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Höchstgerichtsbarkeit in Deutschland im 19. und 20. Jahrhundert. Ein rechtshistorischer Rückblick*

(The Jurisdiction of the Constitutional Justice in Germany in 19th and 20th Century. Legally-Historical View)

*Diemut Majer***

Abstract

Constitutional justice and its competences towards the political powers have been discussed since the 19th century in in Europe. Who controls the laws? A court or the legislative itself? In fact the idea that a court might tell the legislation what the constitution (and the law) is (so the Supreme Court of the US) was completely new. In Germany the „Paulskirchenverfassung" of 1849 created such judicial controls by establishing a supreme court (Reichsgericht) with widespread competences (towards the federal and central powers) in the German „Reich", inclusive the right of every citizen to sue the state before a court on the ground of illegal treatment. The German „Grundgesetz" (Constitution) of 1949 picked up this idea and created a constitutional court (Bundesverfassungsgericht) which became a model for many European constitutions. Where did this belief in the impartiality of a court come from? Not from historical facts, but from hopes in a neutral power. These hopes go back to the Medieval Ages, when the protection of the law (and the people / citizens) belonged to the most important rights and duties of the German Kings and of the Emperor – a right given to him by God himself. Day and night, so the sources tell, the German King Konrad II. (1024 – 1039) on horseback hastened through the vast Empire to punish the evil-doers and to reward the righteous ones. The priority of the law towards the political powers is the essence of the idea of the German „Rechtsstaat". This idea is contrary to the thinking in many states, which do not want its parliaments controlled by a court

Key words: *constitutional courts; control of the political power („Paulskirchenverfassung" 1849, „Grundgesetz" 1949); priority of the law towards the political powers as a special German idea; protection of the law as the first duty of the Kings, given to them by God himself.*

Mit der Verankerung der Verfassungsgerichtsbarkeit im Bonner Grundgesetz hat sich der Verfassungsgeber dafür entschieden, Streitigkeiten zwischen Verfassungsorganen des Bundes oder der Länder sowie zwischen Bürger und Staatsgewalt nicht dem Parlament, sondern einem unabhängigen obersten Gerichtshof (Bundesverfassungsgericht zu übertragen).[1] Dieser ist damit wichtigster „Hüter der Verfassung" (Art. 93 ff. GG). Die Kompetenzen des Bundesverfassungsgerichts sind sehr weit gespannt.[2] Sie sind nicht nur in der deutschen, sondern in der gesamten Verfassungsgeschichte ein Novum und wurden zum Vorbild für zahlreiche Staaten (Österreich, Spanien, Italien, Türkei, Mexiko etc.). Andere Staaten kennen hingegen entweder gar keine Kontrolle von Akten der Legislative oder Exekutive durch ein Gericht (z.B. England) oder eine Verfassungsge-

* Erstmaliger Abdruck bei D. Majer: *Das Bundesverfassungsgericht und das Erbe der Paulskirche*, Jahrbuch des Instituts für deutsche Geschichte Tel Aviv Bd. XVI / 1987 S.135ff. Nachdruck einer leicht veränderten Fassung mit dem o.g. Titel in: D. Fischer; M. Obert, Festschrift für Dietrich Pannier, Köln 2010, S. 119ff.

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1 Höchstgerichtsbarkeit wird hier als Kontrollinstanz über die Einhaltung der Verfassung, nicht als Letztinstanz für fachgerichtliche Entscheidungen verstanden.

2 Im Einzelnen umfassen sie die Staatsgerichtsbarkeit im klassischen Sinne, die zur Lösung von Konflikten im Bundesstaat berufen ist (Konflikte zwischen Bundesländern oder zwischen Bundesländern und Gesamtstaat, Art. 93 Abs. 1 Nr. 3 u. 4 GG). Die Staatsgerichtsbarkeit wird ergänzt durch die sogenannten Organstreitigkeiten (Streitigkeiten zwischen obersten Bundesorganen oder anderen Beteiligten, z.B. Fraktionen des Bundestages, Art. 93 Abs. 1 Nr. 1 GG). Hinzu tritt eine weitere wichtige Kompetenz, nämlich eine umfassende Normenkontrolle im Sinne der Prüfung von Bundes- und Landesrecht auf ihre Vereinbarkeit (Art. 93 Abs. 1 Nr. 2 GG) mit dem Grundgesetz. Daneben kann das BVerfG Rechtsnormen auch aus Anlass eines konkreten Rechtsstreits auf Vorlage eines Gerichts auf ihre Verfassungsmäßigkeit überprüfen (Art. 100 GG; konkrete Normenkontrolle). Schließlich entscheidet das BVerfG auch über Verfassungsbeschwerden von einzelnen Bürgern wegen Verletzung der Grundrechte durch staatliche Einzelakte sowie über Verfassungsbeschwerden von Gemeinden wegen Verletzung der gemeindlichen Autonomie (Art. 93 Abs. 1 Nr. 4a und 4 b GG), weiter über sonstige verfassungsrechtliche Streitigkeiten (z.B. Parteienverbot, Art. 21 Abs. 2 GG). Die Verfassungsbeschwerde wurde erst 1952 in das Grundgesetz eingefügt; vor diesem Zeitpunkt war sie nur einfach gesetzlich verankert; vgl. näher dazu: Der Parlamentarische Rat 1948/49, Akten und Protokolle, Bd. 2, bearb. v. *E. Bucher*, Einleitung, insbes. S. LXI. Nach Art. 1 Abs. 3 GG sind neben Exekutive und Legislative auch die Gerichte zur unmittelbaren Anwendung der Verfassung verpflichtet; damit ist auch jedes einzelne Gericht zum „Hüter der Verfassung" berufen, worauf aber hier nicht näher eingegangen werden soll.

richtsbarkeit nur in eingeschränktem Umfang (z.B. Frankreich), weil sie an der prinzipiellen Prärogative des Gesetzgebers festhalten.[3]

Dieses Vertrauen in die Autorität gerichtlicher Entscheidungen, die über der des Parlaments und der Exekutive steht, bedarf der Erklärung. Sie könnte darin liegen, dass aufgrund geschichtlicher Tatsachen das Ansehen eines obersten Gerichts oder der dritten Gewalt schlechthin in Deutschland sehr hoch ist. Dies ist jedoch nicht der Fall. Ein Blick in die Rechtsgeschichte zeigt, dass die Verfassungsgerichtsbarkeit in der deutschen Geschichte eine nur geringe Bedeutung hatte, da sie in den deutschen Verfassungen entweder nicht vorgesehen war oder nur wenige Kompetenzen hatte. Ebenso fehlt es an demokratiestaatlichen Traditionen. Denn in den Fällen, in denen die Verfassungsgerichtsbarkeit tatsächlich zur Schlichtung staatrechtlicher Streitigkeiten berufen war, hatte sie kläglich versagt, wie die Entscheidungen des Reichsgerichts im Jahre 1932 zum sog. Preußenschlag zeigen.[4]

Auch die Vorläufer der Verfassungsgerichtsbarkeit der früheren Jahrhunderte hatten trotz formal weiter Kompetenzen zu wenig echte Entscheidungsbefugnisse. Zu sehr waren sie (d.h. das im Zuge der maximilianischen Reformen 1495 gegründete Reichskammergericht[5] und der 1498 entstandene Reichshofrat[6]) durch Ausnahmebestimmungen zugunsten der Territorien (privilegium de non appellando u.a.) und durch kaiserliche Eingriffsrechte eingeschränkt. Ähnlich war die Situation in Frankreich.[7] Die Monarchen als oberste Instanz der Gesetzgebung und Wahrer des Rechts waren nicht gewillt, Befugnisse abzugeben.

Nicht historische Erfahrung kann daher die Entscheidung des Grundgesetzes für die Machtfülle der dritten Gewalt in Form der Verfassungsgerichtsbarkeit begünstigt haben, ausschlaggebend war vielmehr die Hoffnung in die Schlichtungsfähigkeit eines Verfassungsgerichtshofs. Diese ist das Ergebnis der übermächtigen autoritären Strukturen in Staat, Wirtschaft und in den herrschenden Eliten,[8] die, nur kurz unterbrochen durch die Weimarer Republik, schließlich in den NS-Staat mündeten. Nach den Erfahrungen des „Dritten Reiches" bestand eine starke Sehnsucht nach dem „rechten" Recht, verkörpert in einer unabhängigen Justiz, die von einer Renaissance des Naturrechts begleitet war. Man wollte keinen „Parlamentsabsolutismus", wie er in Frankreich oder England herrschte; man suchte nach Ausgleich durch eine starke Exekutive und durch richterliche Kontrolle.

Gleichwohl zeigt ein rechtsgeschichtlicher Rückblick, dass die Verfassungsgerichtsbarkeit des Grundgesetzes keine vollständige Neuschöpfung (gewissermaßen ein verfassungsgeschichtlicher „deus ex machina") ist, sondern dass es zu einzelnen Punkten Anknüpfungen gibt, gewissermaßen „Spurenelemente", die sich dann in der Verfassungsgerichtsbarkeit des Grundgesetzes verdichtet haben.[9] Der folgende Überblick[10] mag dies verdeutlichen.

1. Solche Anknüpfungen finden sich zunächst in der bayerischen Verfassung von 1919 (sog. Bamberger Verfassung) und später in der bayerischen Verfassung von 1946. Der bayerische Gesetzgeber hatte eine Verfassungsgerichtsbarkeit mit umfangreichen Kompetenzen vorgesehen, an der sich auch der Verfassungskonvent von Herrenchiemsee orientierte.[11]

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[3] Vgl. die jeweiligen Länderberichte in: *H. Mosler* (Hrsg.) Verfassungsgerichtsbarkeit in der Gegenwart: Österreich, S. 459 f., Italien, S. 294 ff., Schweiz, S. 516, Türkei, S. 562 f., Mexiko, S. 398. Zum Stand vgl. zusammenfassend *M. Hirsch* Verfassungsgerichtsbarkeit und Politik, 1979, S. 30 ff.

[4] In der von der preußischen Regierung den Fraktionen der SPD und des Zentrums angestrengten Entscheidung vom 25. 7. 1932 (RGZ 137 Anh. 65 ff.) lehnte der Staatsgerichtshof den Antrag Preußens auf einstweilige Verfügung, die Einsetzung eines Reichskommissars für Preußen für verfassungswidrig zu erklären, ab, weil das Gericht „über die Gründe für das Vorgehen des Reichspräsidenten" (d.h. für den Erlass einer Verordnung vom 20. 7. 1932, durch den die preußische Regierung unter dem Vorwand, sie tue nichts gegen angebliche öffentliche Unruhen (Es ging um Auseinandersetzungen linker Gruppierungen mit den Nationalsozialisten, Anm. d. Verf.), ihres Amtes enthoben und der Reichskanzler zum Reichskommissar für das Land Preußen eingesetzt worden war, sog. Preußenschlag) „nicht unterrichtet" (!) sei. In der daran anschließenden Entscheidung zur Hauptsache (RGZ 138 Anh. 1 ff.) rechtfertigte der Staatsgerichtshof die Amtsenthebung der preußischen Regierung damit, dass hier eine Ermessensentscheidung des Reichspräsidenten vorliege, die nicht missbräuchlich und somit gerichtlich nicht überprüfbar sei.

[5] Näher *U. Müßig* Höchstgerichtsbarkeit als Motor des frühneuzeitlichen Staatsbildungsprozesses: Frankreich und das Heilige Römische Reich im Vergleich, in: Das Recht und seine historischen Grundlagen, FS für E. Wadle, hrsg. von *T. J. Chiusi* u.a., S. 703 ff., 720 ff.; *D. Willoweit* Deutsche Verfassungsgeschichte, 5. Aufl. 2005, § 15 II 2; das Reichskammergericht war in 1. Instanz für Landfriedensbruchsachen und in Austrägalverfahren (Schiedsgerichtsverfahren) der Territorien zuständig; in 2. Instanz als Appellationsgericht für Territorialgerichte. Das Gericht konnte nach der Lehre der Kameralisten allgemeinverbindliche Regeln (Präjudizien) aufstellen, die jedoch durch kaiserliche Visitationen aufgehoben werden konnten. Bei Zweifeln über die Interpretation eines Reichsgesetzes war der Rekurs zum Reichstag gegeben, der jedoch meist untätig blieb, so dass sich auch hier de facto die kaiserliche Meinung durchsetzte. Entscheidungen des Gerichts beschränkten sich daher auf formellrechtliche Entscheidungen; solche materiellrechtlicher Art sind nach einer empirischen Erhebung zwischen 1497 und 1711 nicht nachgewiesen (*U. Müßig* S. 722 mwN).

[6] Der Reichshofrat hatte konkurrierende Zuständigkeiten gegenüber dem Reichskammergericht. Bei Stimmengleichheit und bei besonderer Wichtigkeit einer Sache war diese dem Kaiser vorzulegen (votum ad imperatorem). Besonders im letztgenannten Fall war der Appell an den Kaiser die Regel; näher *O. von Gschließer* Der Reichshofrat, 1942, S. 28; *W. Sellert* Der Reichshofrat, in *B. Diestelkamp* (Hrsg.) Oberste Gerichtsbarkeit und zentrale Gewalt im Europa der frühen Neuzeit, 1996, S. 15 ff., 29; *U. Müßig* (Fn. 5) S. 729.

[7] Die in der gleichen Zeit entstandenen französischen Gerichtshöfe (parlements) sahen sich zahlreichen königlichen Eingriffsrechten ausgesetzt, weil sie die Kontrolle und Registrierung aller königlichen Akte beanspruchten.

[8] Dazu eingehend *A. J. Mayer* Adelsmacht und Bürgertum, 1984, insbes. S. 11 ff.

[9] Vgl. *J.-D. Kühne* Die Reichsverfassung der Paulskirche, 1985, der sich allerdings auf die Grundrechtsproblematik beschränkt (insb. S. 149 ff., 537 ff.).

[10] Vgl. dazu grundlegend *D. Majer* Gerichtliche Kontrolle und politische Macht: Von der Pauskirche zum Bundesverfassungsgericht, in: Jahrbuch für Deutsche Geschichte, Bd. XVI, 1987, S. 135 ff.

[11] Jedoch war die Zeit der bayerischen Republik nach 1919 zu kurz gewesen, um zu einer gesicherten Aussage darüber zu gelangen, ob das Institut Verfassungsgerichtsbarkeit sich tatsächlich historisch bewährt hatte.

2. Die Weimarer Reichsverfassung vom 11. August 1919 kannte nur sehr beschränkte verfassungsgerichtliche Kompetenzen. Nach Art. 19 war nur die Staatsgerichtsbarkeit im klassischen Sinne, d.h. die Entscheidung von Streitigkeiten nicht privatrechtlicher Art zwischen Ländern sowie zwischen Reich und Ländern (ferner Streitigkeiten innerhalb eines Landes, falls ein Gericht eines Landes nicht zur Verfügung stand) einem bei dem Reichsgericht gebildeten Staatsgerichtshof[12] übertragen. Darüber hinausgehende Befugnisse wie z.B. die Entscheidung von Streitigkeiten zwischen obersten Reichsorganen und die Kontrolle von Reichsgesetzen lehnte die Nationalversammlung bzw. der Reichstag strikt ab; man sah in ihnen „hochpolitische Streitigkeiten", in die ein Gericht nicht eingreifen dürfe, weil dies der Gewaltenteilung widerspreche.[13]

Allerdings hatte es auch schon in Weimar Ansätze zu einer Ausdehnung der Verfassungsgerichtsbarkeit (Verfassungsbeschwerde und Normenkontrolle) gegeben, die jedoch aufgrund der politischen Entwicklung nicht zum Zuge kamen.[14]

3. Auch in der Reichsverfassung 1871 und in der Vorgängerverfassung des Norddeutschen Bundes 1867 finden sich keine Anknüpfungspunkte zur heutigen Verfassungsgerichtsbarkeit. Beide Verfassungen sahen, jeweils in ihrem Art. 76 wörtlich übereinstimmend eine Verfassungsgerichtsbarkeit nicht vor, nicht einmal in Form einer Staatsgerichtsbarkeit, sondern bestimmten zur Entscheidung verfassungsrechtlicher Streitigkeiten zwischen den einzelnen Bundesstaaten sowie subsidiär für Landesverfassungsstreitigkeiten den Bundesrat, also ein politisches Organ (Vertretung der Länder, von den Regierungen bestellt).[15]

4. Geht man noch weiter in die Verfassungsgeschichte zurück, ist die Reformakte des Deutschen Bundes auf dem Frankfurter Fürstentag 1863 in den Blick zu nehmen. Auch sie schaltete den Gedanken einer Verfassungsgerichtsbarkeit aus, weil sie nur die Schiedsgerichtsbarkeit des Bundesgerichtshofs für Streitigkeiten zwischen den Einzelstaaten kannte.[16]

5. Erst in der Paulskirchenverfassung vom 28. März 1849, 100 Jahre vor dem Grundgesetz, finden sich echte Ansätze einer Staats- oder Verfassungsgerichtsbarkeit. Es ist erstaunlich, dass uns die Paulskirchenverfassung in vielen Punkten weit moderner anmutet als die Weimarer Reichsverfassung 1919. Und in der Tat hatten die Schöpfer des Grundgesetzes die Paulskirchenverfassung weit eher im Blick als jene, obwohl sie nie in Kraft getreten ist. Dies gilt insbesondere für den Grundrechtsteil[17] und für die Stellung des Reichsgerichts als verfassungsgerichtlicher Kontrollinstanz.[18] Dessen Befugnisse (Art. 126 ff.) waren sehr weit gespannt, von der Staatsgerichtsbarkeit im klassischen Sinne (Organstreitigkeiten[19]), Normenkontrolle und sogar einer Individualbeschwerde wegen Verletzung verfassungsmäßiger Rechte bis hin zu einer Art Popularklage,[20] durch die jeder Staatsbürger eines Einzelstaats (nach Erschöpfung des Rechtswegs) gegen eine Regierung wegen der Aufhebung oder verfassungswidriger Veränderung der Landesverfassung Klage

[12] Der Staatsgerichtshof war ferner zuständig für die Prüfung der Vereinbarkeit von Landesrecht mit Reichsrecht (Art. 11 WRV). Vgl. näher Protokoll des Verfassungsausschusses der verfassungsgebenden Nationalversammlung vom 20. 3. 1919, 11. Sitzung S. 13 ff.

[13] So auch der Staatsgerichtshof in: *H. Lammers/W. Simons* Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich, Bd. I, S. 154; damit fehle „dem Gebäude des Rechtsstaats (freilich) die Krönung […]"; gegen eine Ausdehnung der Staatsgerichtsbarkeit war auch die h.L., da der Gesetzgeber unantastbar sei (vgl. *G. Jellinek* Allgemeine Staatslehre, 3. Aufl. 1913, S. 489 ff.); *K. Loewenstein* Volk und Parlament nach der Staatstheorie der franz. Nationalversammlung von 1789, 1922, S. 243; *W. Apelt* in: VVdStRL 9 (1925) S. 120; zusammenfassend *H. Simon* Verfassungsgerichtsbarkeit, in: *E. Benda u.a.* (Hrsg.) Handbuch des Verfassungsrechts, 2. Teil, 1984, S. 1256.

