinen Teils sprächen für ein neues Systemverständnis. Thibaut wollte die Rechtswissenschaft wieder an die Bedürfnisse der Praxis annähern.

Dr. *Andreas Deutsch* (Heidelberg) referierte über „Thibaut und die Rechtssprache". Dem zeitlosen Dilemma des Gesetzgebers zwischen den Bedürfnissen nach allgemeinverständlicher Sprache und juristischer Präzision begegnete Thibaut mit „juristischer Mathematik", die jedoch nicht mit

dem Naturrecht zu verwechseln sei. Vielmehr gehe es um innere Zusammenhänge von Normen, die der Gesetzgeber nicht beeinflussen könne. Dieser systematische Ansatz verbot ihm jedoch, das „nationale" Argument Sprache in den Kodifikationsstreit einzuführen. Savigny, der die deutsche Rechtssprache noch nicht für ausgereift hielt, nutzte diese Schwachstelle in seinen Streitschriften erfolgreich aus.

Urteile der Lehrstuhlnachfolger des 19. Jahrhunderts Vangerow, Windscheidt und Bekker über Thibaut waren Thema von Prof. Dr. *Reiner Polley* (Marburg). Bis ins 20. Jahrhundert gab es für den 1840 verstorbenen Thibaut keine Gedenkfeiern. Vangerow weigerte sich, die 9. Auflage von Thibauts „System des Pandektenrechts" für die Fakultätsbibliothek anzuschaffen. Windscheidt äußerte sich zwar positiv über Savigny, explizit negative Äußerungen über Thibaut seien jedoch nicht nachweisbar. Bekker schließlich erkannte zwar, dass in Thibauts letzten Jahren „etwas schief lief", rechnete jedoch ebenso mit Savigny ab, indem er der Wissenschaft die Fähigkeit absprach, alleine Gesetze zu schaffen.

Als Vertreter der Ruperto Carola im badischen Landtag stand Thibaut im Zentrum des Vortrags von Dr. *Dörte Kaufmann* (Heidelberg). Thibaut rechtfertigte seine häufige Abwesenheit und auffällige Zurückhaltung in den Debatten als Strategie: Er wollte seine Stellung für den zwanglosen Kontakt mit den Politikern nutzen und sich primär hinter den Kulissen engagieren. Dennoch verfolgte er das politische Geschehen aufmerksam und setzte sich gelegentlich auch aktiv für ihm wichtige Themen ein, so insbesondere die Abschaffung des badischen Adelsedikts. 1820 legte er das Mandat nach nur einem Jahr nieder.

Prof. Dr. *Johann Braun* (Passau) zeigte anhand von drei Beispielen die Haltung Thibauts zu Promotion und Habilitation jüdischer Rechtsgelehrter. Julius Bingo, der erste jüdische Promovend, durfte eine vom traditionellen, christlichen Promotionseid abweichende Formel schwören. Sigmund Zimmern und Eduard Gans erhielten jeweils erst nach ihrer Taufe eine Professur. Das Grundproblem sahen Thibaut und seine Kollegen nicht in der wissenschaftlichen Eignung, sondern in der von Trägern öffentlicher Ämter erforderten erkennbaren staatsbürgerlichen Loyalität, die man Juden absprach.

Titel des musikalisch untermalten Abendvortrags von Dr. *Harald Pfeiffer* (Heidelberg) war „Thibaut und die Wiederentdeckung ‚alter' Chor-Musik". Aufgrund seiner Vorliebe für vokale Haus- und sakrale Chormusik gründete Thibaut 1814 seinen exklusiven Singkreis, der sich wöchentlich im Dachgeschoss seines Heidelberger Wohnhauses traf und von ihm mit Leidenschaft und Strenge geleitet wurde. 1824 erschien sein bis heute bekanntes Werk „Über die Reinheit der Tonkunst".

Prof. Dr. *Bernd Mertens* (Erlangen) untersuchte Thibauts Rechtsquellenlehre. Das rezipierte römische Recht war für ihn geschriebenes Recht, weil ihm die geschriebenen Reichsgesetze subsidiäre Geltung verschafft hatten. Für Gewohnheitsrecht, dem auch der Gerichtsgebrauch unterfallen sollte, war weniger die dauernde Anwendung als die Überzeugung von dessen Geltung sowie das Einverständnis des Herrschers maßgeblich. Die Rechtswissenschaft hingegen war für Thibaut im Gegensatz zur historischen Schule keine taugliche Rechtsquelle, während das Naturrecht vor allem als Auslegungshilfe und Leitlinie für den Gesetzgeber diente.

Thibauts Hermeneutik war Thema von Prof. Dr. *Stephan Meder* (Hannover). Entgegen der damals herrschenden Stellenhermeneutik war es nach Thibaut für die Interpretation nicht erforderlich, dass die jeweilige Stelle unklar war. Jeder, der sich einer Rede bediene, habe dafür Gründe – folglich auch der Gesetzgeber: Die Rhetorik trage einen Gedanken von außen nach innen, die Hermeneutik von innen nach außen. Für Thibaut gab es daher nur die grammatische und die logische Auslegung, mit deren Hilfe der vom positiven Recht dazu ermächtigte Jurist die beschränkte Ansicht des Gesetzgebers durch extensive Auslegung verbessern musste.