[14] Schon im Verfassungsausschuss der Weimarer Nationalversammlung hatten einzelne Abgeordnete eine Art Verfassungsbeschwerde sowie eine Normenkontrolle vorgeschlagen, die aber vom Verfassungsausschuss später wieder verworfen wurde (vgl. Protokoll der 39. Sitzung S. 69); vgl. näher *R. Oswald* Das richterliche Prüfungsrecht gegenüber Gesetzen und Verordnungen in der konstitutionellen Monarchie und unter der Weimarer Reichsverfassung, 1974. Die Lehre war gespalten. Vgl. die Verhandlungen der Deutschen Staatsrechtslehrervereinigung 1928, VVdStRL 5 (1929); *F. Neumann* Gegen ein Gesetz über Nachprüfung der Verfassungsmäßigkeit von Reichsgesetzen, in: Die Gesellschaft: Internationale Revue für Sozialismus und Politik, 1929, S. 517 ff.; vgl. ferner *A. Brecht* Für ein Gesetz über Nachprüfung der Verfassungsmäßigkeit von Reichsgesetzen, in: ebd., S. 511 ff.

[15] Kam es zu keiner Einigung, war die Frage durch die Reichsgesetzgebung, d.h. durch einen Oktroi der Mehrheit zu lösen. Für Streitigkeiten zwischen Reich und Ländern gab es gar keine Bestimmungen. In beiden Fällen setzte sich daher der politisch Stärkste durch. Für eine Gerichtsbarkeit, die im Bundesstaat machtmäßigend zugunsten der Gliedstaaten wirken musste, war daher kein Raum. *Bismarck* war der exponierteste Vertreter der Auffassung, dass die politische Sphäre Sache der Exekutive und damit „rechtsfrei" sei. Deutlich wird dies in seiner Äußerung im preußischen Verfassungskonflikt: „[…]. So hoch ich die preußischen Richter als juristische Autoritäten stelle, so hat doch die Regierung nicht geglaubt, dass von dem einzelnen Urteilsspruch eines Gerichts […] die politische Zukunft des Landes, die Machtverteilung zwischen der Krone und dem Landtage sowie zwischen den Häusern des Landtages abhängig gemacht werden dürfe […]", Rede vor dem preußischen Abgeordnetenhaus am 22. 4. 1863 (Sten.Ber. 1863, 9521), zitiert nach *H. Simon* (Fn. 13) S. 1256.

[16] Vgl. *W. Geiger* Gesetz über das Bundesverfassungsgericht, 1952, S. XV. Das Bundesgericht wurde als Schiedsgericht tätig, wenn ihm das Direktorium nach erfolglosem Vermittlungsversuch auf Verlangen eines Beteiligten eine bestimmte Streitigkeit überwiesen hatte (Art. 28). Als echtes Gericht war das Bundesgericht zuständig nur in privatrechtlichen Streitigkeiten von Einzelpersonen gegen Einzelstaaten oder von Einzelstaaten untereinander (Art. 27).

[17] Vgl. im Einzelnen *H. Scholler* (Hrsg.) Die Grundrechtsdiskussion in der Paulskirche: Eine Dokumentation, 1982; *J.-D. Kühne* Die Reichsverfassung der Paulskirche, 1985.

[18] Vgl. *H. J. Faller* die Verfassungsgerichtsbarkeit in der Paulskirchenverfassung, in: FS für W. Geiger zum 65. Geburtstag, 1974, S. 827 ff.; *E. R. Huber* Deutsche Verfassungsgeschichte seit 1789, Bd. II, 2. Aufl. 1975, S. 833 f.

[19] Entscheidung von Klagen der Reichsgewalt gegen die Einzelstaaten und umgekehrt, Streitigkeiten zwischen den Reichsorganen (Volkshaus, Staatenhaus, Reichsregierung) (jedoch nur nach vorheriger Einigung, das Reichsgericht anzurufen) und von Verfassungsstreitigkeiten innerhalb eines Landes, Art. 126, lit. b und c.

[20] Jeder deutsche Staatsbürger konnte nach Maßgabe künftiger Gesetze wegen Verletzung seiner verfassungsmäßigen Rechte durch die Reichs- oder Landesgewalt Klage erheben, Art. 126 lit. f und h.

beim Reichsgericht erheben, also gegen jeden Verfassungsbruch das Reichsgericht mobilisieren konnte.[21] Daneben wurden die traditionellen Zuständigkeiten eines Staatsgerichtshofs aus der frühkonstitutionellen Zeit, wie Ministerklage, ferner die Zuständigkeit für Hoch- und Landesverrat sowie für Klagen gegen den Reichs- und Landesfiskus beibehalten.[22]

Die Verfassungsgerichtsbarkeit der Paulskirche stellte eine wahrhaft revolutionäre Neuerung dar. Sie hatte keine unmittelbaren historischen Vorläufer und hat im 19. Jahrhundert, ja bis ins 20. Jahrhundert hinein, keine historisch wirksamen Nachahmer mehr gefunden. Es gab zwar Anknüpfungspunkte an die Zeit des Frühkonstitutionalismus, wenn man an die klassischen Kompetenzen der Staatsgerichtsbarkeit,[23] der Ministerklage usw. denkt. Die eigentlichen verfassungsrechtlichen Kontrollrechte, insbesondere Normenkontrolle (Kontrolle von Gesetzen) und Verfassungsbeschwerde sind jedoch ein Novum, dessen Gründe bisher nicht erforscht sind.[24] Die früheren Verfassungswerke waren alle gerichtsfeindlich (z.B. der Deutsche Bund 1815[25]).

Ausländische Vorbilder waren nicht vorhanden; die zeitgenössischen Verfassungen[26] kannten keine Kontrolle von Regierungsakten oder Normen, da dies der Suprematie des Gesetzgebers widersprochen hätte.[27] Lediglich die napoleonischen Konsulatsverfassungen von 1799 und 1804 sahen in Art. 21 bzw. Art. 71 die Überwachung der Verfassungsmäßigkeit von Akten der Legislative und Exekutive durch den Senat vor, der jedoch politisches Organ nicht Gericht war.[28]

Die umfassenden Kontrollrechte des Reichsgerichts, die so unmittelbar in der Paulskirchenverfassung auftauchten, lassen sich wohl nur mit der rechtspolitischen Gesamtlage erklären. Dies gilt in erster Linie für die neuen Institute der Normenkontrolle, aber auch für die Individualbeschwerde, da die Grundrechte nicht unmittelbar bindend für die Staatsorgane waren, sondern lediglich als Richtschnur der Einzelstaaten dienten (§ 25), so dass ihre Einhaltung durch Verwaltung und Justiz keineswegs als gesichert gelten konnte.[29] Die Entscheidung für ein Reichsgericht mit umfassenden Kompetenzen hatte aber wohl auch rechtssoziologische oder biographische Ursprünge. Die Nationalversammlung war ein Parlament von Honoratioren und Gelehrten, insbesondere von Juristen, d.h. Richtern, Staatsanwälten, Rechtsanwälten, Justizräten und Professoren, wie es vorher und nachher nie mehr zusammengetreten ist, so dass es im damaligen Sprachgebrauch als „Parlament des Geistes“, als „Hochschule für Politik“, oder als „Politische Akademie“ bezeichnet worden ist. Dass ein solches Parlament dem Gedanken der richterlichen Kontrolle des Parlaments nahestand und eher Vertrauen zur Justiz als zu den Mehrheitsentscheidungen der Versammlung hatte, liegt auf der Hand. Ihre Erfahrungen waren von „dem Staat“, nicht von demokratischen Traditionen geprägt. Das dürfte erklären, dass ein gegenüber den fürstlichen Landesregierungen siegreiches deutsches Parlament freiwillig Befugnisse an eine Reichsgerichtsbarkeit übertrug, die es nach der Doktrin der Gewaltenteilung an sich selbst hätte wahrnehmen müssen.

6. Die Paulskirchenverfassung vom 28. März 1849 ist bekanntlich nicht in Kraft getreten, da sie zwar von den norddeutschen Regierungen und Baden angenommen, aber von Preußen, Österreich, Bayern, Württemberg, Sachsen und Hannover verworfen wurde; sie hatte jedoch in „objektivierter“ Form gleichwohl Auswirkungen[30] auf spätere Verfassungswerke, z.B. auf die Erfurter Unionsverfassung 1850.[31] Auch diese Verfassung ist nicht in Kraft getreten, da Preußen vor dem Machtanspruch Österreichs zurückwich (Olmützer Vertrag 1850) und in die Wiederherstellung des Deutschen Bundes einwilligte. Sie zeigt jedoch die Ausstrahlung der Paulskirchenverfassung auch auf

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[21] Art. 126 lit. h.

[22] Art. 126 lit. i und k, l, m und n.

[23] Vgl. *E. R. Huber* Deutsche Verfassungsgeschichte seit 1789, Bd. I, 2. Aufl. 1975, S. 616, 621 ff.; vgl. auch *Rotteck-Welcker* Staatslexikon, 1853, S. 591. Ausführlich *R. von Mohl* Staatsrecht des Königreichs Württemberg, 1. Bd., 1840, S. 822 ff., 830; zur konservativen Gegenposition vgl. zusammenfassend *W. Geiger* (Fn. 16) XII ff.

[24] Einige Ansätze bei *H. J. Faller* (Fn. 18) S. 827 ff.

[25] Vgl. *K. F. Eichhorn* Betrachtungen über die Verfassung des Deutschen Bundes, 1833, S. 106 f.

[26] Z.B. wie die französische Verfassung von 1791, die charte constitutionelle von 1814, wie auch alle folgenden Verfassungen, die belgische Verfassung von 1831 und die US-Verfassung von 1787.

[27] Vgl. näher *K. Zweigert* Einige rechtsvergleichende und kritische Bemerkungen zur Verfassungsgerichtsbarkeit, in: Bundesverfassungsgericht und Grundgesetz, Bd. I, 1976, S. 63 ff.

[28] Zit. nach *W. Grab* Die Französische Revolution: Eine Dokumentation, 1973, S. 291; *J. Godechot* Les Constitutions de la France depuis 1789, 1970, S. 153 ff.; 197; vgl. auch *R. Marcic* Verfassung und Verfassungsgericht, 1963, S. 180.

[29] Vgl. näher *H. Scholler* (Hrsg.) Die Grundrechtsdiskussion in der Paulskirche: Eine Dokumentation, 1982; *D. Majer* (Fn. 10) S. 146 ff.

[30] Näher *D. Majer* (Fn. 10) S. 146 ff.

[31] Die Unionsverfassung war eine konservative Fassung der Paulskirchenverfassung, näher *Th. Nipperdey* Deutsche Geschichte 1800–1918, Bd. I, 5. Aufl. 1998, S. 671 ff. Sie strebte eine kleindeutsche Lösung (Preußen, Sachsen, Hannover) an und übernahm die Bestimmungen über das Reichsgericht der Paulskirche (nicht aber den Grundrechtsteil) fast wörtlich, obwohl das Erfurter Parlament kein demokratisches Parlament war, sondern auf der Basis des Dreiklassenwahlrechts zusammengesetzt war. Die Parlaments-Mehrheit akzeptierte die Anlehnung an die Paulskirche teils aus Überzeugung, teils aus Taktik: Der Zweck sei wichtiger als die Form: man müsse die Einheit auch um den Preis der Paulskirchenverfassung herzustellen suchen. Die fast wörtliche Übernahme der Paulskirchenverfassung in diesem Punkt erfolgte gegen den Widerstand der Konservativen unter Führung *Julius Stahls*, der sich insbesondere gegen jede richterliche Kontrolle staatlicher Akte durch eine Verfassungsgerichtsbarkeit aussprach. Nicht nur der vorgesehene Ernennungsmodus der Richter des Reichsgerichts (je zur Hälfte aus Volkshaus und Staatenhaus) sei unzulässig, da dort nicht preußische Majoritäten regierten. Die Ernennung sei nur durch die monarchische Gewalt möglich, da kein Gericht über dem König stehe. Auch die Institution eines Reichsgerichts schlechthin sei zu verwerfen, da es sich hier nicht um den Schutz der Rechte gegen die politische Gewalt, sondern um den „Streit über den Besitz der Gewalt selbst“ handele, um die „Herrschergelüste, die jetzt mehr oder weniger die gebildete Welt Europas durchdringen und ihrer Befriedigung nachstreben […]“, Rede im Volkshaus des Unionsparlaments vom 26. 4. 1850, in: *J. Stahl* Die Revolution, 1850, S. 98 ff.

die konstitutionellen Staaten (die sich auch in personellen Kontinuitäten zeigte[32]).

So bleibt die Paulskirche und damit ihr Versuch, eine Verfassungs- oder Höchstgerichtsbarkeit in Deutschland zu errichten, in der Geschichte des 19. Jahrhunderts eine Einzelerscheinung, deren Leitgedanken in unserem Zusammenhang – umfassende Kontrolle des Gesetzgebers durch eine neutrale Instanz – erst 1949 wieder aufgenommen wurde. Sie ist aber für das staatsrechtliche Denken von entscheidender Bedeutung, weil sie zum ersten Mal die Grundprobleme demokratisch legitimierter Gremien und ihrer Kontrolle politischer Macht in aller Schärfte herausgestellt und sich prinzipiell für die Kontrolle entschieden hat. Es ist ein bemerkenswertes verfassungsgeschichtliches und verfassungsrechtliches Phänomen, dass 1848/49 ein frei gewähltes Parlament der deutschen Nation zusammentrat, das gleichzeitig seine Machtbefugnisse der Kontrolle des Reichsgerichts unterwerfen, also keinen Parlamentsabsolutismus wollte. Andere verfassungsgebende Versammlungen vorher und nachher, die aus einer siegreichen Revolution hervorgegangen waren, haben niemals einer solchen Machtabtretung zugestimmt, weder die französische, noch die belgische noch die deutsche Nationalversammlung im Jahre 1919. Es bleibt der verfassungsgeschichtlichen Forschung aufgetragen, der Frage der Kontinuitäten und Diskontinuitäten zwischen Paulskirchenversammlung und dem Bonner Grundgesetz[33] weiter nachzugehen, eine Aufgabe,[34] die noch nicht gelöst ist.

[32] Präsident der Unionsversammlung war der spätere Reichsgerichtspräsident *Eduard von Simson*, der Wortführer der Paulskirchendelegation, die König *Friedrich Wilhelm IV*. vergebens die Krone angeboten hatte; *Bismarck* war einer seiner Schriftführer (näher *Th. Nipperdey* Deutsche Geschichte 1800–1918 (Fn. 31) S. 671 ff.

[33] Dazu *J.-D. Kühne* (Fn.9), der die Kontinuität insbesondere im Hinblick auf die Grundrechte bejaht (S. 149 ff., 537 ff.), Grundprobleme bei *D. Majer* (Fn. 10).

[34] Vgl. aber die ausführliche Darstellung der rechtspolitischen und verfassungsrechtlichen Ausgangslagen bei *D. Majer* (Fn. 10).

Die Kompetenz zur Regelung des Militärstrafverfahrens in Österreich(-Ungarn)

(The Competency to Enact Rules for Military Criminal Procedure in Austra(-Hungary)

Christoph Schmetterer *

Abstract

The military criminal procedure rules in Austria (dating back to 1768) were quite old-fashioned by 1900. There were many attempts to reform criminal procedure after 1850. However it was not clear whether the emperor himself or the parliaments were competent to enact new rules. This article examines the arguments for both views.

Key words: *Dualism; Emperor; Military Courts; Military criminal proceedings; prerogative.*

I. Einleitung

An der Wende vom 19. zum 20. Jahrhundert hatte Österreich eine Strafprozessordnung auf der Höhe der Zeit,[1] die nach kleineren und größeren Novellierungen noch heute in Kraft ist.[2] Das materielle Strafrecht war im Strafgesetz (StG) 1852[3] geregelt, das in weiten Teilen eine Art Wiederverlautbarung des StG 1803 war.[4] Hier gab es seit den 1860er-Jahren eine intensive Reformdiskussion, die aber bis zum Ende der Monarchie (und darüber hinaus) kaum zu konkreten Ergebnissen führte.[5]

Die weitaus antiquiertesten Regelungen fanden sich aber im Militärstrafrecht. Das materielle Militärstrafrecht war zwar im Militärstrafgesetz (MilStG) 1855[6] geregelt, dessen Bestimmungen vielfach parallel zu jenen des StG 1852 waren, doch die Verfahrensvorschriften für Militärgerichte waren primär immer noch jene der Constitutio Criminalis Theresiana (CCTh) von 1768.[7] In den 1888er-Jahren wurden die relevanten Bestimmungen in offiziösen Sammlungen als Militärstrafprozessordnung (MilStPO) zusammengefasst, eine inhaltliche Reform fand aber nicht statt.[8]

II. Das Militärwesen im System des Ausgleichs

1. Allgemeines

Durch den Ausgleich von 1867 erhielt das österreichische Militärwesen eine sehr komplexe Struktur:[9] An sich war das Kriegswesen eine pragmatisch-gemeinsame Angelegenheit;[10] die Feststellung des Wehrsystems (also grundsätzliche Fragen der Wehrplicht und Heeresergänzung) war hingegen eine dualistisch-gemeinsame Angelegenheit,[11] und darüber hinaus gab es noch manche Bereiche, die autonome Angelegenheiten der beiden Reichshälften waren.[12]

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1 RGBl. 117/1873.

2 Wiederverlautbart durch BGBl. 631/1975.

3 RGBl. 117/1852,

4 PGS 626/1803.

5 Zu den Reformversuchen siehe: Herbert LOEBENSTEIN, Strafrecht und Strafprozeßrecht, in: Herbert SCHAMBECK (Hg.), Parlamentarismus und öffentliches Recht in Österreich. Entwicklungs und Gegenwartsprobleme, 2. Teilbd. (Berlin 1993) 975–1044, hier 976–980;Werner OGRIS, Die Rechtsentwicklung in Cisleithanien 1848–1918, in: Adam WANDRUSZKA, Peter URBANITSCH (Hgg.), Die Habsburgermonarchie 1848–1918, Bd. II: Verwaltung und Rechtswesen (Wien 1975) 538–662, hier 568.

6 RGBl. 19/1855.

7 Ferdinand SCHMID, Das Heeresrecht der österreichisch-ungarischen Monarchie (Wien 1908) 577; Walter WAGNER, Die k.(u.)k. Armee. Gliederung und Aufgabenstellung, in: Adam WANDRUSZKA, Peter URBANITSCH (Hgg.), Die Habsburgermonarchie 1848–1918, Bd. V: Die Bewaffnete Macht (Wien 1987) 142–633, hier 268.

8 Militär-Strafprocessordnung. Amtliche Zusammenstellung der über das Strafverfahren bei den Gerichten des stehenden Heeres bestehenden Gesetze (Wien 1884–1886); Amtliche Zusammenstellung der für die k.k. Landwehr, den Landsturm und die Gendarmerie über das Strafverfahren bestehenden Gesetze und Vorschriften als Ergänzung zum Dienstbuche über die Militär-Strafprocessordnung des Heeres und der Kriegs-Marine (Wien 1887).

9 Dazu grundlegend Karin OLECHOWSKI-HRDLICKA, Die gemeinsamen Angelegenheiten der Österreichisch-Ungarischen Monarchie. Vorgeschichte – Ausgleich 1867 – Staatsrechtliche Kontroversen (= Rechtshistorische Reihe 232, Frankfurt am Main 2001) 265–290 mit zahlreichen weiteren Nachweisen; außerdem Ivan ZOLGER, Die staatsrechtlichen Grundlagen der Wehrmacht Österreich-Ungarns, in: Österreichische Zeitschrift für öffentliches Recht 2 (1915–16) 525–615.

10 § 1 lit. b Delegationsgesetz (DG), RGBl. 145/1867.

11 § 2 DG.

12 Umkehrschluss aus § 1 lit. b DG.

Dieses ohnehin schon unübersichtliche System wurde noch dadurch verkompliziert, dass es ab 1868 in der Monarchie nicht mehr nur eine, sondern drei Armeen gab: die gemeinsame (ab 1889 k.u.k.) Armee, die ungarische (m.k./k.u.) Honved und die österreichische (k.k.) Landwehr. Diese Dreiteilung wurde vorgenommen, weil die ungarische Seite im Zuge des Ausgleichs verlangt hatte, dass entweder die Armee geteilt wird oder neben der gemeinsamen Armeeeine eigene ungarische geschaffen wird. Eine Teilung der Armee war für Kaiser Franz Joseph nicht akzeptabel. Daher wurden die Honved und – aus Gründen der Parität zwischen beiden Reichshälften – die Landwehr geschaffen.[13] Die beiden Landwehren waren (abgesehen von militärischen Einsätzen im Rahmen der gesamten Bewaffneten Macht) jeweils eine autonome Angelegenheit der beiden Reichshälften.[14]

2. Das Militärwesen zwischen Prärogative des Monarchen und Kompetenz der Volksvertretungen

Das Militärwesen nahm im Konstitutionalismus des 19. Jahrhunderts eine Sonderstellung ein, weil zumindest ein Teil des militärischen Bereichs (nämlich der Oberbefehl im Gegensatz zur Militärverwaltung) von der allgemeinen Gegenzeichnungspflicht ausgenommen war. Das bedeutete, dass der Monarch im Rahmen des Oberbefehls Anordnungen treffen konnte, die auch ohne die Gegenzeichnung eines Ministers gültig und verbindlich waren. Diese Prärogative des Monarchen war für Österreich-Ungarn in § 5 Delegationsgesetz (DG) [15] ausdrücklich verankert:

„Die Anordnungen in Betreff auf Leitung, Führung und inneren Organisation der gesammten Armee stehen ausschließlich dem Kaiser zu."

Im Zusammenhang mit dieser Bestimmung stellte sich die Frage, was genau unter „Führung, Leitung und innerer Organisation" der Armee zu verstehen war. In der Praxis der Donaumonarchie nach 1867 traf der Monarch alle seine Anordnungen in Bezug auf die gemeinsame Armee ohne ministerielle Gegenzeichnung, sodass die Unterscheidung zwischen (gegenzeichnungslosem) Oberbefehl und (gegenzeichnungspflichtiger) Militärverwaltung in Österreich-Ungarn keine Rolle spielte – zumindest soweit es die gemeinsame Armee betraf.[16]

In Bezug auf die Landwehren stellte sich die Situation etwas anders dar: Dort war die Unterscheidung zwischen Oberbefehl und Militärverwaltung auch praktisch relevant. Für den Bereich des Oberbefehls war der Landwehrkommandant zuständig. Er musste Befehle des Kaisers an ihn nicht gegenzeichnen.[17] Für die Militärverwaltung war hingegen der Landesverteidigungsminister zuständig, der entsprechende Anordnungen des Kaisers gegenzeichnen musste und damit die (rechtliche) Verantwortung übernahm.[18]

Es gab aber auch im Militärwesen Bereiche, deren Regelung ausdrücklich den Volksvertretungen vorbehalten war. Das waren primär die Festsetzung des Wehrsystems und die Bewilligung der Rekrutenkontigente.[19] Außerdem konnte der Wirkungsbereich der Militärgerichte nur durch Gesetz festgelegt werden.[20] Bezüglich der k.k. Landwehr gab es zeitweilig noch einige andere Bereiche, die nur durch Gesetz geregelt werden konnten.[21]

Das Budgetrecht wurde für die gemeinsame Armee als pragmatische Angelegenheit von den Delegationen ausgeübt,[22] für die Landwehren als autonome Angelegenheit hingegen vom Reichsrat und vom Reichstag.[23] Die Festsetzung des Wehrsystems und die Rekrutenbewilligung erfolgten als dualistische Angelegenheiten ebenfalls durch die Parlamente der beiden Reichshälften.[24]

3. Die Militärgerichte im System des Ausgleichs

Die komplexe Struktur der Bewaffneten Macht führte dazu, dass auch die Militärgerichte im System des Ausgleichs eine Sonderstellung hatten. Die gesamte nicht-militärische Gerichtsbarkeit war eine autonome Angelegenheit der beiden Reichshälften.[25] Im Bereich der nicht militärischen Gerichte gab es somit nur entweder österreichische (cisleithanische) oder ungarische Gerichte, aber keine gemeinsamen. Das war im militärischen Bereich anders, weil dort die gemeinsame Armee und die beiden Landwehren jeweils ihre eigenen Gerichte hatten. Es gab also österreichische Militärgerichte (jene der Landwehr), ungarische (jene der Honved) und gemeinsame (jene der gemeinsamen Armee).[26] Diese Militärgerichte der gemeinsamen Armee waren die große Besonderheit der Militärgerichtsbarkeit. Sie waren nämlich die einzigen gemeinsamen Gerichte in der Monarchie.[27]

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[13] Johann Christoph ALLMAYER-BECK, Die Bewaffnete Macht in Staat und Gesellschaft, in: Adam WANDRUSZKA, Peter URBANITSCH (Hgg.), Die Habsburgermonarchie 1848–1918, Bd. V: Die Bewaffnete Macht (Wien 1987) 1–141, hier 81–87.

[14] WAGNER, Die k.(u.)k. Armee 417–418.

[15] RGBl. 146/1867.

[16] Christoph SCHMETTERER, Der Kaiser von Österreich als Oberster Kriegsherr 1867–1918, in: JHL 4/1 (2013) 10–18, hier 14.

[17] § 27 Landwehrgesetz 1869 (RGBl. 68/1869); § 18 Landwehrgesetz 1883 (RGBl. 87/1883); § 11 Landwehrgesetz 1893 (RGBl. 200/1893); § 6 Landwehrgesetz 1912 (RGBl. 129/1912).

[18] § 27 Landwehrgesetz 1869; § 17 Landwehrgesetz 1883; § 10 Landwehrgesetz 1893; § 6 Landwehrgesetz 1912.

[19] § 11 lit. b–c GG-RV (Grundgesetz über die Reichsvertretung, RGBl. 20/1861, in der Fassung 1867, RGBl. 141/1867).

[20] Art. 3 StGG-RiG.

[21] Von 1869 bis 1893 war für jede Verwendung der Landwehr außerhalb der cisleithanischen Reichshälfte ein eigenes Gesetz erforderlich, § 3 Landwehrgesetz 1869; § 19 Landwehrgesetz 1883; bis 1883 wurde auch die innere Organisation der Landwehr durch Gesetz geregelt, § 7 Landwehrgesetz 1869.

[22] § 1 lit. c iVm § 13 DG.

[23] § 11 lit. c GG-RV.

[24] § 11 lit. b GG-RV.

[25] Umkehrschluss aus § 1–2 DG; § 11 lit. k–l GG-RV.

[26] Zur Gerichtsorganisation im Einzelnen: SCHMID, Heeresrecht 503–510.

[27] Bis zur Einrichtung des ungarischen Obersthofmarschallgerichts 1909 war allerdings auch das Obersthofmarschallamt in Wien mit seiner Zuständigkeit für die Mitglieder des Herrscherhauses eine Art gemeinsames Gericht; dazu: Ivan ZOLGER, Der Hofstaat des Hauses Österreich (= Wiener Staatswissenschaftliche Studien 14, Wien–Leipzig 1917) 115–117.

Wie bereits ausgeführt hatte der cisleithanische Reichsrat die Kompetenz, den Wirkungsbereich der Militärgerichte festzusetzen. Diese Kompetenz unterschied sich in einem wesentlichen Punkt von den anderen Kompetenzen der Volksvertretungen im Militärwesen. Im Gegensatz zum Budget- und Rekrutenbewilligungsrecht war die Kompetenz bezüglich der Militärgerichte nicht im DG geregelt, sondern in Art. 3 StGG-RiG (Staatsgrundgesetz über die richterliche Gewalt):[28]

„Der Wirkungskreis der Militärgerichte wird durch besondere Gesetze bestimmt."

Die Genese dieser Bestimmung ist durchaus aufschlussreich. Im Entwurf des Subkomites des Verfassungsausschusses war folgender Wortlaut vorgesehen gewesen:

„Der Wirkungsbereich der Militärgerichte ist fortan auf die Strafgerichtsbarkeit über die in aktiver Dienstleistung stehenden Militärpersonen, über Kriegsgefangene und Geiseln und die von der k.k. Kriegsmarine eingebrachten Seeräuber beschränkt. Vom 1. Jänner 1869 an geht der gesammte übrige Geschäftskreis der Militärgerichte auf die Civilgerichte über."[29]

Auf den Antrag Rechbauers[30] beschloss der Verfassungsausschuss dann folgende Umformulierung, durch die sich der geplante Regelungsinhalt aber nicht substantiell änderte:

„Der Wirkungskreis der Militärgerichte ist fortan, vorbehaltlich der Bestimmungen des Kriegszustandes, auf die Aburteilung der von Militärpersonen begangenen militärischen Verbrechen und Vergehen, sowie auf Militär-Disciplinar-Vergehen, dann für Kriegsgefangene und Geißerln und die von der k.k. Kriegsmarine eingebrachten Seeräuber beschränkt. Vom 1. Jänner 1869 an geht der gesammte übrige Geschäftskreis der Militärgerichte auf die Civilgerichte über."[31]

Vor 1867 war die Zuständigkeit der Militärgerichte sehr umfassend gewesen.[32] Das Ziel des Verfassungsausschusses war, deren Zuständigkeit auf den Kernbereich des Strafrechts für aktive Angehörige der Armee zu beschränken. Das Abgeordnetenhaus nahm Art. 3 des Entwurfs an, das Herrenhaus änderte den Wortlaut auf Vorschlag der juridischen Kommission aber wie folgt:

„Der Wirkungskreis der Militärgerichte wird durch besondere Gesetze bestimmt."[33]

Diese geänderte Fassung wurde in weiterer Folge auch vom Abgeordnetenhaus übernommen und schließlich durch die Sanktion des Kaisers zum Gesetz.

Der Grund für die Änderung lag im Dualismus. Das Kriegsministerium und das Herrenhaus befürchteten, dass die ursprünglich vorgesehene Regelung (nur) in der cisleithanischen Reichshälfte dazu führen könnte, dass der Umfang der Militärgerichtsbarkeit in den beiden Reichshälften unterschiedlich ausgestaltet werden könnte. Daher sollte die genaue Abgrenzung einem eigenen Gesetz vorbehalten bleiben, das in Übereinstimmung mit der ungarischen Reichshälfte erlassen werden sollte.[34] 1869 wurde in Cisleithanien dann tatsächlich ein Ausführungsgesetz über den Wirkungsbereich der Militärgerichte erlassen.[35] Das Gesetz regelte ausschließlich die Abgrenzung der militärischen von der zivilen Gerichtsbarkeit. Diese Abgrenzung war 1867 – wie bereits ausgeführt – einem eigenen Gesetz vorbehalten worden, damit die Regelung mit der ungarischen Reichshälfte abgestimmt werden konnte. Seltsamerweise wurde das Ausführungsgesetz 1869 dann aber ohne vorherige Abstimmung mit Ungarn erlassen. In der ungarischen Reichshälfte wurde die Abgrenzung von Zivil- und Militärgerichtsbarkeit bis zum Ende der Monarchie nicht gesetzlich geregelt.[36]

Die Intention des historischen Gesetzgebers bezüglich Art. 3 StGG-RiG war also nur, dass die Abgrenzung der militärischen von der zivilen Gerichtsbarkeit durch (eigenes) Gesetz erfolgen sollte. Eine Aussage über die Regelung des militärgerichtlichen Verfahrens war hingegen nicht intendiert.

III. Die Kompetenz zur Regelung des Militärstrafverfahrens

Schon vor 1900 war lange klar, dass das Militärstrafverfahren dringend reformbedürftig war. Die Reform gelang jedoch erst mit der MilStPO 1912. Davor gab es immer wieder Entwürfe zur Reform, deren Umsetzung zuletzt an politischen Gründen scheiterte: Vertreter der ungarischen Reichshälfte verlangten nämlich gerade in den Jahren nach 1900 wieder eine Teilung der gemeinsamen Armee bzw. eine stärkere Magyarisierung ihrer ungarischen Teile. In Bezug auf das Militärstrafverfahren wurde das schließlich gelöst, indem der Kaiser Ungarisch als Verfahrenssprache akzeptierte.[37]

Neben diesen politischen Problemen stellte sich aber auch die Frage, wer überhaupt zur Erlassung von Vorschriften über das Militärstrafverfahren zuständig war – konkret, ob es in die Prärogativen des Monarchen fiel oder eine Kompetenz der Volksvertretungen war. Diese Frage war schon 1869 im Zuge von Reformüberlegungen aufgetaucht,[38] führte aber vor allem im letzten Jahrzehnt des 19. Jahrhunderts zu einer publizistischen Diskussion zwischen Weisl und Korwin-Dzbanski.

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[28] RGBl. 144/1867.
[29] Barbara HAIDER, Die Protokolle des Verfassungsausschusses des Reichsrates vom Jahre 1867 (Wien 1997) 197, Anm. 6.
[30] Rechbauer beantragte auch, die geplante Regelung schon mit 1. Juli 1868 in Kraft treten zu lassen, konnte sich mit diesem Antrag aber nicht durchsetzen; HAIDER, Verfassungsausschuss 198.
[31] Die neue Gesetzgebung Österreichs. Erläutert aus den Reichsraths-Verhandlungen, Bd. 1: Die Verfassungsgesetze und die Gesetze über den finanziellen Ausgleich mit Ungarn (Wien 1868) 428.
[32] WAGNER, K.(u.)k. Armee 268.
[33] Neue Gesetzgebung 458–459.
[34] Ebd.
[35] RGBl. 78/1869.
[36] SCHMID, Heeresrecht 497, WAGNER, K.(u.)k. Armee 540–541.
[37] WAGNER, k.(u.)k. Armee 553–554; hingegen hielt der Kaiser strikt an der deutschen Kommandosprache für die gesamte Bewaffnete Macht fest.
[38] WAGNER, K.(u.)k. Armee 544.

1. Ernst Weisl

Weisl war der Meinung, dass die Militärgerichtsbarkeit nicht zur inneren Organisation der Armee gehörte und damit auch nicht vom Kaiser kraft seiner Prärogativen geregelt werden konnte. Er begründete das mit drei Argumenten. Zunächst verwies er auf Art. XII des Kundmachungspatents zum MilStG 1855,[39] dessen erster Satz lautete:

„Das strafgerichtliche Verfahren bei den Militär-Gerichten wird durch ein besonderes Gesetz geregelt werden."

Hier war eine Regelung durch Gesetz ausdrücklich angeordnet. Außerdem war es für Weisl unlogisch, dass das materielle Militärstrafrecht durch Gesetz geregelt sein sollte, das militärische Strafverfahrensrecht aber nicht.[40]

Außerdem meinte er, dass sich Art. 2 StGG-RiG („Die Organisation und Competenz der Gerichte wird durch Gesetze festgestellt.") sowohl auf die Zivil- als auch auf die Militärgerichte bezog. Dies sah er durch Art. 3 StGG-RiG bestätigt. Er meinte nämlich, dass sich aus der Reihenfolge der beiden Bestimmungen ergebe, dass „Gerichte" in Art. 2 der weitere und „Militärgerichte" in Art. 3 der engere Begriff sei. Daraus leitete er ab, dass sich die Bestimmung des Art. 2 auf alle Gerichte, also auch auf Militärgerichte beziehe. Daher könne die Feststellung der Organisation und Kompetenz der Militärgerichte nur durch Gesetz erfolgen.[41]

Schließlich ergab sich für Weisl auch aus der Systematik des DG, dass die Regelung der Militärgerichtsbarkeit keine kaiserliche Prärogative im Sinne des § 5 2. Satz sei. Der erste Satz des § 5 beziehe sich nämlich nur auf die Verwaltung der gemeinsamen Angelegenheiten und ordne diese grundsätzlichen dem gemeinsamen Ministerium zu. Daher könne sich die Ausnahmeregelung des zweiten Satzes, in der die Prärogativen des Kaisers bezüglich der Armee definiert wurden, ebenfalls nur auf die Verwaltung beziehen. Die Militärgerichtsbarkeit sei aber kein Teil der Verwaltung und könne daher nicht von der kaiserlichen Prärogative umfasst sein.[42]

2. Stanislaus Korwin-Dzbanski

Korwin-Dzbanski kam in seinen Arbeiten zu diesem Thema zu einem grundlegend anderen Ergebnis als Weisl. Er meinte, dass die militärische Strafrechtspflege notwendigerweise ein Teil der inneren Organisation der Armee sei, und begründete das zunächst nicht juristisch, sondern durch betont biologistische Überlegungen:

„Auch die Armee ist selbstverständlich so ein ‚Organismus' höherer Ordnung. Ihre ‚innere Organisation' umfasst das innere Gefüge, ihren Bau sowie die Summe der Functionen aller ihre Elemente und Organe. Ähnlich wie beim individuellen Organismus in des Wortes engerer Bedeutung sind nun auch bei diesem Organismus höherer Ordnung die ‚Functionen' seiner Elemente und Organe sowie die Gesammtfunctionen desselben theils normale, regelmäßige (physiologische), theils solche unter zweckwidrigen Verhältnissen, reactive, annormale (pathologische). Zu letzteren werden beispielsweise gehören: die Zurückweisung oder Ausmerzung zweckwidriger (untauglicher) Elemente und – was hier zunächst interessiert – namentlich die Reaction (eventuell Unschädlichmachung) bei dem Vorhandensein direct schädlicher Elemente. Bekanntlich sind ‚Delicte' nichts Anderes, als nur Formen und Symptome von gewissen Erkrankungen socialer Organismen. Ergriffen hievon werden gewisse Elemente (Menschen) solcher Organismen. Eine der diversen Formen, in welchen der betroffene Organismus in solchen Fällen reagirt, ist die Strafrechtspflege. Die Art und Weise, wie sich diese Reaction in den Functionen des betreffenden Organismus und seiner Organe äußert, wird ‚formelles' (Process), wie sie sich aber in dem schädlichen Elemente (Verbrecher) selbst manifestiert (Strafe) ‚materielles' Strafrecht genannt. Dem Gesagten zufolge ist somit die ‚Militär-Strafrechts-pflege' ein Complex von Reactionen der Armee auf strafbare Insulte ihrer Mitglieder und die Art dieser Reaction steht mit der ‚inneren Organisation' der Armee in ursächlichem Zusammenhange. Wird also von einer Regelung der ‚Militär-Strafrechtspflege gesprochen, so kann darunter nur eine Änderung der ‚inneren Organisation' der Armee […] verstanden werden."[43]

In seiner Erwiderung auf Weisl brachte Korwin-Dzbanski dann aber doch juristische Argumente für seine Sichtweise. Zunächst führte er aus, dass das StGG-RiG schon ganz prinzipiell nicht auf die Militärgerichtsbarkeit anwendbar sein könne, weil die Armee und damit auch die Militärgerichtsbarkeit eine gemeinsame Angelegenheit beider Reichshälften sei. Korwin-Dzbanski verwies darauf, dass die Gesetzgebung bezüglich der gemeinsamen Angelegenheiten gemäß § 6 DG durch übereinstimmende Beschlüsse der Delegationen erfolgen sollte. Das StGG-RiG beziehe sich hingegen unstreitig nur auf die cisleithanische Reichshälfte und könne daher keine Regelung einer gemeinsamen Angelegenheit enthalten.[44]

Außerdem meine Korwin-Dzbanski, dass Art. 3 StGG-RiG keinen eigenständigen Sinn hätte, wenn die Regelung des Art. 2 ohnehin auch Militärgerichte einschließe. Vielmehr müsse Art. 3 als Ausnahmebestimmung zu Art. 2 verstanden werden. Bei den Militärgerichten werde eben nicht die Organisation und die Kompetenz durch Gesetz festgestellt, sondern lediglich deren Wirkungskreis. Diesbezüglich meinte Korwin-Dzbanski, dass Wirkungskreis ein Synonym für Kompetenz sei. Er kam daher zu dem Ergebnis, dass zwar die Kompetenz der Militärgerichte durch Gesetz festzulegen sei, nicht aber deren Organisation und somit das Verfahren.[45]

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[39] RGBl. 19/1855.