Prof. Dr. *Christian Hattenhauer* (Heidelberg) referierte über „Thibauts Personenbegriff". Die Trias des Personenrechts, *status libertatis*, *civitatis* und *familiae*, bestimmte das Zivilrecht bis ins 19. Jahrhundert. Thibaut gehörte zu den ersten, die von „Rechtsfähigkeit" sprachen. In der Sache unterschied er aber noch zwischen natürlicher und bürgerlicher Rechtsfähigkeit, wobei er offenbar die Vernunft als Voraussetzung der Rechtsfähigkeit ansah. Erst in der umfassend überarbeiteten achten Auflage seines Lehrbuchs wurde die ältere *status*-Lehre aufgenommen und das Vernunfterfordernis gestrichen, wodurch sich für *Hattenhauer* nicht zuletzt die Frage nach der Motivation dieser einschneidenden Änderung stelle.

Prof. Dr. *Christoph Becker* (Augsburg) stellte seinem Vortrag über Verkauf und Übereignung der Ware bei Thibaut zwei Digestenstellen (D. 41.1.38 und D. 41.1.322) voran, wobei die erste für den Eigentumsübergang nur die Einigung, die andere jedoch eine *causa* für die Übertragung erforderte. Nach einem Überblick über die Übereignungsmodelle verschiedener Kodifikationen und Pandektenlehrbücher sah *Becker* speziell bei Thibaut nur knappe Ausführungen zur Übereignung, wobei er wohl eher dem Prinzip von *causa* und *traditio* zuneigte.

Eine „Skizze zu Besitz, Eigentum und Methode" betitelte Prof. Dr. *Christian Baldus* (Heidelberg) seinen Vortrag. Thibaut stand der *probatio diabolica* in der *rei vindicatio* ablehnend gegenüber. Er wollte im Vindikationsprozess dem Kläger den Beweis erleichtern, konnte eine Vermutungsregelung wie jene der *actio Publiciana* aber nicht aus dem Gesetz ableiten. Billigkeitserwägungen kamen nach seiner Methode nur in Betracht, wenn grammatische und logische Auslegung sich nicht widersprachen und keine Ergebnisse lieferten. Er bekam, so *Baldus*, seinen „Begriff nicht in den Griff", was die Frage nach der Leistungsfähigkeit seiner Methode aufwerfe.

Prof. Dr. *Götz Schulze* (Potsdam) beleuchtete Thibauts Verhältnis zum französischen Recht und bemerkte zunächst, dass dieser zwar Beobachter, aber kein Kenner des französischen Rechts gewesen sei. Er war Befürworter einer Kodifikation, hielt im Code Napoléon jedoch „bis auf wenige Ausnahmen alle Hauptbestimmungen für durch und durch misslungen". Insbesondere bemängelte Thibaut die Bestimmungen zur Volljährigkeit, der beschränkten Testierfähigkeit sowie zum Grundstücks- und Hypothekenrecht, hob jedoch die Zivilehe positiv hervor.

Die Rezeption Thibauts in Frankreich und Belgien wurde von Prof. Dr. *Jean-François Gerkens* (Lüttich) untersucht. *Gerkens* gab einen Überblick über den Werdegang August Warnkönigs, Student Thibauts und Begründer der „Themis", der damals wichtigsten juristischen Fachzeitschrift Frankreichs und später Belgiens. Nachdem sich Warnkönig der historischen Schule zuneigte, wurde Thibaut in der „Themis" nur äußerst selten genannt. Im vierten Band der „Themis" wird eine französische Übersetzung des Pandektenlehrbuchs Thibauts erwähnt, die jedoch sonst nirgends belegt sei. Insgesamt sah *Gerkens* zumindest über Warnkönig oder die „Themis" keinen Einfluss Thibauts in Frankreich und Belgien. Sein Name war zwar bekannt, man setzte sich jedoch nicht mit seinen Ideen auseinander.

Erste Schritte zu einer Forschungsperspektive entdeckte Prof. Dr. *Mario Varvaro* (Palermo) mit seinem Vortag zu „Thibaut in Italien und ins Italienische". Thibaut werde bis heute in Italien meist nur im Zusammenhang mit Savigny genannt, eine wirkliche Rezeption sei bislang nicht nachweisbar. Es gebe jedoch einige italienische Übersetzungen Thibauts, insbesondere aus der zweiten Hälfte des 19. Jahrhunderts. In diesen bislang nur wenig erforschten Übersetzungen sah *Varvaro* den Schlüssel zu einer möglichen Rezeption Thibauts in Italien.

Prof. Dr. *Francisco Javier Andrés Santos* (Valladolid) verglich die Rezeption Thibauts in Spanien mit einer Wüste: Es gebe keine Übersetzungen und sein Name tauche nur gelegentlich als Gegenspieler Savignys auf. Die Gründe sah *Andrés Santos* einerseits in der Kodifikationsbewegung Spaniens, die insbesondere in den Regionen auf großen Widerstand stieß, und andererseits in der umstrittenen Rezeption der historischen Schule. Eine intensivere Erforschung der Quellen des ausgehenden 19. Jahrhunderts könnte jedoch noch zeigen, dass die spanischen Kodifikatoren Thibauts Ideen näher waren als bislang angenommen.

Prof. Dr. *Martin Avenarius* (Köln) betrachtete Thibaut aus der Sicht des Zarenreichs, wo er stärker wahrgenommen wurde als in Westeuropa. Nachdem er Rufe nach Char'kov und Mitau abgelehnt hatte, wurden Teilübersetzungen seines Pandektenlehrbuchs angefertigt, die 1819 auch den „Institutionen des russischen Rechts" zugrunde lagen. Aufgrund seiner Opposition zur deutschen historischen Rechtsschule und speziell zu Savigny, der im Zarenreich teils als esoterisch kritisiert wurde, sahen die russischen Studenten und Juristen in Thibaut einen „vernünftigen" Juristen, Sinnbild eines attraktiven Kontrastprogramms.

Nach den Vorträgen entwickelten sich lebhafte Diskussionen, insbesondere erblickte man hinsichtlich Thibauts Rezeption im Ausland neue Forschungsperspektiven. Der Tagungsband erscheint innerhalb der Reihe „Heidelberger Rechtshistorische Abhandlungen" voraussichtlich im Sommer 2015 bei Mohr Siebeck.

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Report from an international conference of French Society for Legal History, *Les Journées Internationales de Ljubljana 2014 de la Société d'Histoire du Droit*, organized jointly with the Department for Roman Law and Legal History of University of Ljubljana Faculty of Law (Professors Janez Kranjc and Katja Škrubej), "Le juge dans l'histoire: Entre création et interprétation du droit", from June 5 - 8 2014 in Ljubljana.

Following the decision of the General Assembly of the French Society for Legal History at their annual conference in 2013 (*Journées Internationales de Besançon 2013*), the University of Ljubljana Faculty of Law was named a host of this year's edition of the *Journées*. The topic that was chosen out of three traditionally proposed by the host, placed in its focus the role of a judge throughout the history, especially his challenging position in-between creating and interpreting what at different times in history was perceived to be the law. The contributors were particularly invited to examine two of the possible perspectives, in spite of the fact that the two can hardly ever be entirely separated one from the other: the relation of the judge to the norm (rule) on one hand, and the relation of the judge to justice (equity) on the other. Twenty one speakers from nine countries largely adhered to the above *files rouges*, each with his or her twists and emphases. It is worth mentioning, that at the *Journées*, the official languages have customarily been French and English, with the vast majority of papers in fact presented in French.

The one to open the conference was Franc Testen, one of the most respected Slovene jurists, also the former president of the Slovene Supreme Court, who in his address, *The mission of the judge*, outlined the main processes that the

Slovene judiciary in the last decades of the so called transition had gone through and which he himself not only witnessed but also actively helped to shape. Perhaps one of the most important emphases of his speech was his take on the question of formalism, so often imputed to the judges and courts in a form of reproach by different critics coming not only from the general public or politicians in power but often also from his professional peers, practicing law in the non-judicial arena. Speaking largely from his own experiences, defending the professional autonomy of the courts and of each judge in particular, Mr. Testen persuasively evoked the fine line between the said autonomy and the perils of too activist a stance by the judiciary. In this light, he presented the complexity of the feared formalistic approach which in some cases might indeed pervert the very intention of the rule, whereas in others, it might serve exactly in the opposite way - as its only guarantor. The second speaker to address the audience was Boris Bernabé, professor of Legal History at the University Paris-Sud Orsay (Paris XI), with his in-depth reflection of the chosen general topic in a paper with an evocative title *Ŕ la source du pouvoir modérateur du juge*.

Three papers that followed found their inspiration in Roman Law. The first was by Marko Petrak, professor of Roman Law at the University of Zagreb Faculty of Law, who in his contribution *"Addicere" en droit romain archaďque: Le juge en tant qu'interprčte de la volonté de Dieu?* elaborated on a thesis that in the context of the most ancient roman procedure it must have been the king (*rex*) who in his role of a judge, served in fact as an interpreter of the supreme god's will, and that the means to bring that about was the reading of the birds' omens, which was expressed by the phrase *"aves addicunt"*. In continuation, Jean-Francois Bregi, professor of Roman Law from Nice, in his paper *La déontologie du juge dans le Digeste* focused his attention on the role of a judge as it can be discerned from this most venerable of the roman legal sources. The qualities of a good judge as opposed to those of his bad counterpart as well as the unanimous condemnation of the latter according to the sources were at the centre of the speaker's attention. The paper by Paulina Święcicka from Krakow Jagiellonian University Legibus, non exemplis iudicandum (ex C. 7.45.13, Imp. Iustinianus, 529 ap. J.-C.) – le juge, le précédent et l'analogie dans la perspective de l'antiquité romaine was one of those contributions that responded to the proposed general topic in a particularly complex way. As her point of departure, she took the cited Justinian's constitution and analysed it in comparison with the views of Roman jurists, all in the effort to understand the very idea of the (late) Romans on how to apply the laws and make use of the analogy when evoking the past decisions in similar cases, but not at the same time losing sight of the individuality of each particular case. The paper by Jeroen M. J. Chorus, the Vice President of the Amsterdam Court of Appeal and a former professor of Roman Law and Legal History at the University of Leiden, *La casuistique de la conscience du juge dans, la tradition romano-canonique (12ème-16ème siěcles*), was grounded in the wealth of medieval sources and offered a true insight into the working of the medieval judicial mind in the context of the roman-canonical procedure as well as into that of the medieval jurists and theologians (e.g. Hostensius, S. Thomas and Domingo de Soto). In his lucid analysis, the author concentrated chiefly on how the medieval jurists treated the question whether a judge can act upon his private knowledge of the facts in the matter at hand despite the rules of procedure and if by working around them can and indeed should rend a decision which is not *contra* his conscience.