[40] Ernst WEISL, Ein verfassungsmäßiges Recht Sr. Majestät?, in: Stanislaus KORWIN-DZBANSKI, Die Gesetzgebende Gewalt Sr. Majestät als Obersten Kriegsherrn (Wien 1895) 14–17, hier 15.

[41] Ebd.

[42] WEISL, Verfassungsmäßiges Recht 16.

[43] Stanislaus KORWIN-DZBANSKI, Ein verfassungsmäßiges Recht Sr. Majestät!, in: Stanislaus KORWIN-DZBANSKI, Die Gesetzgebende Gewalt Sr. Majestät als Obersten Kriegsherrn (Wien 1895) 11–13, hier 12.

[44] Stanislaus KORWIN-DZBANSKI, Kritische Erörterungen, in: Stanislaus KORWIN-DZBANSKI, Die Gesetzgebende Gewalt Sr. Majestät als Obersten Kriegsherrn (Wien 1895) 18–34, hier 18–19.

[45] KORWIN-DZBANSKI, Kritische Erörterungen 19–22.

Korwin-Dzbanski bezweifelte auch, dass sich schon aus dem Kundmachungspatent zum MilStG 1855 ergebe, dass das Militärstrafverfahren nur durch Gesetz geregelt werden könne. Dafür führte er zwei Argumente an: Einerseits sei Art. XII des Kundmachungspatents durch § 5 DG materiell derogiert worden, andererseits sei zu bedenken, was im Jahre 1855 unter Gesetz verstanden worden sei, nämlich eine allgemeine Anordnung des Kaisers, bei der dieser aber nicht an einen Vorschlag einer Volksvertretung gebunden sei – weil es in der Epoche des Neoabsolutismus schlichtweg keine Volksvertretung gab.[46]

Schließlich setzte sich Korwin-Dzbanski noch mit der Frage auseinander, ob sich die militärischen Prärogativen des Kaisers nach § 5 2. Absatz DG nur auf die Verwaltung bezogen oder auch die Militärgerichtsbarkeit einschließe. Er meinte, dass der Begriff „Anordnungen" im zweiten Absatz ein wesentlich weiterer sei als der Begriff „Verwaltung" im ersten Absatz – freilich ohne seine Interpretation dieser Begriffe näher zu begründen. Daraus leitete er ab, dass sich die Prärogativen des Kaisers nicht nur auf die Verwaltung beschränkten, sondern auch die Regelung der Militärgerichtsbarkeit umfassten.[47]

3. Beurteilung

Es erscheint nicht sinnvoll, heute – mehr als hundert Jahre Erlassung der MilStPO – zu beurteilen, ob Weisl oder Korwin-Dzbanski Recht hatte. Hingegen ist es noch immer sinnvoll zu fragen, wie überzeugend die einzelnen Argumente vor dem Hintergrund der seinerzeitigen Rechtslage waren. Genauso aufschlussreich kann die Frage sein, welche (möglichen) Argumente damals nicht gebracht wurden.

Zunächst ist festzuhalten, dass die Interpretation des Art. 3 StGG-RiG für beide Autoren zentral war. Umso interessanter ist es, dass beide die Gesetzesmaterialien nicht heranzogen, obwohl diese schon damals gedruckt vorlagen und auch eindeutige Informationen über die Intentionen des historischen Gesetzgebers enthalten.[48]

Dass Weisl nicht auf die Gesetzesmaterialien einging lässt sich auch damit erklären, dass diese seinen Standpunkt nicht stützen konnten. Immerhin geht aus der Diskussion des Jahres 1867 eindeutig hervor, dass es in Art. 3 StGG-RiG nur um die Abgrenzung der Militär- von der zivilen Gerichtsbarkeit gehen sollte. Gerade deshalb ist es erstaunlich, dass Korwin-Dzbanski die Gesetzesmaterialien nicht als Argument für seine Position benutzte.

Bezüglich des Verhältnisses von Art. 2 und 3 StGG-RiG waren sich Weisl und Korwin-Dzbanski in einem Punkt einig, nämlich darin, dass „Gerichte" in Art. 2 der weitere und „Militärgerichte" in Art. 3 der engere Begriff war. Die Schlüsse, die sie daraus zogen, waren aber ganz unterschiedlich. Weisl leitete daraus ab, dass die allgemeine Regel des Art. 2 auch auf Militärgerichte anwendbar sein sollte. Korwin-Dzbanski hingegen sah in Art. 3 eine Ausnahmeregel. Militärgerichte waren auch Gerichte im Sinne des Art. 2; ihre Organisation und Kompetenz wäre daher an sich durch Gesetz festzulegen gewesen. Art. 3 machte aber eine Ausnahme, indem er bestimmte, dass bei den Militärgerichten nur der Wirkungsbereich durch gesondertes Gesetz geregelt werden sollte. Für mich ist die Argumentation von Korwin-Dzbanski überzeugender. Nicht umsonst fragte er, welchen Sinn Art. 3 hätte haben sollen, wenn die Militärgerichte ohnehin von Art. 2 umfasst gewesen wären.

Weisl und Korwin-Dzbanski beschäftigten sich zwar intensiv mit Art. 3 StGG-RiG und seinem Verhältnis zu Art. 2. Interessanterweise gingen beide aber nicht auf Art. 11 lit. k StGG-RV ein, wonach die Strafjustizgesetzgebung eine Kompetenz des Reichsrats war. Immerhin hätte sich auch hier die Frage gestellt, ob die Strafjustizgesetzgebung die Gesetzgebungskompetenz für das Militärstrafverfahren einschließt oder nicht. Vermutlich gingen beide davon aus, dass die entscheidenden Regelungen jene in den Art. 2 und 3 StGG-RiG waren und dass sich die Interpretation von Art. 11 lit. k GG-RV (Grundgesetz über die Reichsvertretung 1861 idF 1867)[49] an der Interpretation des StGG-RiG zu orientieren habe.

Auffällig ist auch, dass die Argumente beider Autoren der Komplexität des dualistischen Systems nur teilweise gerecht wurden. Beide hatten nämlich eine einheitliche Argumentationslinie, die sie sowohl auf die gemeinsame Armee als auch auf die Landwehr bezogen. Somit differenzierten sie nicht zwischen den cisleithanischen Gerichten der Landwehr und den gemeinsamen Gerichten der k.u.k. Armee. Dabei bezog sich das StGG-RiG grundsätzlich nur auf rein cisleithanische Angelegenheiten, das DG hingegen ausschließlich auf die gemeinsamen. Daher war es argumentativ nicht ganz sauber, aus dem StGG-RiG Schlüsse über die gemeinsame Armee abzuleiten oder aus dem DG solche über die Landwehrgerichte. Genau das tat Weisl aber. Er legte die Art. 2 und 3 StGG-RiG so aus, dass das Militärstrafverfahren nur durch Gesetz geregelt werden könne und bezog dieses Ergebnis nicht nur auf die Landwehrgerichte, sondern auch auf diejenigen der gemeinsamen Armee. Genauso ergab seine Interpretation von § 5 DG, dass sich die militärischen Prärogativen des Kaisers nur auf die Verwaltung, nicht aber auf die Justiz beziehen könnten. Auch dieses Ergebnis übertrug er undifferenziert auf die gemeinsame Armee und die Landwehr.

Korwin-Dzbanski nahm den Unterschied zwischen gemeinsamen und autonomen Angelegenheiten auch im Militärwesen zumindest grundsätzlich wahr. Immerhin verwies er darauf, dass sich Art. 2 und 3 StGG-RiG nur auf autonome Angelegenheiten Cisleithaniens bezogen und daher für gemeinsame Armee nicht relevant sein konnten. Daraus leitete er ab, dass der cisleithanische Reichsrat nicht für die Gesetzgebung zum Militärstrafverfahren der gemeinsamen Armee zuständig sein könne. Diese Argumentation stützte er auf § 15 DG, nach dem die Gesetzgebung in (pragmatisch-)gemeinsamen Angelegenheiten von den Delegationen ausgeübt werden sollte. Das Problem mit dieser Bestimmung lag allerdings darin, dass sie sich nur im österreichischen DG fand. Der ungarische GA XII:1867

[46] KORWIN-DZBANSKI, Kritische Erörterungen 22–25.
[47] KORWIN-DZBANSKI, Kritischer Erörterungen 26–27.
[48] Neue Gesetzgebung.
[49] RGBl41/1867.

enthielt keine korrespondierende Bestimmung. In der Praxis wurde dieser Widerspruch dadurch gelöst, dass es keine Gesetzgebung durch die Delegationen gab. Die Kompetenzen der Delegationen waren in der Praxis auf das Budgetrecht für die pragmatisch-gemeinsamen Angelegenheiten beschränkt. Die (sonstige) Gesetzgebung in pragmatisch-gemeinsamen Angelegenheiten erfolgte durch paktierte Gesetze von Reichsrat und Reichstag, obwohl dies nicht nur § 15 DG, sondern auch dem ersten Satz des § 11 GG-RV widersprach.[50] Diese Praxis ignorierte Korwin-Dzbanski in seiner Argumentation aber. Seine Argumentation, warum der Reichsrat keinesfalls zuständig sein könne, lief also ins Leere.

Allerdings war das Ziel von Korwin-Dzbanskis Argumentation nicht die Zuständigkeit der Delegationen, sondern die Unzuständigkeit des Reichsrats. Sein primäres Argument war daher auch nicht § 15 DG, sondern § 5 DG. Für ihn war klar, dass die militärischen Prärogativen des Kaisers auch das Militärstrafverfahren umfassten, weil auch das seiner Meinung nach eine Frage der inneren Organisation der Armee war. Diese Auffassung vertrat er sowohl für die gemeinsame Armee als auch für die Landwehr. Im Ergebnis war Korwin-Dzbanskis Argumentation bezüglich der einzelnen Teile der Armee damit genauso undifferenziert wie die von Weisl.

Es ist schon bemerkenswert, dass keiner von beiden hier eine abgestufte Position vertrat. Es wäre ja denkbar (wenn auch unpraktisch) gewesen, dass das Militärstrafverfahren bezüglich der gemeinsamen Armee vom Kaiser alleine hätte geregelt werden können, während für das Strafverfahren in der Landwehr ein Gesetz des Reichsrats mit kaiserlicher Sanktion erforderlich gewesen wäre. Immerhin gab es auch andere Bereiche, die in der Landwehr nur durch Gesetz, in der gemeinsamen Armee aber vom Kaiser allein geregelt werden konnten.

Meiner Meinung nach sind die Argumente Korwin-Dzbanskis insgesamt plausibler – zumindest in Bezug auf die gemeinsame Armee. Gerade hier zeigt sich aber, dass man sich aus der Distanz von mehr als einem Jahrhundert nicht anmaßen kann, die Richtigkeit zeitgenössischer Argumente zu beurteilen.

Die Diskussion um die Zuständigkeit für das Militärstrafverfahren wurde nämlich endgültig entschieden, als 1912 die neuen Militärstrafprozessordnungen erlassen wurden – und zwar gerade nicht im Sinne von Korwin-Dzbanski. Das neue Militärstrafverfahren wurde durch Gesetze eingeführt, die von Reichsrat und Reichstag beschlossen und dann vom Monarchen sanktioniert wurden. Damit war verbindlich entschieden, dass das Militärstrafverfahren nicht Teil der militärischen Prärogativen des Kaisers war.

Selbst nachdem entschieden war, dass die MilStPO 1912 durch Gesetz(e) erlassen werden sollte, gestaltete sich ihre konkrete Erlassung denkbar kompliziert. Tatsächlich wurden nämlich drei (praktisch gleichlautende) Prozessordnungen durch fünf Gesetze eingeführt: Die MilStPO für die k.k. Landwehr durch ein Gesetz des cisleithanischen Reichsrats,[51] die MilStPO für die k.u. Honved durch ein Gesetz des ungarischen Reichstags[52] und jene für die k.u.k. Armee durch paktierte Gesetze des Reichsrats[53] und des Reichstags[54] sowie ein Gesetz des bosnisch-herzegowinischen Landtags.[55] Dieser legislative Aufwand macht deutlich, wie kompliziert das System des Dualismus war.

[50] OLECHOWSKI-HRDLICKA, Gemeinsame Angelegenheiten 413–416.
[51] RGBl. 131/1912.
[52] GA XXXIII:1912.
[53] RGBl. 130/1912.
[54] GA XXXII:1912.
[55] Gesetz und Verordnungsblatt für Bosnien-Herzegowina 43/1914.

Rituale Blutanklage in Ungarn im Jahre 1883

(Ritual blood libel in Hungary in 1883)

István Stipta *

Abstract

This essay analyses the legal background of the blood libel process taken place in 1882–1883. It also gives an overview on the norms of Hungarian criminal process of that era and their prevail in the praxis. The paper examines each process phase, including the important momenta of the investigation, examination, accusation and the court litigation. It also follows the theoretical and practical deficiencies of the process. Furthermore, the paper searches for reasons that led to the ritual blood libel of medieval heritage in Hungary of the civil era.

Key words: *blood libel; ritual murder; court process of Tiszaeszlár 1882–1883; Hungarian criminal process.*

Am 1. April, 1882 verschwand ein Dienstmädchen mit 14 Jahren im ungarischen Dorf Tiszaeszlár am Theiß. Da sich an diesem Tag Juden aus der Gegend im Dorf trafen, verbreitete sich der Verbracht, dass sie das Mädchen töteten, und ihren Blut zum rituellen Zweck, zur Zubereitung der Ostermatze verwendeten. Bald fing die offizielle Untersuchung an, am Ende deren eine Anklage erhoben wurde, und nach der öffentlichen Verhandlung ein Urteil getroffen wurde. Der Prozess lief unter großem internationalem Interesse, und seine Wirkung in Ungarn war auch außergewöhnlich. Der Beitrag überblickt die damaligen ungarischen Regeln des Strafrechts, die einzelnen Phasen des Verhandlungsprozesses und die Urteile der Verhandlung.

I. Die Mangelhaftigkeiten des damaligen ungarischen Strafverfahrens

Die Verhandlung von Tiszaeszlár war im Wesentlichen die Folge der mangelhaften und widersprüchlichen rechtlichen Regelung der ungarischen strafsachlichen Rechtsverfolgung. Der Verdacht wäre prozessrechtlich nicht verstärkt worden können, wenn Ungarn über eine Prozessordnung des Strafverfahrens auf dem Niveau des Zeitalters verfügt. Man kennt, dass die gestalteten Regeln nicht einmal im Bereich des Strafrechts zu verabsolutisieren sind, es ist jedoch auch eine historisch bewiesene Tatsache, dass die Rechtsunsicherheit wegen des Normdefizites fast immer zu Missbräuchen der Rechtsprechung führt. Am Anfang der 1880er Jahre waren beide prozessrechtlichen Bereiche der ungarischen formellen Rechtsprechung nicht kodifiziert. Ein Grund der rechtlichen Unsicherheit war die hinziehende Justizpolitik von Kálmán Tisza, das andere Grund war es, dass die gesetzliche Regelung wurde nicht einmal von der damaligen Rechtswissenschaft bestimmt verlangt. Beherrschend war die organische Auffassung, nach dem das alte Recht auch auf dem Gebiet des Prozessrechtes beschützt, höchstens in aktualisierter Weise weiterentwickelt werden soll.[1]

Ein wesentlicher Teil der damaligen prozessrechtlichen Regeln stammten aus dem ständischen Zeitalter, weil 1861 die Enquete der Landesrichter (Országbírói Értekezlet) dafür, in Ungarn das historische Recht zu behalten. Die mehr entwickelte österreichische Prozessordnung aus dem Zeitalter des Neoabsolutismus wurde von der ungarischen Nation nicht akzeptiert. Um die Regeln des Strafverfahrens zu modernisieren, erarbeitete der Konsiliar des Ministeriums der Justiz Károly Csemegi – im Auftrag der Regierung – einen Entwurf mit 122 Paragraphen, der vom Justizminister István Bittó am 6. März, 1872 vor das Abgeordnetenhaus eingelegt wurde. Da sich das Parlament kurz danach löste, wurde der wichtige Vorschlag nicht angenommen. In seiner Ordnung No. 4765 schickte der Justizminister ihn den ungarischen Gerichten als maßgebende Regel am 1. Mai, 1872. Das, nach dem Umschlag des Vorschlags benannte „Gelbes Buch" spielte in der Rechtsanwendung eine wichtige Rolle[2] Dabei spielte es auch eine Rolle, dass der Generalanwalt von Budapest mit seiner Empfehlung No. 3224 vom 18. Mai, 1872 auch die Staatsanwaltschaften aufriefen, dem Vorschlag zu fol-

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1 Balogh, Elemér: Die ungarische Strafrechtskodifikation im 19. Jahrhundert. Rechtsgeschichte und Rechtsgeschehen. (Hrsg.) Thomas Vormbaum. Band 12. LIT Verlag. Wien/Zürich, 2010. 32–33. p. Diese Frage wird von der Seite des materiellen Strafrechts analysiert im Beitrag von Bató, Szilvia: Törvényesség nélkül. Az anyagi jogi legalitás elve a Csemegi-kódex előtt [Ohne Gesetzmäßigkeit. Das Prinzip der Legalität im materiellen Recht vor dem Kodex von Csemegi.] In: Konferencia a bírói hatalomról és az állampolgárságról. (Szerk.: Homoki-Nagy Mária) Szegedi Egyetemi Kiadó. Szeged, 2011. 29–40. p.

2 Bittó, István: 1872-es igazságügyminiszteri utasítás. [Anweisung des Justizministers von 1872]. Jogtudományi Közlöny. VII. évf. 1872. 4. sz. 29–32. p. Die Gründe der Verordnung: Jogtudományi Közlöny. VII. évf. 1872. 4. sz. 13–18. p.

gen. In der Verhandlung wurde meistens auf diese Rechtsquelle mit zweifelhafter Normativität verwiesen.