Two more papers took as their respective points of the departure topics from the *ancien régime*. The first by Thierry Hamon, assistant professor of Legal History at the University Rennes I, *Les magistrats du Parlement de Rennes et l'interprétation de la Coutume de Bretagne (16ème-17ème siècles*) who presented a topic, I dare say little known outside France albeit of considerable interest to many beyond the borders of former historical province, which was the judicial role of the *Parlement de Rennes*, especially its relation with the corpus of the *Coutume de Bretagne*, first redacted as a private collection in 1320, but then officially revised and adopted in 1580. Next, *Jean-Marie Augustin*, professor of Legal History and emeritus from the University of Poitiers, in his paper *L'interprétation de la volonté par le juge: la théorie des conjectures au service de l'institution familiale (16ème-18ème siècles)* compared the different judicial interpretations of the last will in cases of fideicommissary substitution which could have been discerned from the records of the *parlements,* as well as those that were defended by the legal doctrines of the period, concentrating primarily on the question, whether a judge should always in such cases apply the strict letter of the last (written) will or not. In continuation, Sébastien Evrard, assistant professor of Legal History at the University of Lorraine, with his *Rôle du juge et interprétation du droit sous la Convention nationale (1793–1795). La justice militaire aux armées : une institution mal aimée et méconnue*, introduced us to yet another little known topic, this time from the French revolutionary period and from the domain of military justice. Having compared three unpublished sources (protocols of the court and a private diary by one of the judges among others), the author challenged the traditionalist views of such justice being largely socially discriminative, practicing severity in punishment and lacking good organization. In continuation, the papers by two Suisse legal historians followed. The first, Anne Peroz, assistant professor at the University of Lausanne in her contribution *Burlamaqui et l'arbitraire du juge* analysed the work of a less known 18th century Suisse jurist and professor of natural law Jean-Jacques Burlamaqui (1695–1748). Burlamaqui was not only a scholar but also an active participant in the political life of the city-state of Genève in his role of a member of the *Petit Conseil*, which in the last resort had also the role of a criminal law-court. The author organized her topic around two main lines of investigation, the first being Burlamaqui's view of a judge as a strict guarantor of the

social contract, while with the second the author researched the judge's task of appreciating the harshness of the sentence to be inflicted. Denis Tappy, professor of Legal History at the University of Lausanne, in his paper *Le juge simple « bouche de la loi » ou acteur autonome de la naissance des normes juridiques ? Eclairages helvétiques sur l'interprétation et la création judiciaires du droit*, equally engaged himself with « the affaire suisses »,primarily with the particularities of the Suisse Civil Code from 1907 and one of its more famous provisions that does not limit the judge to passing judgments in concrete cases only, which is without a parallel in other European civil codes and which can trace its tradition to the panels of local judges, who even in 19th century were not all trained jurists, but who in the case of controversy and in the absence of a clear rule, traditionally would fairly quickly resort to rendering judgement based on equity. Next, Frédéric Charlin, from University Grenoble II, in his contribution *Des bonnes mœurs à la dignité humaine : la Cour de cassation, entre tradition et ordre public moderne* compared the evolution of two key concepts, *boni mores* and human dignity, and its mutual relation in the context of the decisions of the *Cour de cassation*. Xavier Godin, Professor of Legal History from the University of Nantes in his *Le Conseil privé et l'interprétation du juge* took under his scrutiny the role of the judges of yet another institution but from an earlier period and their strategies of interpretation. Audrey Virot from Université Paris Sud, in her *La dernière réforme de l'ancienne Rote, par Grégoire XVI en 1834. Théorie et pratique jusqu'à la chute des États pontificaux* closely examined the workings of the Roman Rota, particularly in its last phase before the end of Papal States. Mélanie Bost from Royal Military Academy in Brussels centred her fascinating analysis *Rôles du juge en période de crise: l'exemple de la magistrature belge* around the jurisprudence of the courts and its role as law in the period of the First World War when Belgium was under occupation and its parliament as the legislative power in dissolution. Marek Stus from Krakow Jagiellonian University in his *Le droit des successions français dans la pratique judiciaire polonaise de l'entre-deux-guerres* examined a case of legal transplants in the form of French hereditary law being applied in the decisions of polish courts during the period between the two world wars. And last but certainly not least, Frédéric Constant, Assistant Professor at the Université Paris Ouest Nanterre la Défense, in his contribution *Le juge chinois et l'interprétation du droit* presented a rather surprising analysis of the work of Chinese judges of earlier periods, in their role as functionaries of the emperor, and their relation to the codes adopted at the beginning of each new dynasty, as well as the possibilities opened to them by the lawful resorting to the reasoning by analogy in exceptional cases, where the decisions had to be in the last instance confirmed by the emperor and his council in a special procedure of revision. It is worth pointing out that one of the panels was organized especially for the young legal historians and the presentation of their respective doctoral or habilitation theses: Thérence Carvalho University Rennes I, *La circulation et la réception du modèle physiocratique dans l'Europe des Lumières* ; dr. Michał Gałędek, University of Gdańsk, *Administrative Thought in the Kingdom of Poland (1814–1831)* ; Oscar Hernández Santiago, Universidad Nacional Autónoma de México/Max Planck Institut für europäische Rechtsgeschichte, *Reato e peccato nella Sala del Crimen de la Real Audicencia de México (1568–1680)* ; dr. Anna Klimaszewska, University of Gdańsk, *The French model of civil procedure from historical perspective*; Thomas Outin, University Panthéon-Assas Paris II, *Le traitement du contentieux financier par le Conseil du Roi durant les dernières décennies de l'Ancien Régime*.