Eine gründliche, die Analyse der einzelnen Urteile voraussetzende Forschung könnte entscheiden, laut welcher Rechtsnormen und Rechtsprinzipien die Rechtsprechung in den 1880er Jahren in Ungarn lief. Im Allgemeinen ist es festzustellen, dass während der Zeit der großen Verhandlung das Strafverfahren laut der Rechtsprechung der königlichen Kurie, des Gelben Buchs, der dessen Vollstreckung dienenden Ordnungen des Generalstaatsanwalts und des Innenministers, der Ordnung des Innenministers vom 15. August, 1880, der weiterlebenden Bräuche und der einzelnen Regeln des Zivilprozessrechts (!) lief. Die entscheidenden Strafrichter verwendeten oft die damaligen wissenschaftlichen Werke, besonders das Buch „Strafrechtslehre" von Tivadar Pauler, in dem der Autor – der während des Verfahrens Justizminister war – für die veraltete gebundene Beweiswürdigung eine Stellung nahm.[3] Eine von den bitteren Lehren der Strafverhandlung des Jahrhunderts ist, dass sich im Jahre 1883 in Ungarn immer noch die individuelle Rechtsauffassung, die so genannte Rechtspraxis im Bereich der Strafrechtsprechung – in solchem empfindlichen Bereich des Staats- und Gesellschaftsleben – durchsetzte. Die Rechtsprechung war nicht einheitlich, der Partikularismus endete nicht, die Rechtsanwendung war in den verschiedenen Teilen des Landes abweichend.

Die maßgebenden Freiheitsgarantien des Strafprozesses, die deklarierten Verfahrensgrundsätze setzten sich widersprüchlich durch. Laut des Strafverteidigers im Verfahren Károly Eötvös „hatte Ungarn damals ein besonderes Strafverfahrenssystem. Ein verwickeltes System der Öffentlichkeit und des geheimen Verfahrens, der Mündlichkeit und der Schriftlichkeit. Während der Ermittlung konnte niemand, nicht einmal sein Rechtsvertreter, Verteidiger mit dem Beschuldigter kontaktieren. In die Akten der Untersuchung konnte niemand, nicht einmal der Verteidiger einsehen." Die Dauer der Untersuchung wurde auch nicht beschränkt, ihre Anordnung und Terminierung hing vom Untersuchungsrichter. Die Ordnung der Durchsetzung der Strafmacht war zentralisiert, sie befolgte in der Ermittlungsphase das Prinzip der Inquisition. Das inquisitorische Verfahren war auch laut Károly Csemegi „das aus dem Instinkt der Staatsmacht stammende System des Mystizismus, der Geheimnisvölligkeit, des Formalismus und der Subtilitäten."[4]

„Welches Land konstitutionell wurde, umgestaltete sein System zum akkusatorischen Verfahren." Das geschah noch nicht im damaligen Ungarn.[5] Während des Gerichtsverfahrens stellte es sich heraus, dass das akkusatorische Verfahren, das von den Zeitgenossen für erwünscht und von dem geltenden Recht für nachahmenswert gehalten wurde, setzte sich in der Praxis widersprüchlich durch. Der öffentliche Ankläger verfügte über das Recht zu beantragen, das jedoch bezog sich nicht auf, den ganzen Prozess anzutreiben, sondern lediglich die als Prozessphase betrachtete Vorprüfung zu veranlassen. Auch innerhalb dessen war es unklar, wie und wie tiefgründig die Anträge der Staatsanwaltschaft die Prüfungshandlungen bestimmen können. Man findet keine Verfügung nicht einmal davon, welche prozessrechtlichen Konsequenzen die Anklagerücknahme durch den Staatsanwalt während der Untersuchung hatte. Es formte sich ein auch die Praxis paralysierender Widerspruch auch in diesem Fall zwischen den Bestimmungen von der Öffentlichkeit und der Kompetenz des Staatsanwalts im Gelben Buch und im Gesetz von der Staatsanwaltschaft (Gesetz Nr. XXXIII vom 1871).[6]

Wegen der dogmatischen Unbestimmtheit des ungarischen Prozessrechts separierten sich klar die einzelnen Phasen des Verfahrens, und nicht einmal die Regelung in Bezug auf die Rechtsstellung der Personen im Gerichtsverfahren war eindeutig. Das Gelbe Buch unterschied zwischen der Vorermittlung und der Untersuchung.[7] Diese zweifache Bezeichnung mit verschlimmerter Terminologie täuschte vor, dass der Prozess auch eine ordentliche Ermittlungsphase hatte. Die Rechtswissenschaft kritisierte scharf die Tatsache, dass im Prozess zwei verschiedene Behörden (die Polizei und das Gericht) mit gleichen Verrichtungen beschäftigt wurden. Vom Aspekt des Gerichtsverfahrens

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[3] Pauler, Tivadar: Büntetőjogtan. II. kötet. Anyagi büntetőjog különös része. Alaki büntetőjog. [Strafrechtslehre. 2. Band, 2. Besonderer Teil des materiellen Strafrechts. Formelles Strafrecht.] 2. kiad. Pest, 1870. (im Weiteren: Pauler) 421–431. p. Die weiteren maßgebenden rechtswissenschaftlichen Werke: Kautz, Gusztáv: A magyar büntető jog és eljárás tankönyve különös tekintettel a gyakorlati élet igényeire is. [Das Lehrbuch des ungarischen Strafrechts und – Prozesses mit besonderer Hinsicht auch auf die Ansprüche des praktischen Lebens.] Pest, 1873.; Magyar bűnvádi eljárás törvényszékek előtt. Törvényjavaslat. Készítette [Akkusatorisches Verfahren in Ungarn vor den Gerichtshöfern. Hergestellt von] Csemegi, Károly. Bp., 1882.; Bűnvádi eljárás a törvényszékek előtt. Szokásjogi forrásokból összeállította [Akkusatorisches Verfahren vor den Gerichtshöfern. Von gewohnheitsrechtlichen Quellen zusammengestellt von] Fayer, László. Bővített különlenyomat a Jogtudományi Közlönyből. [Erweiterte Sonderausdruck vom Rechtswissenschaftlichen Amtsblatt.] Bp., 1884.; Bűnvádi eljárás a törvényszékek előtt. Szokásjogi forrásokból összeállította [Akkusatorisches Verfahren vor den Gerichtshöfern. Von gewohnheitsrechtlichen Quellen zusammengestellt von] Fayer, László. Második füzet. [Zweites Heft.] Bp., 1885.; Fayer, László: A magyar bűnvádi eljárás mai érvényében. [Das geltende akkusatorische Verfahren in Ungarn.] 2. kiad. Bp., 1887.; Székács, Ferencz: A magyar büntető eljárás kézikönyve [Das Handbuch des ungarischen Strafverfahrens.] 2. kiad. Bp. 1887. (im Weiteren: Székács).

[4] Pauler 352–353. p.; Eötvös, Károly: A nagy per, mely ezer éve folyik s még sincs vége. [Die große Verhandlung, die seit 1000 Jahren läuft, und trotzdem ist es noch nicht zu Ende.] Révai testvérek Irodalmi Intézet Rt. Budapest, 1904. (im Weiteren: Eötvös) III. 157. p.; Székács 412–413. p.

[5] Tervezet [Entwurf] 1882. 15. p. Es existierte auch ein gegenteiliger Standpunkt; in der Zeit des Gerichtsverfahrens argumentierte Gusztáv Beksics „im Interesse der Geltendmachung der ungarischen Staatsidee" für den akkusatorischen Prozess. Magyar Jogászegyleti Értekezések XII. köt. A büntető bíróságok szervezete és hatósági köre, tekintettel a magyar bűnvádi eljárás tervezetére. 1883. március 19 és június 1 között folyt vita. [Aufsätze der ungarischen Juristenvereins. XII. Band. Die Organisation und Kompetenzen der Strafgerichte angesichts des Entwurfs des ungarischen akkusatorischen Prozesses.] Bp., 1884. 64. p.

[6] Nánási, László: A magyar királyi ügyészség története 1871–1945. [Die Geschichte der ungarischen königlichen Staatsanwaltschaft.] Legfőbb Ügyészség. Bp., 2011. (im Weiteren: Nánási) 86. p.; Die Dokumente von József Bary in Beziehung mit der Untersuchung von Tiszaeszlár. Országos Széchényi Könyvtár. Kézirattár. [Landesbibliothek Széchényi, Manuscriptarchiv.] Fol. Hung. 1847/I-II. (im Weiteren: OSZK Bary) 671–672. p.

[7] Dr. Baumgarten, Izidor: Az előzetes eljárás reformja (Különlenyomat a „Büntetőjog Tárából"). [Die Reform des vorläufigen Prozesses (Sonderausdruck aus der Sammlung des Strafrechts)] Bp., 1893. (im Weiteren: Baumgarten) 8–9. p.

von Tiszaeszlár stellte sich als tragisch auch die dogmatische Sicht dar, die die Vorermittlung und die Untersuchung nicht für den organischen Teil des Strafprozesses hielt, deshalb wünschte sie sich nicht, die strafrechtlichen Freiheitsgarantien auf diese Prozessphasen – nicht einmal im erforderlichen Maße – zu erweitern. Die Vorermittlung wurde inhaltlich als die Vorbereitung der richterlichen Untersuchung durch die öffentliche Verwaltung betrachtet.

Die weitere Mangelhaftigkeit des damaligen Systems der Rechtsverfolgung war es, dass es der königlichen Staatsanwaltschaft lediglich das Überwachungsrecht im laufenden Verfahren und lediglich eine nachträgliche Rolle bei der definitiven Beurteilung des Falles einräumte, damit führte es die ersetzenden und ergänzenden Untersuchungen ein.[8] Die Rechtslage der am akkusatorischen Gerichtsverfahren Teilnehmenden und die in das Gerichtsverfahren gezogenen Personen waren auch ungeklärt. Damit kann es erklärt werden, dass auch in den offiziellen Dokumenten der großen Verhandlung sich die Ausdrücke Verdächtigter, Angeschuldigter und Angeklagter mischen. Es existierte für die Prozessfristen keine rigorose Regel. Deshalb konnte es vorkommen, dass der öffentliche Ankläger nur am 12. Mai, 1882 die – zu dieser Zeit schon ein internationales Echo auslösende – Ortsuntersuchung des Falles verordnete.[9]

Nicht einmal die öffentliche Verwaltung und die Rechtsprechung wurden voneinander getrennt, bei der Teilung der Staatsgewalt setzten sich die Prinzipien von Montesquieu nicht durch. Für die Verhältnisse der 1880er Jahre ist die Ordnung des Innenministers charakteristisch, in dem es von der Mitwirkung der Munizipien in den akkusatorischen Verfahren ging. Aufgrund dieser Ordnung erhielten die Verwaltungsbeamten eine Ermittlungsrolle und nahmen ungebildete Gemeindenrichter und Komitatspanduren an der Judikatur teil. Der Einleitungstext der Ordnung an sich ist die ernste Kritik der damaligen Rechtsprechung. „Derjenige weitverzweigte und vielmals kontroverse Prozess, der sich – mangels eines Gesetzes mit systematischer und taxativer Maßnahme – im Bereich der Strafjustiz, rein aufgrund der Praxis des Gerichtshofes an den ungarischen Gerichten entwickelten, führten oft zu Kompetenzkonflikten und ungeordneten Umständen.“ [10]

Der erdrückende Widerspruch der damaligen Rechtsprechung war es, dass – bis zum Gesetz Nr. XVII. vom 1891 zur Modifizierung der Organisation der Richter und der Staatsanwälte – sich auf den richterlichen Beruf niedrigere Qualifikationsvorschriften als die für die Rechtsanwälte bezogen. Die bruchstückartigen Verfahrensregeln setzten keine Befähigungsbedingungen gegen die an der Ermittlung Teilnehmende, so wurde die Vorermittlung von dem Gemeinderichter und dem Notar der Gemeinde getan. Entgegen dem Gelben Buch wurde ein Subnotar des Gerichtshofes zur Untersuchung des Kriminalfalles ausgeschickt. Deshalb schrieb Eötvös, dass „weder Gesetz, noch Praxis gestattete, dass bei solchem wichtigen Fall solcher niederwertige Gerichtsbeamte die große und schwierige Arbeit der Untersuchung verrichten. Der Gerichtshof jedoch überwand das Gesetz und die Praxis.“ [11] Mangels ausschließender Normen konnte in diesem Fall eine wegen Mordes verurteilte Person der Notar des Untersuchungsrichters werden, und konnte das die Anklage des eines von den deutigsten Kriminalprozessen im Jahrhundert begründende Protokoll verfertigen. In dem Verfahren äußerster Bedeutung wurde die Ermittlung – wieder zitiert Eötvös – „auf ein Zöglingsubnotar als Untersuchungsrichter, einen Substaatswalt mit stupider Denkgewohnheit, ein paar Gendarmen roher Moral und ein paar unerfahrene, ungebildete Ärzte vertraut.“ [12]

Im Vorbereitungsprozess wurde auch die Unschuldsvermutung beeinträchtigt, da es vorkam, dass von den Verdächtigten der Beweis ihrer Unschuld erwartet wurde. Auch noch in der Begründung des freisprechenden Urteils erster Instanz fasste ab, dass „die leugnenden Angeklagten waren nicht fähig, mit dem Geständnis welches einwandfreien Zeugen es zu beweisen, dass sie während der Zeit der laut der Anklage von ihnen begehenden Handlung nicht in der Kirche waren.“ [13] Die maßgebenden Normen waren nicht einmal in der Frage der Unmittelbarkeit und der Mündlichkeit des Verfahrens eindeutig. Nicht einmal für die freie Beweiswürdigung der Richter sind maßgebliche Regeln zu finden. Die Verteidigung konnte nicht alle ihre Rechte während des Verfahrens durchsetzen. Obwohl der Verteidiger laut des damaligen Strafverfahrens mit den Angeklagten nicht kontaktieren durfte, hätte er jedoch – laut des Gesetz vom 1871 an die Staatsanwaltschaft – mit den Zeugen sprechen dürfen. Diese Möglichkeit wurde für die Verteidigung in der Vorermittlungsphase des Gerichtsverfahrens nicht gewährleistet.

Die Methode der Verwendung der Beweise war ungeregelt, es existierte nicht einmal eine schriftliche Regel für die Anhörung der Zeuge. Sie durften in der Privatwohnung des Gendarmen und in Anwesenheit von Unzuständigen verhört wurden, wie es bei der Erzwingung der entscheidenden Äußerung in der Nacht am 21. Mai, 1882 passierte. Während des Verfahrens ermittelte der Notar ohne Ermächtigung, führte die Anhörung und stellte das Protokoll zusammen. Die von der Behörde gesammelten prozessualen Beweise waren in entscheidendem Maße Zeugenaussagen, zwar laut der damaligen Rechtsliteratur war „kein zweifelhafterer Beweis als die Zeugenaussage.“ [14] Die Un-

[8] Baumgarten 161. p.
[9] OSZK Bary 685–687. p.
[10] A 13.587/1872. BM számú rendelet. [Ordnung des Innenministers Nr. 13.857/1872].
[11] Auch aus den Memoiren von József Bary stellt sich es heraus, dass es am Gerichtshof von Nyíregyháza solche Person mit richterlichen Qualifikation (Géza Megyery) existierte, die rechtsmäßig die Tätigkeit des Untersuchungsrichters hätte erfüllen können. A tiszaeszlári bűnper. Bary József vizsgálóbíró emlékiratai. [Das Strafverfahren von Tiszaeszlár. Die Memorande vom Untersuchungsrichter József Bary.] Királyi Magyar Egyetemi Nyomda. Bp., 1933. (im Weiteren: Bary) 46. p.
[12] Eötvös II. 72. p.; Antal, Tamás: Törvénykezési reformok Magyarországon (1890–1900). Ítélőtáblák, bírói jogviszony, esküdtszék. [Reforme der Justiz in Ungarn (1890–1900). Rechtsmittelgerichte, richterlicher Rechtsverhältnis, Schwurgericht.] Dél-Alföldi Évszázadok 23. Csongrád megyei Levéltár. Szeged, 2006. 137–154. p.
[13] Urteil erster Instanz, Eötvös III. 233. p.
[14] Székács 70. p. Mit gleichem Inhalt: Pauler 437–440. p.

tersucher des Falles wollten statt sachlicher Beweise um jeden Preis belastende Zeugen erwerben. Während der Vorermittlung erzwangen die Gendarmen mit Gewalt Zeugenaussagen essentieller Bedeutung.[15] Der Untersuchungsrichter hielt nicht einmal die Rechte des in das Gerichtsverfahren gezwungenen minderjährigen Kindes ein. Der Vater wurde nicht in das Verfahren eingezogen, und kein Betreuer – wie das damals benannt wurde – wurde für den Schutz der Rechte der Angeschuldigten mit beschränkter Geschäftsfähigkeit, für die Vertretung ihrer außerprozessualen Interessen beigeordnet.

Die Logik des Untersuchungsrichters baute sich in den von ihm geführten Phasen des Verfahrens auf das Prinzip der Kollektivschuld. Die Untersuchung betrachtete es auch als einen zweifelhaften Umstand, dass es in Tiszaeszlár mehrere fremde Schächter und einige jüdische Bettlerfamilien im fragwürdigen Zeitpunkt gemeinsam anwesend waren. Die Verdächtigten, die einander oft gar nicht kannten, wurden aus entfernten Siedlungen gesammelt, beaufsichtigt mit besonderem Kummer, dass sie ausschließlich Juden seien. Nur Juden wurden verklagt, so wurde der Christ Ignác Matej nicht angeklagt, der (wie sich später herausstellte: auf Zwangswirkung) seine Teilnahme an der Leichnamschwemmung bekannte, aber einer von den Angeklagten wurde auch Emanuel Taub, der mit den Angeklagten nur zu Mittag aß, und den Gästen, die zum Probenflehen und zur Schächterwahl in Tiszaeszlár ankamen, Unterkunft gab. Sonst in seinem Fall beantragte nicht einmal der königliche Hauptstaatsanwalt die Anklageerhebung, trotzdem fand der Anklagerat des Gerichts so, dass er davon wissen musste, was die anderen getan hatten.

Während der Vorermittlung wurde auch das Prinzip der Öffentlichkeit verletzt. Laut des traditionellen ungarischen Gewohnheitsrechts durfte jede „anständige, erwachsene Person" bei den prozessentscheidenden Verfahrenshandlungen anwesend sein. Ein besonderes Recht zu erscheinen hatten der Angeklagte und der Verteidiger. Laut der seit Jahrhunderten existierenden Praxis sollte die Vorentscheidung des Gerichtshofes, die mit der Ausschließung der Öffentlichkeit getroffen wurde, als nichtig betrachtet werden. Trotzdem wurden weder die Angeklagten noch die Verteidiger von der die Zeugenaussagen beglaubigenden Verhandlung informiert. Nicht einmal zur richterlichen Beschau wurden die Angeklagten eingeladen, und wurden die Verteidiger nicht informiert. Schon 1765 verlangte Cesare Beccaria, die Bedingungen der vorläufigen Festnahme zu bestimmen. Das damalige ungarische Prozessrecht entsprach nicht einmal dieser Forderung. Auch unter solchen Umständen kam es die Situation selten vor, den Angeklagten aufgrund seiner Zeugenaussage zu verhaften, wie es Móric Scharf passierte. Entgegensetzt der elementaren Regeln der Rechtsprechung wurde der Untersuchungsgefangene in einem Privathaus unterbracht, und der Kronzeuge des Gerichtsverfahrens – mit einer an die Rechtsprechung des Mittelalters erinnernden Lösung – wurde für 14 Monate im Untersuchungsgefängnis gehalten. Nach der Freilassung des früher verhafteten minderjährigen Kronzeugen („mit der Ausschließung der Möglichkeit, mit seinen Eltern zu kontaktieren) wurde ihm im offiziellen Raum der Gefängniswärter eine Unterbringung gewährleistet.[16]

Vor 1848 wurde das ungarische Strafgerichtssystem auf die Schriftlichkeit gebaut. Auch in der Zeit des Gerichtsverfahrens von Tiszaeszlár hätte die präzise Befestigung der Verfahrenshandlungen eine besondere Bedeutung gehabt, da die Berufungsforen ausschließlich aufgrund der Dokumente des Gerichtsverfahrens entschieden. Das das große Strafprozess begründende Protokoll der Verdächtigten hatte kein Datum darauf, selbstverständlich damit es nachträglich auf den Zeitpunkt datiert werden kann, auf welchen die falsche Aussage erzwungen wird. Das Protokoll, das von dem Prozess der Erkennung in Csonkafüzes geschrieben wurde, wurde nicht mit den Zeugen unterschrieben, und befestigt wurden nicht einmal die Äußerungen, die im Leichnam Eszter Solymosi erkannten. Das Protokoll der von den Flößern erzwungenen Aussagen wurde vom Dolmetscher nicht unterschrieben. Der Untersuchungsrichter stellte das Protokoll selbst zusammen, obwohl das Gelbe Buch die Verpflichtung vorschrieb, Protokollführer zu verwenden. Der königliche Staatsanwalt hätte bei der Anhörung der Angeklagten nicht anwesend sein können, trotzdem nahm er daran handelnd teil.

Das Strafgericht von Nyíregyháza authentifizierte am 23. Mai, 1883 das den Prozess gründende Protokoll des Kronzeugen, wie das die Geschworenen der Komitate im ständischen Alter in der Zeit von Mátyás Hunyadi tan. Dieser Akt kann vom Aspekt der Rechtsgrundsätze auch nachträglich ausgesetzt werden, weil von 1872 die schriftliche Verhandlung der Gerichtsverfahren endete, die Verhandlungen wurden öffentlich, mündlich, mit der Mitwirkung der Betroffenen gehalten, um die unmittelbare Wahrheit zu ermitteln.[17] Die Ergebnisse der Untersuchung waren strikt geheim, nur diejenige konnten öffentlich werden, die gegen die Angeklagten läuteten. Diese Mangelhaftigkeiten können nicht nur auf die Versäumnisse der amtlichen Mitwirkenden zurückgeführt werden; sie waren in erheblichem Maße die Konsequenzen der widersprüchlichen prozessrechtlichen Regelung.

Einer der wichtigen Versuche, das moderne Strafprozessrecht zu schöpfen, der Gesetzentwurf vom Innenminister Teofil Fabiny vom Jahre 1888 fasste die Besonderheiten Strafjustiz dieser Epoche folgenderweise zusammen: „Der Mangel an System und Einförmigkeit, Grundprinzipien von der schon lange veralteten und kaum gekannten ungarischen Praxis, Regeln die angesichts der Einzelheiten gefolgt und von einer anderen, weniger freisinnigen Gesetzgebung geschöpft wurden, und von den Entwicklungen der lokalen Praxis ergänzt wurden, Willkür in vielen Richtungen und die grellsten Anomalien."[18]

[15] Die Gewalt wurde von der Begründung des Urteils der Kurie dritter Instanz als eine Tatsache festgestellt. Kúriai ítélet. [Urteil der Kurie.] Eötvös III. 275. p.

[16] Szabolcsi Levéltár [Archiv] 129/1882 sz.

[17] Laut eines von den Dokumenten der Untersuchung begründete der eventuelle spätere Widerruf der Aussagen die Beglaubigung durch das Gericht. Das zeigt auch die veraltete inquisitorische Denkweise, die das Recht auf den Widerruf der Aussage bezweifelt. OSZK Bary 686. p.

[18] A magyar bűnvádi eljárás törvényjavaslata. Az 1887/92-iki országgyűlés második időszakában a képviselőház elé terjesztette Fabiny Tihamér igazságügyminiszter. [Der Gesetzentwurf des ungarischen akkusatorischen Prozesses. In der zweiten Etappe des Parlaments vom 1887/92 präsentiert von Innenminister Tihamér Fabiny.] Franklin Társulat. Bp., 1889. 15. p.

II. Die Phasen des Gerichtsverfahrens

1. Phase der Polizei (öffentlichen Verwaltung)

Der betreffende Strafprozess wurde von einer Periode von beinahe einerhalb Monat antizipiert, deren amtlichen Maßnahmen und hauptsächlich Versäumnisse vom Aspekt der Sammlung der tatsächlichen Grundlagen des Gerichtsverfahrens von entscheidender Wichtigkeit waren. Die Mutter von Eszter Solymosi berichtete am April 3. 1882 dem Hauptrichter des Dorfes das Verschwinden ihrer Tochter vom 1. April. Schon derzeit bat die Mutter die Behörde, „die jüdische Kirche durchzusuchen." Dazu fühlte sich der Vorgesetzte des Dorfes nicht bevollmächtigt, er erfasste kein Protokoll, er traf keine amtliche Maßnahme, er schickte nur die Mutter zu seinem Vorgesetzten des Bezirks weiter.[19] Am nächsten Tag berichtete so der Anmelder selbst dem Hauptstuhlrichter des Bezirks in Vencsellő das Verschwinden und sein Verdächtnis. Die Mutter bat wieder, die Kirche zu untersuchen, aber Jenő Jármy erließ nur eine offizielle Fahndung, die die Personenbeschreibung des verschwundenen Dienstmädchens auch beinhaltete.[20] In dem Fall stellte die disziplinärische Untersuchung, die von Innenminister Kálmán Tisza veranlasst wurde, die Verantwortung von Jármy später fest. Laut des Hauptstaatsanwalts des Komitats bestand das Versäumnis darin, dass das Organ der öffentlichen Verwaltung hielt nach der ersten Meldung von Frau Solymosi „die regelmäßig zu vollstreckende Polizeiuntersuchung nicht sofort, weil es nicht reicht, nur die verschwundenen Personen ordnungsgemäß zu fahnden, sondern unbedingt auch ordentliche polizeiliche Untersuchung zu halten, die die Umstände der Verschwindung darstellt."[21]

Es ist eine besondere und bisher wenig gekannte Tatsache, dass die Mutter von Eszter Solymosi am „laut der Anweisung von Gábor Farkas" 6. April in Nyíregyháza auch den Vorsitzenden des Komitatsgerichtshofs Ferenc Kornis aufsuchte, dem sie sagte, dass ihre Tochter von den Juden „unterschlagen" wurde. Der Vorsitzende „verwies sie mit der Bemerkung, dass sie solches Hörensagen nicht glauben solle", „er anwies übrigens [die Analphabete], ihre Beschwerde schriftlich einzureichen, was sie jedoch versäumte zu tun." Die Erinnerung an die Begegnung konnte dem Leiter des Gerichtshofs, dem Vorsitzenden des Anklagerates und dem Leiter des Strafrats, der später die Angelegenheit auf erster Instanz entschied, seelische Beschwerden verursachen. Es wäre nämlich die amtliche Pflicht vom Vorsitzenden des Komitatsgeichtshofs Ferenc Kornis gewesen, mit dem Prozess anzufangen und die Ortsuntersuchung sofort zu verordnen.[22] Wenn er fünf Tage nach dem Verschwinden getan hätte, hätte die Untersuchung schneller und ergebnisreicher sein können.

Die Behörden der öffentlichen Verwaltung untersuchten nicht mit richtiger Gründlichkeit die Umstände des Verschwindens und die Ereignisse des inkriminierten Tages. In dieser entscheidenden Phase der Aufklärung des Falles verging zudem ein Monat ohne Maßnahme definitiv zu treffen. Die Mutter gang am 4. Mai wieder zum Hauptstuhlrichter, so dass er Untersuchung hält. Jármy schrieb einen Brief an den Gemeinderichter, in dem er ihn bat, Maßnahme zu treffen, und von deren Ergebnisse zu referieren. Den Brief brachte die Mutter (!) heim und gab ihn dem Gemeinderichter Gábor Farkas.[23] Von diesem Moment an rechnet man den offiziellen Anfang der Ermittlung der Polizei.

Der Gemeinderichter hielt zuerst am 6. Mai mit der Hilfe des Gemeindenotars Ermittlung. Im dessen Laufe wurde die Ortsgerede (die Version des rituellen Mords vom Kind mit 5 Jahren Samu Scharf) auch schriftlich festgestellt. Deren Wahrheitsgehalt wurde nicht kontrolliert, man überzeugte sich davon nicht, ob das Kind durch das Schlüsselloch der Judenkirche alles überhaupt sehen konnte, was er behauptete. Die Leute von der Behörde der Gemeinde verhörten nicht einmal die Hauswirtin von Eszter Solymosi, sie strebten sich nicht, die sachlichen Beweise einzusammeln. Der Vorstand der Gemeinde schickte zum Hauptstuhlrichter Jenő Jármy am selben Tag das Protokoll, aber Jármy traf auch diesmal keine definitiven Maßnahmen, sondern er, ignorierend „die ordnungsmäßig zu vollstreckende Untersuchung der Polizei", leitete seelenlos zur Behörde der öffentlichen Anklage, zum königlichen Staatsanwalt von Nyíregyháza das Dokument weiter.[24]

Die amtliche Akte wurde auf den königlichen Vizestaatsanwalt László Nagy signiert, der sich auch nicht beeilte, die eingegangenen Dokumente durchzustudieren.[25] Der Vertreter der Anklagebehörde beantragte aufgrund der genommenen Protokolle am 12. Mai, dass der königliche Gerichtshof auf dem Ort eine richterliche Untersuchung hält. Wegen der abwartenden, zögernden Attitüde der Organe der öffentlichen Verwaltung geriet der Fall von Eszter Solymosi zu spät zum Strafverfahren. Die Organe der öffentlichen Verwaltung konnten sogar die den Grund der Verschwindung vermutenden persönlichen und sachlichen Beweise nicht einsammeln – obwohl das ihre Aufgabe gewesen wäre.

2. Die Vorermittlung des Gerichtshofs

Die zweite Prozessphase des Strafverfahrens fing am 12. Mai, 1882 an, als Vizestaatsanwalt László Egresi Nagy eine Ortsuntersuchung in Tiszaeszlár beantragte. Die Prozessphase schließ am 29. Juli, 1882.[26] Die Aufgabe der damaligen Vorermittlung war, die Umstände der nach dem Verdacht begangenen Straftat

[19] Szabolcsi Levéltár [Archiv vom Komitat Szabolcs] 5208/82. sz.
[20] OSZK [Landesbibliothek Széchényi] Bary 221. p.; Kövér, György: A tiszaeszlári dráma. Társadalomtörténeti látószögek. [Das Drama von Tiszaeszlár. Sozialwissenschaftliche Blickwinkel.] Osiris. Bp., 2011. 750 p. (im Weiteren: Kövér). 357. p.; Eötvös I. 83. p.
[21] Szabolcsi Levéltár 670/1882. sz. Szikszay Pál megyei főügyész. [Komitatshauptstaatsanwalt Pál Szikszay].
[22] Szabolcsi Levéltár 5208/82. sz.; Kövér 367. p.
[23] Eötvös I. 86. p.
[24] Szabolcsi Levéltár 3087/82. sz. Gegen Jármy veranlasste der Innenminister – durch den Hauptgespan – auch eine disziplinäre Untersuchung, die die Organe des Komitates ohne Strafe, mit einer Warnung beschloss.
[25] Kövér 372–373. p.; Bary 43. p.
[26] Bary 1933. 611. p.

und die annehmbaren Täter herauszufinden. Die für diese richtungsgebenden Prinzipien waren in § 19–32 des Gelben Buchs. Der Leiter der Vorermittlungsphase und verantwortlich dafür war der Untersuchungsrichter, der die Organe der öffentlichen Verwaltung in Anspruch nehmen durfte, aber sie hatten nur subsidiäre Behördenaufgaben. Die Staatsanwaltschaft hatte keinen definitiven Einfluss an die Tätigkeit des Untersuchungsrichters, sie sollte lediglich sein Büro von den Ermittlungshandlungen und eventuellen Ortsuntersuchungen informieren. Wenn der Leiter der Anklagebehörde es für rechtfertigt hielt, durfte er den ausgewählten Staatsanwalt auftragen, bei den Ermittlungshandlungen anwesend zu sein und die für wichtig gehaltenen Propositionen zu treffen. Wenn es eine Auseinandersetzung zwischen dem Untersuchungsrichter und dem Staatsanwalt von den zu treffenden Maßnahmen gab, dann entschied der Rat des Gerichtshofs.[27]

Der Ermittlungsantrag der Staatsanwaltschaft formulierte den Verdacht „des gewaltsamen sexuellen Verkehrs, Wegstehlens, Entführung". Der Strafsenat des königlichen Gerichtshofs von Nyíregyháza fand die Vorlegung von László Egresi Nagy am 13. Mai definitiv begründet, und gab wegen der Verordnung der dringenden Untersuchung einem mit ihm befreundeten Untersuchungsrichter die Dokumente des Falles.[28]

Am 16. Mai setzte der Untersuchungsrichter József Bary „im Fall gegen József Scharf mit dem Verdacht vom Kindesraubs und Mords" die vom Gerichtshof verordnete Ortsuntersuchung auf den 19. Mai. Zu dieser Zeit verhörte er den Kindeszeugen mit 5 Jahren, Samu Scharf, der gegen seine Eltern und Bruder gestand. Aufgrund dieses Geständnisses wurden der als Teilnehmende benannten Bruder, Vater und weitere zwei Erwachsene sofort festgenommen. Es ist eine ausgezeichnete rechtsgeschichtliche Aufgabe, Die Äußerung der während sieben Tagen verhörten 53 Zeugen, das Protokoll des Ortsbeschaus zu analysieren und sie mit den Beweisen der öffentlichen Verhandlung, die den gleichen Inhalt hatten, zu vergleichen. Besonders wesentlich in diesem Aspekt war das Geständnis des am 20. Mai verhörten Halbbruders, des Kronenzeugen mit 14 Jahren Móric Scharf, das schließlich der stärkste „Beweis" der Anklage wurde. Die Untersuchung „gab außer der erheblichen Verdachtsursache keinen direkten sachlichen Beweis."[29]

Es war ein fataler Prozessfehler, dass Móric am 21. Mai zur Wohnung vom Gendarmen András Recsky, nach Nagyfalu, wo Móric von ihm und vom Schreiber Kálmán Péczeli gezwungen wurde, ein belastendes Geständnis auszusagen.

Untersuchungsrichter József Bary war nicht anwesend, obwzar er das Protokoll hätte aufnehmen sollen. Im Text finden sich Ausdrücke wie Zwang oder Szene, die vom Jungen nicht angewandt wurden. Das Protokoll (wie das schon erwähnt wurde) hatte kein Datum darauf, weil damals es noch nicht gewusst wurde, wann er ein Geständnis aussagt.[30] Das Verhören geschah in der Nacht, was vom Rechtsmittelgericht Budapest in seinem Urteil von zweiter Instanz ernst eingewandt wurde.[31] Laut des Bescheids des Untersuchungsrichters vom 22. Mai, 1882 „zeigt sich der Verdacht gründlich, dass [Eszter Solymosi] von mehreren Israeliten angeblich wegen religiöser Zwecke in der jüdische Kapelle getötet wurde." Sich darauf beziehend, ordnete er für jene, die unter Überwachung der Polizei waren, eine Untersuchungshaft an. Die Betroffenen legten eine Berufung dagegen ein, aber der Gerichtshof von Nyíregyháza stimmte der freiheitsentziehenden Entscheidung zu.[32] Während des Prozesses sollte man den Kronenzeugen von seinen Eltern entfernen, deshalb wurde er am 22. Mai zusammen mit den Verhafteten nach Nyíregyháza, zum Sitz des Gerichtshofes geliefert. Staatsanwalt László Egresi Nagy stimmte den nächsten Tag der separierenden Maßnahme zu.

Am 23. Mai erhörte Vorsitzender des Gerichtshofes Ferenc Kornis den Untersuchungsrichter und hielt sofort eine Sitzung. Die Mitglieder des Anklagerats waren Richter des Gerichtshofes Gusztáv Russu und Ernő Gruden. Anwesend war auch der Leiter der königlichen Staatsanwaltschaft Menyhért Both. Der Gerichtshof beglaubigte – wie in alten Zeiten – die prozessentscheidende Zeugenaussage des.es Kindes.[33] Die Verhandlung war nicht öffentlich. die Angeklagten wurden nicht berufen, für ihre Verteidigung wurde auch nicht gesorgt. Da die Authentifikation der Zeugenaussage war nicht der Teil des offiziellen Prozesses, hätte die Verteidigung freilich eingezogen werden können, dadurch gewährleistend die unserem alten Recht entsprechende Kundenöffentlichkeit. Das taten sie aber nicht, deshalb konnten die Verhafteten immer noch nicht wissen, was die Anklage gegen sie ist, und warum sie ihre Freiheit verloren.[34]

Königliche Staatsanwalt Menyhért Both schlug vor, dass der Zeuge Móric Scharf seine Aussage nicht widerruft, und weiterhin unter Überwachung bleibt.[35] Der Gerichtshof konnte den absurden Vorschlag nicht annehmen, er gab dem Untersuchungsrichter das Kind zusammen mit den Dokumenten zurück. Bary löschte die Untersuchungshaft am 26. Mai, aber er rief den Kindeszeugen zur offiziellen Räumlichkeit der Zuchthausbewacher, und verbot, dass seine Eltern ihn treffen können.[36]

[27] Bary 1933. 51. p.
[28] Bary 1933. 44–45. p.
[29] Kövér 377. p.; Bary 1933. 59. p.
[30] Bary 71–72. p.; Eötvös I. 110., 139. p.
[31] Das Urteil zweiter Instanz. Eötvös III. 259. p.; Bary 98. p.
[32] OSZK Bary 88. p.
[33] Der die Anklage vertretende Vizehauptstaatsanwalt äußerte bei der Endverhandlung die Beglaubigung als „eine Handlung, die den Prozessregeln des Strafverfahrens nicht entsprach." Bary 79. p.
[34] Eötvös I. 126–127. p. Dagegen: laut § 38 der damals gültigen Regelung „ist der Angeklagte berechtigt, nach dem Beginn der Untersuchung einen Rechtsanwalt-Verteidiger als Hilfe zu haben." Also dafür gab es vor dem Beginn der Untersuchung keine Möglichkeit. Bary 80. p.
[35] Bary 81. p.; Eötvös I. 130–131. p.
[36] Eötvös I. 132. Bary 81. p. Das Kind bat um den Hausarrest, weil er bei seinen Eltern nicht bleiben wollte. Pauler stimmte in seiner auf die Interpellation gegebenen Antwort auch dieser Entscheidung zu. Bary 83. p.

Vom professionellen Aspekt war die schwierigste Frage des Strafprozesses, ob es möglich ist, in solcher wesentlichen Verhandlung die Aussage eines Minderjährigen annehmen zu können. Bei der Endverhandlung ließ der Gerichtshof Móric Scharf nicht schwören, er betrachtete seine Aussage rechtlich nicht relevant. Das war die Aussage, die der Gerichtshof in der Voruntersuchungsphase beglaubigte, und nahm sie früher als den Hauptbeweis der Ermittlung an. Auf diese Zeugenaussage – so die spätere Begründung – kann der Gerichtshof keine Anklage begründen, weil der Zeuge „vor dem Gericht den starken Beweis seines Hasses und seiner Verachtung gegen seine gesetzliche Religion, seinen Vater, und seine Glaubenschicksalsgesellen gab.“[37] Daneben war er vom unreifen Lebensalter, in seinen Äußerungen wurden weiterhin zahlreiche Widersprüche gefunden.[38]

Zur diesen Verhandlungsphase gehörte eine besondere Episode des Verfahrens, das Finden der Leiche im Theiß am 18. Juni, 1882, und die romanhafte Ereignisfolge der Identifizierung des Leichnams. Die prozessrechtlichen Bezüge sind auch in dieser Hinsicht nicht offengelegt. Es tauchte schon eine Debatte zwischen dem Untersuchungsrichter, den Verteidigern und dem Staatsanwalt von der Ausgabe des Leichnamsuntersuchungsprotokolls für die Verteidigung und der Möglichkeit der Teilnahme der Verteidigung auf.[39] Durch die Denkweise voll von Vorurteilen bewertete der Anklagebeschluss des Gerichts als im Voraus ungültig den Teil des Arztexperten-Gutachtens, der nicht die bei der Beiordnung des Experten gestellten Fragen beantwortete. Ungeachtet dessen, dass diese Antworten laut § 60 des Gelben Buchs vom Aspekt der Beurteilung der Angelegenheit relevant waren, obwohl der Verdacht des Leichnamsschmuggels in Frage gestellt wurde.