The conferences ended with a session of the General Assembly of the Society, led by its president Sophie Démare-Lafont, professor at the University Panthéon-Assas and the Directeur d'études (Sciences historiques et philologiques) at the École pratique des Hautes Etudes, which brought about the decision that the next Journées Internationales will be hosted by the University Rennes I, from May 28 - 31 2015, with the general theme being "La controverse".

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Third Biennial Conference of the European Society for Comparative Legal History

"Traditions and Changes" (Macerata, 8–9 July 2014)

The reviewed conference is another meeting of the growing European Society for Comparative Legal History (ESCLH, blog: http://esclh.blogspot.com) which since December 2009 seeks to promote comparative studies in European legal history and beyond. Following the Inaugural Conference in Valencia in 2010 and the Second Biennial Conference in Amsterdam in 2012 (Definitions and Challenges. 9-10 July 2012), the Third ESCLH Conference took place at one of the oldest universities in Italy, Universitŕ degli Studi di Macerata (UNIMC, founded in 1290) on 8–9 July 2014. It was realised through the joint support of UNIMC and Maastricht University, Hart Publishing, Springer Verlag. and the Chamber of Commerce of Macerata Province. For just two days a calm university trans-

formed itself to a lively summer venue to discuss various aspects of "Traditions and Changes" across the ages. The broad topic attracted 72 presenters and probably as much listeners from many EU countries, Brazil, Israel, Russia, South Africa, and USA.

The opening addresses by the Rector of UNIMC Luigi Lacche, the Head of the Department of Law of UNIMC Ermano Calzolaio, and the President of the ESCLH Aniceto Masferrer were followed by the plenary speech of Prof. Dr. Michael Stolleis (J.W. Goethe University, Frankfurt/M.) "Traditions and Changes, and the Role of Legal History". The speaker focused on the key features of the modern European legal tradition (law as the will of the sovereign, nationalism, nation-state, constitutionalism) and its contemporary changes resulting from the revival of the project "(United Western) Europe" after WWII. United Europe as legal community and an Occident-Christian concept faces the challenges of integrating legal cultures of post-Soviet states, transforming the "old-fashioned" nation-states into a supra-national union, and changing Eruocentric perspective in the globalising world. All that, in the words of the acknowledged German scholar, adds more value to the comparative approach in legal studies, legal history included.

In the presentations that followed the plenary meeting the participants elaborated their comparative studies in the domains of public and private, civil and criminal, continental and Anglo-American, European and colonial, medieval and modern, academic and practical etc. The best overview of the range of presentations gives the list of the panels packed in two days[1]:

Day 1 (8 July):

1a) Custom, Tradition, and Change in Anglophone Legal History;
1b) Legal Education between Tradition and Change;
1c) Legal Education between Tradition and Change;
2a) Civil Law Codification: Tradition and Change;
2b) Private Law between Tradition and Change;
2c) Property Law: Tradition and Change;
3a) Criminal Law: Changes and Tradition in Comparison;
3b) Tradition and Change in Labour Law;
3c) Custom and Tradition;
3d) Western Tradition? Europe, Euro-centrism and Europeanization.

Day 2 (9 July):

4a) Slavery, Freedom and the Law in Portugal and Brazil (18th and 19th centuries);
4b) European Legal Traditions in Comparison;
4c) Scholars between Tradition and Change;
4d) Trade, Capitalism and Common Goods;
5a) Swedish Legal Models in a Changing Europe;
5b) Legal Traditions in Comparisons;
5c) The French Codification of Criminal Law and its Influence in Spain and Central Europe;
6a) Comparative Racial Laws: The Italian and European Experience;
6b) Constitutional Law: vouching for the Tradition and driving the Change;
6c) Common Law between Tradition and Change.