Laut der Aussage, die am 20. Juli, 1882 vor dem königlichen Gerichtshof getroffen, aber von dem Gericht nicht angenommen wurde, schlug Salamon Schwarz Eszter mit Faust tot, weil sie ihn verspottet hatte. Diese mündliche Behauptung bot „gegen die Ablenkung der Untersuchung in andere Richtung, und den Angeklagten, der nach dem Widerruf folgerichtig verneinte, keinen richtigen Beweis.“[40] Auf der öffentlichen Verhandlung stellte es sich eindeutig heraus, dass er die Äußerung, in der er der kapitalen Sünde unternahm, für die Befreiung seiner verbitterten Angeklagtengesellen traf.

3. Untersuchung

Die Untersuchung der Gerichtsverhandlung von Tiszaeszlár begann mit dem Abschluss des Vorermittlungsprozesses am 29. Juli, 1882 und beendete am 22. Oktober.[41] Die Prozessphase fing mit dem Beschluss an, der vom Untersuchungsrichter des königlichen Gerichtshofs getroffen und mit der Genehmigung von László Egresi Nagy ausgegeben wurde, und der „eine besondere Untersuchungsverhaftung verordnete.“[42] Laut § 35 des Gelben Buchs bildete es den Gegenstand der Untersuchung „alle Angaben bezüglich der Straftat, ihrer Qualität, der Täter, der Mitschuldiger, der Gehilfen, der Hehler sowie des durch die Straftat verursachten Schadens, durch die die Straftat und die Schuld oder Unschuld sowie die erschwerenden oder mildernden Umstände bewiesen werden können.“

Die substantielle Zusammengehörigkeit der Verfahrensphasen wird von der folgenden Wendung, dem folgenden Absatz der obenstehenden Verfügung bewiesen: „Aus diesem Grund sind die Ergebnisse der Vorermittlung zu berücksichtigen, und die von den Beamten der öffentlichen Sicherheit gemachte Vorermittlung ist vom Untersuchungsrichter im Aspekt von nicht nur der Essenz sondern auch der Form zu kritisieren, notfalls zu ergänzen oder zu wiederholen.“ Das passierte nicht, nicht einmal diese Phase der Verhandlung erfüllte die für sie beabsichtigte garantielle Rolle. Der Untersuchungsrichter wäre dazu verpflichtet, auch die die Angeschuldigten rettenden Umstände offenzulegen, die der objektiven Wahrheit dienenden Beweise einzusammeln. Der während des Prozesses beigeordnete königliche Staatsanwalt Imre Havas warnte auch József Bary, dass „der Untersuchungsrichter die unparteiische Sphäre der beiden Anklage und der Verteidigung einzusammeln.[43] Die Verfahrensentscheidungen, die rekonstruiert werden können, die bestehenbleibenden Behördendokumente der Prozessphase warten noch auf Verarbeitung, aber ihre einfache Durchsicht verursachte auch eine ernstes Mangelgefühl im Aspekt von der Unparteilichkeit des Untersuchungsrichters.

4. Anklageerhebung

Laut § 78 des Gelben Buchs gibt der Untersuchungsrichter – nach der Beendung der Untersuchung – dem königlichen Staatsanwalt die Dokumente, der verpflichtet ist, seinen Antrag bezüglich der Anklageerhebung gegen den Angeschuldigten oder der Behebung der Untersuchung innerhalb 30 Tagen, „oder wenn er die Untersuchung für mangelhaft hält, seinen Antrag bezüglich ihrer Ergänzung innerhalb 8 Tagen mit den Dokumenten vor dem Gericht einzureichen.“ Wenn der königliche Staatsanwalt die Anklageerhebung veranlasste, „soll jede zu bestrafende Handlung, auf die er den Beschluss der Anklageerhebung zu erweitern wünscht, in seinem Antrag eindeutig und getrennt bezeichnet werden.“

Der Gerichtshof entschied mit Beschluss von der Anklageerhebung oder der Behebung der Untersuchung, eventuell ihre Ergänzung. Die Untersuchung sollte behoben werden, wenn die

[37] Urteil erster Instanz. Eötvös III. 234. p.
[38] Die ungarische Rechtstradition zählte die völlige Zeugenglaubwürdigkeit der Minderjährigen vom 16. Lebensalter. Pauler 438. p.; Bary 95. p.
[39] OSZK Bary 671–672. Der Staatsanwalt bezog sich auf § 19 vom Gesetz Nr. XXXIII. vom 1871, laut dessen der Staatsanwalt in jeder Phase der Strafuntersuchung einen Antrag treffen kann. Kövér 432–433. p.
[40] Das Urteil der Kurie. Eötvös III. 273–274. p.
[41] Bary 611–612. p.
[42] OSZK Bary 685–686. p. Die Untersuchungsverhaftung wurde bezogen auf Satz a, d § 45 der „Prozessregeln des Strafverfahrens“ verordnet. Der Ausdruck „besondere Untersuchung“ wird vom Gelben Buch nicht gekannt, aber es stellt sich vom Lehrbuch von Paulaner heraus, dass dieser Termin eine Untersuchungsform gegen konkrete Personen bedeutete. Pauler 361. p.
[43] Nánási 81. p.

Handlung keine Straftat bildete, auch wenn die Strafbarkeit der Handlung ausgeschlossen wurde. Ein Beschluss von der Behebung wurde getroffen auch wenn es „dank der Gewichtslosigkeit der belastenden Beweise es im Voraus zu sehen ist, dass der Angeklagte auf der Endverhandlung freisprochen wird oder es genug Beweise existieren."

Die Anklageschrift wurde am 14. April, 1883 eingereicht.[44] Die öffentlichen Ankläger, voraus der königliche Hauptstaatsanwalt Sándor Kozma waren mit dem Leiter der Verteidigung Károly Eötvös einverstanden, dass in diesem Fall die Anklageerhebung mit keinen rechtlichen schützbaren und keinen die öffentliche Verhaltung aushaltenden Beweisen unterstützt werden kann. „Die Anklage hat nämlich keine sachliche Tatsache, und die Angeklagten werden mit der Wahrheit von keinen ernsthaften Erscheinungen belastet." Trotzdem erhob die Staatsanwaltschaft eine Anklage, grundsätzlich weil „die aufgeregte Gesellschaft die Öffentlichkeit verlangte, und das konnte ohne Anklageerhebung nicht erreicht werden."[45] Der die Untersuchung führende Staatsanwalt hatte sogar keine Möglichkeit, die Beweise freilich zu ermessen, deshalb sollte er eine Anklage erheben auch dann, wenn er lediglich die Widersprüche der Zeugenaussagen klären wollte. Während der Zeit der Verhandlung, am 18. April, 1883 brachte Sándor Halmágyi, nennend diesen Fall als Beispiel, eine von den auffallenden Mangelhaftigkeiten des damaligen Prozessrechtes. Im Gerichtsverfahren von Tiszaeszlár „war die Staatsanwaltschaft gezwungen, in ihrem Anklageantrag zu betonen, dass die wirkliche Bedeutung der meist distrahierenden Zeugenaussagen ohne Endverhandlung, ohne Unmittelbarkeit nicht festgestellt werden kann. Also der königliche Staatsanwalt, die aggressive Macht ist gezwungen zu gestehen, dass hier das kontradiktorische, mündliche Verfahren schon gut wäre; weil hier, schon bei der Frage der Anklageerhebung, eine große Schwierigkeit gelöst werden könnte, von der jede schmerzhaft aufgeregt sein sollen."[46]

Durch den Anklageantrag entschied der königliche Gerichtshof mit einem Bescheid Nr. 1430 vom 16. April, 1883 von der Anklageerhebung gegen die 15 Angeschuldigten von israeliter Religion, die im Gefängnis waren. Der Anklagebeschluss des Gerichts wegen Mord, Mitschuld wegen Mord und Schuldbesohlen machte den weiteren Prozess und die Haltung der Endverhandlung obligatorisch. Die Anklage wurde von Vizehauptstaatsanwalt Ede Szeyffert vertretet. Laut des damaligen Prozessrechts und der Gerichtsstruktur traf der Gerichtshof den Anklagebeschluss, und in diesem Aspekt sollten und eigentlich konnten weder die Angeklagten noch ihre Verteidiger im Voraus verhört werden. Der Strafsenat des Gerichtshofs von Nyíregyháza mit Vorsitzendem Ferenc Kornis traf aufgrund des Antrags, der vom königlichen Hauptstaatsanwalt von Budapest als Ankläger am 9. Mai, 1883 eingereicht wurde, einen Bescheid von Anklageerhebung.[47]

Gegen den Anklagebeschluss konnte der Angeklagte und seiner Verteidiger zum königlichen Rechtsmittelgericht von Budapest, der lediglich aufgrund der Dokumente entschied, eine Berufung einlegen. In kapitalen Angelegenheiten, wie auch in unserem Fall, verfuhr die königliche Kurie als Forum dritter Instanz.[48] Die Angeklagten und ihre Verteidiger nahmen die Rechtsmittelmöglichkeit nicht in Anspruch. Zum ersten, weil die Beurteilung mindestens ein Jahr gewesen wäre, zum zweiten verlangten die Angeklagten immer mehr beherzt die öffentliche Verhandlung. So wurde der Anklagebeschluss rechtswirksam.

Der im großen Gerichtsverfahren kreierte Verdacht und die formulierte Anklage stellten sich also in der Periode der Vorermittlung zusammen. Während der eine größere Öffentlichkeit gewährleistenden zweiten Prozessphase, der Untersuchung bekam die Verteidigung schon größeren Raum. Die Haltung einer öffentlichen Verhandlung wurde von der Anklageerhebung ermöglicht. Prüfend rein vom juristischen Aspekt gründeten die Angaben der Vorermittlung und der Untersuchung keine Schuld, und sie dienten zur Anklageerhebung nicht genug Beweise. Die Verletzten und die Gesellschaft verlangten jedoch eine öffentliche Verhandlung. Die Fehler der Aufklärungsprozessphasen sollten, und zwischen amtlichen Rahmen konnten nur hier erklärt werden.

5. Endverhandlung

Der Gerichtshof anberaumte die Verhandlung an Dienstag, 19. Juni, 1883, die schließlich 46 Tage dauerte und beendete am 3. August. Definitive Verhandlungen waren an 34 Werktagen, von 8–9 Uhr Morgen bis 2–3 Uhr Nachmittag.[49] Das war bis dann die längste Verhandlungsserie des Gerichtshofes, an der 300 Angeklagten, Zeugen und Experten teilnahmen. Von der Verhandlung wurde ein wortwörtliches, schnellschriftliches Protokoll gemacht. Das wurde beide von der Verteidigung und der Anklage gebeten, weil sie der Unparteilichkeit des Gerichts nicht vertrauten. Das Verhandlungsprotokoll ist eine ausgezeichnete, aber größtenteils noch eine unverarbeitete Quelle zur Analyse der damaligen Verhandlungsordnung, oder zur Vorstellung der Expertengutachten, der Zeugenaussagen, der Anklagen- und der Verteidigungsreden.[50]

Der Vorsitzende des Beurteilungssenat war Ferenc Kornis, seine zwei Mitglieder waren Ernő Gruden und Barna Fejér, die

[44] Bary 612. p.
[45] Eötvös III. 157. p.
[46] Magyar Jogászegyleti Értekezések. XII. köt. A büntető bíróságok szervezete és hatósági köre, tekintettel a magyar bűnvádi eljárás tervezetére. 1883. március 19 és június 1 között folyt vita. [Aufsätze der ungarischen Juristenvereins. XII. Band. Die Organisation und Kompetenzen der Strafgerichte angesichts des Entwurfs des ungarischen akkusatorischen Prozesses] Bp., 1884. 114–115. p.
[47] Der Anklagenbeschluss wurde vom Vorsitzenden des Gerichts am Öffnungstag der Endverhandlung „als rechtswirksamen Beschluss" genannt. OSZK Bary 219–227. p.
[48] Eötvös III. 160. p.
[49] Eötvös III. 161. p.
[50] Tisza-Eszlár. (Napi értesítő) A tisza-eszlári bűnper végtárgyalása alkalmával. [Vom Anlass der Endverhandlung des Strafprozesses von Tisza-Eszlár] Gyorsírói felvétel nyomán kiadja a „Nyírvidék" szerkesztősége. Nyíregyháza, 1883. (im Weiteren: Endverhandlung) 1–29. sz.

„in zivilrechtlichen Angelegenheiten ausgezeichnet waren.“ [51] Es charakterisiert wohl das damalige Gerichtssystem und die personalen Umstände des Gerichtshofes von Nyíregyháza, dass in diesem Fall von großer Bedeutung keine über die vorgeschriebenen Bedingungen verfügenden Untersuchungsrichter beauftragt, oder keine beruflich kompetenten Beurteilungsräte geformt werden konnten. Laut des Gelben Buchs begann die Endverhandlung mit der Feststellung der Anwesenheit der Berufenen, dem folgte die Anklagerede. Die öffentliche Anklage wurde von Ede Szeyffert vorgelegt, der – auf einzigartiger aber der Situation entsprechender Weise – eine die Angeklagten schützende Verteidigungsrede sagte. „Statt der Angeklagten klagte er die Untersuchung, besonders den Untersuchungsrichter damit, dass er die Beweise eines mittelalterlichen Aberglaubens eifrig hetzten, und er trat gegen den königlichen Gerichtshof damit auf, dass er in seinem Anklagenbeschluss den Verdacht des Ritualmords ausdrückte.“ [52]

Der Vizehauptstaatsanwalt reichte nach der Beendung des Beweisungsprozesses, am 39. Tag der Verhandlung, am 27. Juli, 1883 seine Antragsrede der öffentlichen Anklage ein. Er fand die Angeklagten unschuldig, er beantragte, sie „von der Anklage und ihre Folge freizusprechen“ und sie freizulassen.[53] Er wies darauf hin, dass sich in Ungarn das akkusatorische Prinzip eindeutig noch nicht durchsetzt, und das Gericht nach der Beweisführung weder an den Antrag des Staatsanwalts noch die Qualifizierung der Handlung, oder die Bemessung der Strafe geknüpft wird. Es sollte mit dogmatischen Methoden analysiert werden, wie sich diese Rechtsinterpretierung innerhalb relative kurzer Zeit änderte, weil die Kurie mit ihren in der zweiten Hälfte der 1880er Jahre getroffenen Beschlüssen das richterliche Verfahren an Anklage knüpfte. Laut der bezüglichen prinzipiellen Entscheidungen, wenn der Staatsanwalt wegen irgendwelcher Straftat keine Anklage erhob, erfolgte keine wesentlichen Rechtsprechungsmaßnahmen. „Wenn der Ankläger auf der Endverhandlung die Anklage erlegte, sollte der Gerichtshof einen Behebungsbeschluss, und im Fall des Freisprechungsantrags ein Freisprechungsurteil treffen.“ [54]

Das Urteil erster Instanz des Gerichtshofs wurde am 3. August, 1883 verkündigt. Zwei stimmende Richter des Gerichtshofes nahmen eindeutig für die Freisprechung Stellung, deshalb sollte der Vorsitzende keine Stellung nehmen.[55] Die Methode der Anhörung der Verhandlungszeugen, die Ordnung der Gegenüberstellung, die Verhandlungsreden (besonders die Rede von Károly Eötvös), die Technik der Verhandlungsführung, der Text und die Begründung des Urteiles soll noch vom Aspekt der Rechtsgeschichte offengelegt, analysiert und bewertet werden.

6. Die Rechtsmittelphase

Das freistellende Urteil des Gerichts erster Instanz wurde von der Staatsanwaltschaft und den Angeklagten angenommen. Gegen die Entscheidung appellierte Frau Jánosné Solymosi. Das königliche Rechtsmittelgericht von Budapest nahm das Berufungsrechtsmittel ein, aber es hätte übrigens unabhängig davon das Urteil überprüfen sollen, weil sich der Anklagebeschluss auf eine schwierige Straftat bezog, die sich „laut der bestehenden Rechtsprechungspraxis den Gegenstand entweder der Freisprechung oder im Fall eines Strafurteils der Überprüfung ex officio“ [56] bildete.

Als Gericht zweiter Instanz verfuhr das königliche Rechtsmittelgericht von Budapest, das in seinem Urteil vom 22. Dezember, 1883 das Urteil erster Instanz bestätigte. Die Begründung ist jedoch vom rechtlichen Aspekt gründlicher als früher, sie beschäftigt sich nicht mit der Beschreibung der Verfahrenshandlung, sondern hauptsächlich der rechtlichen Bewertung der Beweise. Das Rechtsmittelgericht kritisierte den Voruntersuchungsprozess, und wand auch einige von den Entscheidungen des Untersuchungsrichters ein. Das Berufungsgericht bewertete die zwei wesentlichen Beweise der Anklage, die Aussage des Kindeszeugen und die Identifizierung der Leiche von Csonkafüzes mit prinzipieller Sorgfältigkeit. Den ersten (wegen der Minderjährigkeit des Zeugen, der Unbestimmtheit und des widersprüchlichen Charakters der Aussage) fand das Gericht nicht relevant. Andererseits wies es darauf hin, dass die Ergebnislosigkeit der Identifizierung der Leiche kein prozessentscheidender Faktor hätte sein können, weil wenn die Leiche ohne Wunde am Hals dem verschwundenen Mädchen gehört, dann kann die Behauptung des Kronenzeugen nicht wahr sein, und wenn sie nicht wahr ist, dann konnte es (im Zeitpunkt der Anklageerhebung) auch nicht sicher, dass Solymosi Eszter starb.[57]

Durch die Berufung der Mutter erfolgte auch die Beurteilung dritter Instanz. Die Kurie wies auch darauf hin, dass sie das Urteil aufgrund der bestehenden Strafpraxis und seiner eigenen Entscheidung Nr. V vom 5. März, 1881 ex officio überprüft hätte. Das oberste Rechtsprechungsforum bestätigte am 4. April, 1883 die Entscheidung des Rechtsmittelgerichts, und nahm auch die Gründe der Entscheidung an.