Each panel was chaired by a well-known legal historian who moderated the Q&A session and the discussion at the end of each panel. In addition to the panels several coffee breaks were equally important to maintain the existing links with other colleagues or to establish new ones. Several publishers contributed to the creative atmosphere by presenting new monographs and collected essays on legal history.

The results? Hardly anyone would dare offer a decisive summary of such a busy conference. Indeed, the keynote speaker at the concluding plenary session, Prof. Dr. Lauren Benton (New York University), preferred to present the results of her own research on the protective laws of the British Empire in the early 19th century instead of offering any 'wrap-up' of the conference.

Generally, this conference helped to get a clearer idea of the complexity of the very concept of legal tradition, the hybridity and changeability of the diverse legal traditions in history. Also the conference encouraged further comparative efforts in cooperation with other colleagues. Although no conference papers are scheduled to be published, some key ideas will soon be expressed in print. A good example is the (forthcoming) essays "A Patchwork of Accommodations" on European legal hybridity and jurisdictional complexity edited by the members of ESCLH and conference participants Dirk Heirbaut and Seán Patrick Donlan. Indeed, the plurality of the legal world could not be grasped without comparison and joint efforts of legal historians.

A final word of gratitude goes to the organisers at UNIMC. Their hospitality and teamwork made the conference even more productive and open-minded.

Dmitry Poldnikov*

[1] The programme of the conference can be found here: http://giurisprudenza.unimc.it/en/research/conferences/esclh2014/call-for-papers-and-programme/programme

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Report of the scholarly conference on Transformation of Constitutional Law[1]

To honor the 70th anniversary of the commencement of legislative activity of the Slovak National Council, a scholarly conference was held at Comenius University in Bratislava, Faculty of Law. The title of the conference 'Transformation of Constitutional Law' was further specified by its subheadings: 70 years of Slovak constitutional law and The genesis of the Slovak democratic anti-fascist statehood.

The conference was addressed by the Head of the legal history department, Prof. Jozef Beňa, CSc., who briefly outlined the development of constitutional law in the Central and East European countries, focusing particularly on the comparison of continuity and discontinuity moments in the three periods: after 1918, 1944/45 and 1989/90 respectively, and accentuating formal (dis)continuity and evaluation of this transformation by newly formed states and regimes from the perspective of legality and legitimacy.

The first conference block comprised presentations by guest speakers form Croatia and Ukraine. Associate Professor Budislav Vukas, jr., PhD. outlined the issues relating to Croatian statehood and offered a brief overview of the Croatian constitutional development in 1945–1993. Further, he focused on the following issues: concept of federalism as a form of national coexistence in the multiethnic Yugoslavia, confederation attempts and subsequent dissolution of Yugoslavia, and formation of independent Croatia under conditions of war conflict. In conclusion to his presentation he pointed out to the importance of the protection of the national statehood. The next paper was presented by Associate Professor Iulianna Tsvietkova, PhD. from the Taras Shevchenko National University of Kyiv. The beginning of her presentation was devoted to the historical development of legal arrangements of Ukraine. She pointed out that the territory of Ukraine has not always been unified and it depended on the influence of the then current dominator. There have been ongoing attempts to overcome this fragmentation and to achieve independence. Since the question of Ukrainian independence continues to be topical these days, the speaker focused her attention also on the issue of crisis in Ukraine. As a citizen of Kiev, she expressed her opinion on various current issues such as the referendum in Crimea, former Ukrainian President Viktor Yanukovych's refusal to sign the Association Agreement between Ukraine and the EU, and the escalation of the tension that led to the series of demonstrations at Maidan. In her closing statement she pointed out that the current problem of Ukraine stems from the fact that Ukraine is still overly involved in its past. This presentation underscored the importance of perceiving the current international reality also in the context of constitutional history and development of particular states.

The second conference block was opened by PhDr. et Mgr. Peter Mulik, PhD. from the Institute of History of the Slovak Academy of Sciences. His attention was focused on the forms of Slovak statehood from the Slovak national emancipation point of view. In his paper the speaker analyzed the problematic path leading to the establishment of Slovak statehood in the 20th century. Further, he stated that only after the events of October 6th 1938 we could refer to the Slovak political nation, thus representing the completion of twenty-years-long attempts of Slovak autonomists. Another paper was presented by Mgr. Miroslav Lysy, PhD. from Comenius University, who focused his attention on the controversial topic, namely whether the Slovak State (1939–1945) can be considered the legal successor of the Great Moravia. At the beginning of his presentation the speaker outlined the importance of state symbols, which can be an expression of the state's continuity or conversely the repudiation of continuity of a particular state. Further, he discussed the reasons for the need of a particular state to make a concrete relationship to its past and concluded that those reasons might have connection with the search for its own legitimacy as well as legality. The representatives of the Slovak State tried to present the Slovak State as being the successor of the Great Moravia and emphasized the importance of the Cyrillo-Methodian tradition. At the end of his talk Dr. Lysy focused on the attempts to materialize the statehood in the form of a Svatopluk's memorial erected after a nationwide fund-rising. The speaker pointed out that there are some parallels between the Statue of Svatopluk dated 1939/40 and the Statue of Svatopluk which currently stands in the courtyard of the Bratislava Castle. The third paper in this block was presented by Mgr. Ondrej Podolec, PhD., who spoke about the legal and political aspects related to the international recognition of the Slovak State. He argued that a request for the recognition of the Slovak State was sent by the newly formed Ministry of Foreign Affairs on March 16th 1939; however, the international acceptance of the Slovak State continued to be questionable for a couple of years. There were significant limits of its sovereignty, such as the treaty of protection (Schutzvertrag) or limited financial and personal reserves for the development of international relationships. The speaker concluded that it is necessary to look at the historical events in the context of past international and internal determinants, rather than from the current perspective. The closing presentation of this conference block was presented by JUDr. Katarina Zavacka, CSc., from the Institute of State and Law, Slovak Academy of Sciences. At the very beginning of her paper titled 'On ratihabition of

[1] The conference was held under the project "Continuity and Discontinuity of Law in Slovakia in the 20th Century and its Impact on Legal Arrangement in the SR", funded by the Slovak Research and Development Agency.

the Slovak National Council's regulations' she stated that ratihabition of the Slovak National Council's regulations was never actually applied. She was mostly concerned with the criticism of legislative activities of the Slovak National Council because of reputed antidemocratic content of its regulations.

The last block of the conference comprised four presentations which, unlike the previous purely legal historical topics, focused more on theoretical aspects of constitutional law. The paper titled 'Material Core of the Constitution' was delivered by JUDr. Monika Forejtova, PhD. from the University of West Bohemia in Pilsen. The issue she raised is closely connected with the question whether the current constitutional framers are authorized to legally bind all future generations. Very important are also the limits of the amendments and adaptations in the wording of the Constitution that have been made over the years. The speaker cited the view of K. Schmidt who argued that any amendments to the Constitution are valid only so long as they preserve its basic structure. The remaining question is: who shall guarantee the legality of constitutional amendments and preservation of its material core? The next speaker to present his paper was JUDr. Dusan Nikodym, CSc. from the Institute of State and Law, Slovak Academy of Sciences. He addressed the issue of constitutional legislation and the relating controversial questions. He stated that some of the amendments to the Slovak Constitution violate its material core. To exemplify the case the speaker pointed to the constitutional amendment No. 356/2011 Coll., which attributed some extended competences to the president and thus interfered with the material core of the Constitution, since the Slovak Republic is a parliamentary republic and such competences are more typical for a presidential system. His proposition de lege ferenda was that priority be put on rigorous regulation of the relationship between the Slovak Republic and the European Union by relevant legislation. The third speaker in this section of the conference, JUDr. Milan Hodas, PhD., presented the paper about the adaptation of constitutional law in the context of the membership in the European Union. The last conference speaker was JUDr. Simona Ondečková who focused on the transformation of the election legislation. First, she briefly analyzed the interpretation of the term 'democracy' and presented the aim of her contribution: to define the term 'democracy' and to outline pertinent election legislation during the communist regime and its necessary transformation caused by the collapse of communism.

Following an open discussion, Professor Jozef Beňa, CSc. expressed his satisfaction with the course of the conference and emphasized the necessity for bridging legal history, current legal system, and also debates pro futuro.

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Nachruf auf Prof. Dr. Louis Chlodwig Morsak

(* 3.3.1939 - † 2.8.2014)

Quelle: Bayernbund Rosenheim

Wer hätte vor dreieinhalb Jahren, als der Verfasser dieser Zeilen die beiden Lehrveranstaltungen „Rechtsgeschichte für Südtiroler" besuchte und mehrfach mit seinem hochgeschätzten Professor in dessen Kämmerchen oder in der Cafeteria der Alma Mater Oenipontana zusammensaß, gedacht, dass wir ihn schon so bald betrauern müssen? Ein gnädiger und für viele allzu früher Tod setzte seinem Leben am 2. August 2014 nach langer, schwerer Krankheit ein Ende.

In dieser Ausgabe des „*Journals on European History of Law*" wird in einer kleinen Abhandlung Louis Chlodwig Morsak wieder lebendig. Darin spiegelt sich der tiefe Respekt des Verfassers vor dem väterlichen Freund, dem akademischen Lehrer und dem Forscher wider. So hat ihn der Autor erlebt: sachlich-streng, Begabungen und Talente fördernd, immer hilfsbereit und dennoch mit einem unvergleichlichen und feinen Humor. Der Verfasser hat stets von dem klugen Rat profitiert, den der Verstorbene zurückhaltend und niemals ungefragt erteilte. Professor Morsak war ein Vorbild, auch im privaten Bereich. Doch das Professor-Student-Verhältnis war mehr als eine bloße Arbeitsbeziehung, vielmehr eine vertiefte und auf gegenseitiges Vertrauen gestützte Verbin-

dung. Persönliche Erlebnisse und Anekdoten würden hier den Rahmen sprengen.

Der Lebensweg von Louis Chlodwig Morsak begann am 3. März 1939 in München als Sohn eines Lungenfacharztes. Im Alter von 35 Jahren promovierte Morsak nach seinem Studium der Rechtswissenschaften bei Louis Carlen an der Universität Freiburg im Üechtland mit einer Arbeit über das Wesen der Strafbarkeit des Ehebruchs. 1983 erfolgte die Habilitation, die er bei Nikolaus Grass zum Thema der Rechts- und Sakralkultur bayerischer Pfalzkapellen einreichte. Seit April 1983 war Morsak Universitätsdozent, Jahre später wurde ihm von Bundespräsident Kurt Waldheim der Berufstitel des tit. ao. Universitätsprofessors verliehen.

Seine thematischen Schwerpunkte lagen im deutschen Privatrecht, der österreichischen Rechtsgeschichte, der mittelalterlichen Kirchenverfassungsgeschichte, in den Untersuchungen über das Haus Österreich sowie in der Rechts- und Sakralkultur im bayerischen und Tiroler Raum im Allgemeinen und der Südtiroler Rechtsgeschichte im Besonderen.

Morsaks Lebenswerk ist demnach vor allem durch viele Veröffentlichungen im rechtshistorischen Bereich geprägt. So verfasste er Abhandlungen über die österreichische Rechtsgeschichte und die rechtlichen Dimensionen der Volksrechte, die Herrscherkirchen in der Schweiz und die sakrale Rechtskultur, herrscherliche Bildzeichen und die Neun Chöre der Engel als Programm politischer Ikonographie in Österreich, zur Rechtsarchäologie einer Nürnberger Weinprobierschale aus dem 17. Jahrhundert, zum Tatbestand der Abtreibung in der Lex Baiuvariorum und über die herzogliche Altarstiftung für Schloss Tirol als Rechtsdenkmal und Landesheiltum.

Als der Verfasser dieses kleinen Nachrufes im Jahr 2010 gemeinsam mit den bekannten Juristen Franz Matscher und Peter Pernthaler eine Festschrift für Hans R. Klecatsky herausgab, ließ sich Morsak nicht zweimal bitten und schrieb eine äußerst interessante Betrachtung über den Andreas-Hofer-Mythos als Stoßseufzer der Rechts- und Kulturgeschichte Tirols nieder. Dieser Beitrag ist ein bedeutender Aufsatz im Rahmen der vielen Texte rund um die 200. Wiederkehr der Tiroler Freiheitskämpfe im Jahr 1809.

Des Weiteren galt der Rechtshistoriker Morsak als einer der besten Kenner des Landes Südtirol. Dabei waren es vor allem die Impulsvorträge über die ältere und neuere Rechtsgeschichte Südtirols, die in lebhafter Erinnerung bleiben. Gekonnt und mit einer großen Portion Sprach- und Wortwitz ausgestattet, schaffte es Morsak wohl wie kein anderer, den Spagat zur Gegenwart herzustellen und somit die Rechtsgeschichte in die Rechtsgegenwart zu überführen. In vielen lebhaften Diskussionen, die dank der vorher erwähnten Vertrauensbasis zustande kamen, war Louis Morsaks Haltung hierbei Vorbild und Auftrag zugleich. Diesem Auftrag muss die Universität Innsbruck auch in Zukunft folgen.

Morsak hatte ein Herz für Freud und Leid seiner Mitmenschen, und er verfügte über die seltene Gabe, auch größeres Ungemach in ein leicht erträgliches Los, wenn nicht gar in Unwichtigkeit und Bedeutungslosigkeit umzumünzen. Sein schweres Schicksal in den letzten Lebensmonaten geht nicht nur dem Verfasser nahe. So nehmen wir aufrichtig am Schmerz der Alma Mater Oenipontana und ihrer Institute für Römisches Recht, Rechtsgeschichte und Italienisches Recht wie auch der fassungslos zurückgebliebenen Kollegen, Freunde und Studenten Anteil. Danke für alles, lieber Louis, und Gott empfohlen!

Andreas Raffeiner*

* Bozen, Italien.

Obituary in Memory of Professor Antonio Guarino

(* 1914 - † 2014)

Source: Senato della Repubblica

On the 2nd October, the dean of the Romanists Prof. Antonio Guarino died in Naples at the age of 100. He was born on the 16th May 1914 in Cerreto Sannita (Benevento). At the age of 18 he published his first book ‚*Collatio bonorum*', where the latin title revealed the argument of Roman Law. He was a student of Siro Solazzi and Vincenzo Arangio-Ruiz, who guided him in the study of that legal discipline. After brief stint as a judge and a journalist, he devoted himself to the activity of professor. Prof. Guarino begun his teaching career at the University of Catania and then for thirty years at the University Federico II of Naples. Generations of scholars have grown up with his fundamental work, the manual ‚Istituzioni di diritto privato romano', which has had numerous

editions. The matter Institution of Roman Law was included between the most important of the degree course in law, where the relative tests represented the main obstacle for first-year students. From 1976 to 1979 Prof. Antonio Guarino served as member of the Italian Senate. In 1989 he retired to be elected as *professor emeritus* by University Federico II of Naples.

He was perennial member of Accademia dei Lincei and over the years collaborated with several newspapers.

In his final interview with the newspaper ‚Repubblica' - on his 100th birthday, Professor Guarino announced the imminent publication of the volume ‚Ultime pagine di diritto romano'.

Carmine Galloro*

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The supplements must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

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