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Die Gerichte trafen aufgrund der widersprüchlichen Beweise der Vorermittlung und der Untersuchung, die Gutachten der Ärztexperten, und die ausgerichteten Argumente der Verteidigung ein freisprechendes Urteil. Als Jurist weiß man, dass ein

[51] Bary 46. p.
[52] Végtárgyalás [Endverhandlung] 1. sz. 1–3. p.; Bary 550. p.
[53] Szeyffert 6. p. Das Urteil zweiter Instanz qualifizierte die Äußerung des Staatsanwaltes als „einen Rücktritt von der Anklage“, trotzdem hielt es für berechtigt, die mit einem rechtswirksamen Anklagebeschluss begonnenen Angelegenheit ex officio zu überprüfen. II. fokú ítélet [Urteil zweiter Instanz] Eötvös III. 254. p.
[54] Felber, Arthur: A magyar bűnvádi eljárás a törvényszékek, járásbíróságok és közigazgatási hatóságok előtt. [Das ungarische Strafverfahren vor den Gerichtshöfen, Bezirksgerichten und Behörden der öffentlichen Verwaltung.] Zalaegerszeg, 1892. 75. p. Die bezogenen Gerichtsurteile: Kúria 15767/1882, 8474/1883 BJT 1882/IV/16.; Nánási 82. p.
[55] Eötvös III. 209. p.
[56] Urteil zweiter Instanz Eötvös III. 253. p.
[57] Urteil zweiter Instanz III. 271. p.

Strafprozess nicht zum völligen objektiven Wahrheitsfindung dient, das kann die irdische Rechtsprechung nicht unternehmen, dafür ist sie nicht ermächtigt, und sie hat dazu keine Mittel. In diesem Verfahren stellt sich auch nicht mit unwiderlegbarer Bestimmtheit heraus, was das Schicksal von Eszter Solymosi wurde. Auch in den schriftlichen Materialen des offiziellen Prozesses können zahlreiche (unbewiesenen) Versionen gelesen werden: sie wurde schwanger, und sie versteckte sich vor Scham, oder vielleicht ihre gnadenlose Hauswirtin verzehrte sie oder wegen ihr begang Eszter Selbstmord. Es kam auch auf, dass sie konnte den Tod ihres beliebten Vaters und Bruders, und es ertragen, ein Dienstmädchen zum dritten Mal zu werden. Sie konnte das Opfer eines Mordes oder eines Menschenraubs, aber (wie so oft am Theiß) auch ein tragischer Unfall konnte am Anfang April, 1882 passieren. Man weiss nicht, weil die Untersuchung jede andere Version vornherein ausschloss, und suchte mit hartnäckiger Besessenheit nur nach die Spuren des in Gruppen begangenen Ritualmordes.

Die Begründung des Urteils erster Instanz, laut deren „die Anklage des Mordes gegen die Angeklagten nicht bewiesen wurde", ein oft zitierter antisemitischer Topos. Demnach wurden die Angeklagten auf erster Instanz lediglich mangels Beweise freigesprochen, im Fall ihrer Schuld wurde keine eindeutige Entscheidung getroffen. Es war zu sehen, dass es nicht die Wahrheit ist, weil der Staatsanwaltsantrag die Angeklagten unschuldig fand, und das Gericht – verwendet die damals übliche Terminologie – ein Freisprechungsurteil traf. Es ist fraglos, dass die Begründung des Gerichts erster Instanz die parteiischen Feststellungen der Untersuchung überaus gründlich erörtert, und die Gründe der Freisprechung nur kurz zusammenfasst. Es kann aber nicht vergessen werden, dass dieses Forum früher die Entscheidungen des Untersuchungsrichters bestätigte und dessen Anklagerat die Anklage legalisierte, also begang es (wie schon gesehen, auch selbst der Vorsitzende) in den Anfangsphasen des Verfahrens schwierige Versäumnisse. Das Freisprechungsurteil war also eine anständige Selbstkorrektion, die suggestive Begründung kann als eine einfache Selbstbestätigung betrachtet werden.

Im Verfahren von Tiszaeszlár hatten die Umstände außer Prozessrechts eine wichtige Rolle: die Prozessphase der öffentlichen Verwaltung wurde grundsätzlich davon bestimmt, dass die Behörden eine verzögernde Mentalität hatten, dass bei der Vorermittlung der Untersuchungsrichter nicht genug Lebenserfahrung hatte, und er parteiisch war.

Die korrekte Untersuchung wurde am Anfang von der Negligenz der Beteiligten der Staatsanwaltschaft behindert. Die Anklageerhebung wurde nicht von der Absicht, die mir Beweisen bestätigte Schuld zu vergelten, sondern vom Interesse der Angeschuldigten, die Wahrheit herauszufinden, begründet. Es ist auch richtig, dass (abweichend von der berüchtigten Dreyfus-Affäre) sich keine störenden Aspekte außer der Rechts während der öffentlichen Verhandlung und der rechtlich korrekten Rechtsmittelphase durchsetzen konnten.

Nach der großen Verhandlung wurde der Prozess der Kodifikation des ungarischen Strafrechts bestimmt mehr voll von Anstoß. Der im Jahre 1888 fertiggemachte Entwurf das Gesetz an Strafprozessrecht vom Jahre 1896 regelte schon umfangreich den Vorbereitungsprozess. Das Gesetz regelte die Einzelheiten der Untersuchung und der Ermittlung, bestimmte den Rechtstellung der Teilnehmenden am Strafprozess, die Prozessordnung und die Einzelregeln ihrer Administration. Es nahm für die Öffentlichkeit, die Unmittelbarkeit und die Mündlichkeit Stellung. Die Verhandlung von Tiszaeszlár war eine ernsthafte Lehre für die Schöpfer des ungarischen Gesetzes.

Statutory Regulation of Capital Punishment in Hungary during the Horthy Era and World War II.

Zoltán J. Tóth *

Abstract

The present paper deals with the history of the normative regulation concerning capital punishment in Hungary between 1919–1944, that is, during the Horthy era. Right after the end of the Soviet Republic of Hungary, in August 1919, the legal system of the Hungarian Kingdom was reinstated. Capital punishment, however, remained general penalty not only in the military criminal procedure, but in the ordinary one as well. Besides these, from time to time, numerous martial law statutes stipulated that the death penalty could be applied in cases of various criminal offences, both in peacetime (mainly in 1921, 1924 and 1931–1932) and, particularly, wartime. The implementation of capital punishment, however, culminated in 1943 and 1944 when (that is, in the end of 1944) the statehood of Hungary collapsed.

Key words: *capital punishment; martial law; criminal law; legal history in Hungary; Horthy era; World War II.*

In most of the history of Hungary, the death penalty used to be a regular punishment (*poena ordinaria*) that could be imposed for various crimes against life, limb, state, religion and even property, mostly on the grounds of customary law or under the rules of local statutory regulations. The middle ages and the early modern age may be considered as the 'classical' era of the extensive use of the capital sanction, however even in these times it was not the death penalty but the various types of corporal punishment that were most commonly used.[1] Under the enlightened absolutist rulers the actual application of the most severe penalty decreased significantly (for a short time it was even formally abolished by Joseph II. in respect of common delicts),[2] and in the Reform Era the death penalty was rarely sentenced and more rarely carried out even on the grounds of customary

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1 For the works on penal law in the feudalist era see, e.g.: Bakóczi, Antal: Az emberölés. [Homicide.] Közgazdasági és Jogi Könyvkiadó, Budapest, 1984; Balás, Gábor – Domokos, Andrea: Erdély rövid jogtörténete 1947-ig. [A brief history of Transylvania until 1947.] Közgazdasági és Jogi Könyvkiadó – Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete, Budapest, 1991; Béli, Gábor: Magyar jogtörténet: a tradicionális jog. [Hungarian legal history: Traditional law.] Dialóg Campus Kiadó, Budapest–Pécs, 1999; Béli, Gábor – Kajtár, István: Az osztrák (-német) büntető jogszabályok hatása a magyar jogban a 18. században (a Praxis Criminalis). [The effect of Austrian (-German) statutory criminal regulations on the law of Hungary in the 18th century. (The Praxis Criminalis).] In: Ádám, Antal (ed.): Dolgozatok az állam- és jogtudományok köréből XIX. [Essays from the issue of jurisprudence XIX.] Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kara, Pécs, 1988; Csemegi Károly művei. [Works of Károly Csemegi.] Franklin-Társulat, Budapest, 1904; Csizmadia, Andor – Kovács, Kálmán – Asztalos, László: Magyar állam- és jogtörténet. [Hungarian legal history.] Nemzeti Tankönyvkiadó, Budapest, 1995; Degré, Alajos: A kínvallatás bevezetése a magyar büntető perbe. [The introduction of torture into the Hungarian criminal process.] In: Jogtudományi Közlöny, 1974/7. szám, pp. 381–383; Doleschall, Alfréd: Halálbüntetés. [Capital punishment.] In: Márkus Rezső (ed.): Magyar Jogi Lexikon, III. kötet. [Hungarian Legal Encyclopedia.] Pallas Irodalmi és Nyomdai Részvénytársaság, Budapest, 1900; Eckhart, Ferenc: Magyar alkotmány- és jogtörténet. [Hungarian constitutional and legal history.] Budapest, Politzer Zsigmond és Fia jogi könyvkereskedés, Budapest, 1946; Firon, András: Káinbélyeg. Nyugdíjazzuk-e végleg a hóhért? [Mark of Cain. Shall we retire the hangman for good? Panoráma Kiadó, Budapest, 1991; Hajdu, Lajos: Bűntett és büntetés Magyarországon a XVIII. század utolsó harmadában. [Criminal offenses and sanctions in the last third of the 18th century in Hungary.] Magvető Könyvkiadó, Budapest, 1985; Király, János: Magyar alkotmány- és jogtörténet, különös tekintettel a nyugat-európai jogfejlődésre. [Hungarian constitutional and legal history with special regard to the legal development of Western Europe.] Budapest, Grill Károly Könyvkiadóvállalata, 1908; Mezey, Barna (ed.): A magyar jogtörténet forrásai. [The sources of law in the Hungarian legal history.] Osiris Kiadó, Budapest, 2001; Mezey, Barna (ed.): Magyar jogtörténet. [Hungarian legal history.] Osiris Kiadó, Budapest, 1999; Meznerics, Iván: A megyei büntető igazságszolgáltatás a 16–19. században. [The criminal jurisdiction of comitati in the 16th–19th century.] Budapest, Sárkány-Nyomda r. –t., 1933; Szemere, Bertalan: A büntetésről s különösebben a halálbüntetésről. [On the punishment, with special regard to capital punishment.] Halálbüntetést Ellenzők Ligája, 1990; Timon, Ákos: Magyar alkotmány- és jogtörténet, tekintettel a nyugati államok jogfejlődésére. [Hungarian constitutional and legal history, with special regard to the legal development of the Western countries.] Budapest, Hornyánszky Viktor cs. és kir. Udvari Könyvnyomdája, 1903; Trócsányi, Zsolt: Törvényalkotás az Erdélyi Fejedelemségben. [Legislation in the Principality of Transylvania.] Gondolat Kiadó, Budapest, 2005; Werbőczy, István: Tripartitum. Téka Könyvkiadó, Budapest, 1990. For the Hungarian practice of the death penalty in the middle ages and the early modern age, see, in general: Tóth J., Zoltán: A halálbüntetésre vonatkozó anyagi jogi szabályok a feudalizmus Magyarországán. [Substantive criminal regulations in Hungary during the feudalism.] Jogtörténeti Szemle, 2007/4., pp. 30–50.

2 This was done by *Sanctio Criminalis Josephina 1787*, that was nevertheless revoked before his death in 1790, and this status (that is, inter alia the *de iure* reintroduction of the death penalty) was sanctioned by Act XL of 1790/91 of Leopold II. (Cf: Hajdu, Lajos: II. József büntetőtörvénykönyve Magyarországon. [Joseph II's Criminal Code in Hungary.] In: Jogtudományi Közlöny, 1974/1-2. szám, pp. 48–55; Mezey /ed./, supra note 1, A magyar jogtörténet forrásai, p. 243.).

law.[3] Apart from the retaliation following the 1848/49 Revolution and War of Independence[4] the capital sanction increasingly became an exceptional punishment in the 19th century, as evidenced by the first Hungarian Criminal Code Act V. of 1878, the so-called Code of Csemegi, which made it only applicable (but never obligatory) for the most serious forms of treason, such as the murder or intentional killing of the king or the attempt thereof (Section 126, Point 1.),[5] and murder (Section 278)[6], provided that the perpetrator of the offense was at least twenty years old at the time when the crime was committed (Section 87). Partly due to this, and partly due to the changed conception of criminal law, at this time the death penalty was rarely applied actually (even compared to other contemporary countries), and even if it was, it was sentenced exclusively for murder. Between 1881 and 1898 a total of 223 (12 per year on average) death penalties were imposed by courts of first instance, however, in only 34 cases were these approved by the Curia (this meant, on average, two executions per year during this period). Moreover, there was a short period (between 1895 and 1899) when no death sentence was approved by the Curia, and between 1896 and 1900 no executions were carried out in Hungary.[7] This peaceful era ended in the years during World War I and shortly afterwards, when first because of the threat of war, then because of the war itself and later in order to protect the results of the revolution, extraordinary criminal norms were introduced, to a lesser extent by Acts, mostly by decrees delegated by these Acts, which made capital punishment applicable (in state of siege even compulsory) for more and more offences.[8] Against this background, we get to August 1919, when, with the collapse of the Soviet Republic, a new political order emerged and began the Horthy era, which, on the one hand consolidated the legal (including criminal) conditions by restricting again the use of capital punishment in respect of common offenses, on the other hand continued the practice of previous years, the answer of which for the extraordinary situations or those regarded as such, was the creation and enforcement of extraordinary rules on a regulatory level, and which ultimately culminated in the martial law regulations of World War II.

After the fall of the Soviet Republic just three weeks were needed for the new government to restore (at least declaratively) the former legal status: this was done by Government Decrees No. 4.038 and No. 4.039., adopted on 19th August 1919, promulgated and entered into force the next day. The former stated that all criminal proceedings conducted by the bodies of the Soviet Republic and every decision and judgment taken by them were invalid,[9] and that for the future, the laws originated before the foundation of the Soviet Republic were considered normative,[10] while the latter ordered to punish all those who had exerted any such activity to the Soviet Republic, which was contrary to the previous legislation.[11] For this, the Decree ordered the creation of separate councils consisting of five judges (presiding judge and four members) in each criminal tribunal, for the procedure thereof it ordered the application of the rules of accelerated criminal procedure, regulated by the same Decree. Some of these rules were the same as in Decree No. 9.550. of 1915 I.M.E.[12,13] while others rather approximated the acceler-

[3] For the practice concerning the penalty of death during this period, see: Tóth J., Zoltán: A halálbüntetés írottjogi szabályozása Magyarországon a felvilágosodástól a Csemegi-kódexig. [Staturoy regulation of capital punishment from the Enlightenment to the Code of Csemegi.] De Iurisprudentia et Iure Publico, 2008/3., pp. 81–101.

[4] Based on his archival research, Károly Kecskeméti speaks about approx. one hundred and fifty executed political and military leaders, while Barna Mezey writes about not quite 120 executions, however they both recognize that the number of those killed by imperial soldiers in resistance to their arrest or in order to prevent their escape may be a multiple of this. (Cf. Kecskeméti, Károly: A halálbüntetés eltörlésének ügye az országgyűlésen. [The issue of the abolition of capital punishment in the Dieta of Hungary.] In: Kerezsi, Klára /ed./: Kriminológiai Közlemények 53., Magyar Kriminológiai Társaság, Budapest, 1996, pp. 84–104.; and Mezey, Barna: Az 1849. évi megtorlások történetéhez. [To the history of retaliation in 1849.] In: Jogtudományi Közlöny, 1999/11., pp. 457–466.).

[5] „Any person who murders or intentionally kills the king or attempts to accomplish any of these crimes is guilty of a felony of high treason…" (Section 126.1.) „High treason in case of Section 126.1. is punishable… by death." (Section 128).

[6] „Any person who, with premeditated intentions, kills another person, is guilty of murder and is punishable by death." (Section 278.).

[7] These numbers do not include the crime statistics of Croatia.

[8] The first in line of these norms were three Acts, adopted before World War I.: the parallel or twin Acts XXXII. and XXXIII. of 1912 on Military Criminal Procedure for the Joint Forces and the Army and Act LXIII. of 1912 on Exceptional Measures in the Event of War; these were followed by, under the delegated power of Section 31. of the latter Act, the Decrees No. 12.002. of 1914 I.M.E., and 5.487., 5.488. and 5.491. of 1914 M.E. of the Minister of Justice on accelerated procedure and martial law, then additionally the Decrees No. 5.735., 5.488.and 6.082. of 1914 and 2.060. and 9.550. M.E. of 1915, as well as Act XIX of 1915; and lastly, during the Hungarian Soviet Republic, in addition to the regular criminal tribunals, the so-called revolutionary tribunals were allowed to impose death penalty under Decree No. IV. of the Revolutionary Governing Council, for crimes listed in Decrees No. I., V., XX., XXIII., XXIV., XXXIII., XLII., LVII., LVIII., LXXIV., XCIV. and CIX, and under Decree No. XLV., „in case of urgent need", for any other delicts, and the summary courts that were set up again, were also allowed to apply death sentence under Decree No. XCIV. for felonies most threatening to the established order. (For exhaustive information on the regulation of the capital sanction in these few years, see: Zoltán J. Tóth: Rendkívüli büntetőjog és halálbüntetés az 1910-es évek Magyarországán. [Extraordinary criminal law and the death penalty in Hungary in the 1910 s.] Themis, June 2007., pp. 49–62.).

[9] Section 2 and 10 Para (2).

[10] Section 1 Para (1).

[11] Section 1: „The Tribunal adjudicates, according to the rules of accelerated criminal procedure, regulated by this Decree: 1. over the bodies, officials and agents of the Soviet Republic, who, by usurping and pretending to act with official powers, committed acts in violation of the criminal laws; 2. over the armed bodies of the Soviet Republic or the persons not mentioned in Point 1. who committed crimes in order to establish, maintain or restore the Soviet Republic, regardless of whether the act was committed before or after the enactment of this Decree."

[12] In 1915, with Decree No. 2.060. of 1915 M.E. the government amended and supplemented Decree No. 12.002. of 1914 I.M.E. on accelerated procedure and martial law, and with this a new, uniform code was introduced, which was officially named then as Decree No. 9.550. of 1915 I.M.E.

[13] Such as, for example, the prohibition of the formal investigative process, or the regulation of the defendant's right to defense.

ated procedure to martial law.[14] Furthermore, Government Decree No. 4.039 also governed martial law specifically,[15] which it made applicable for crimes listed in Section 12, Point 4 of Act LXIII. of 1912[16], exclusively in case of prior promulgation, for subsequently committed delicts, regardless of whether these acts – according to the same decree (due to their realization in the interest of the Soviet Republic) – fell under the milder accelerated procedure. (In this case, therefore, the more stringent martial law had primacy.) However, for state of siege, the government decree – in contrast to the accelerated procedure – did not impose any specific rules, but ordered the application of Chapter II. of Decree No. 9.550. of 1915 I.M.E.

The possibility of the imposition of martial law became allowed for the government in the next year also by law, in case of high treason, and in respect of certain violent crimes against authorities or individuals. All this was done by Act XXXVIII. of 1920 on the extension of martial law offenses, which in turn dealt with martial law on similar delicts committed by soldiers as well. Finally, the criminal aspects of the transition period were closed by Act III of 1921 on the protection of public and social order, which, clearly in response to the events of the Soviet Republic, ordered those to be punished by death as committed an offense against the state, „who committed a crime in conjunction with and for the objectives of an organization or a movement, the purpose of which is the violent subversion or destruction of the legal order of the state and the society, especially the violent establishment of the exclusive reign of a social class", and also those who initiate or lead a such organization or movement, „if the law established the death penalty for the crime committed" (Section 2). This meant, that if any laws (such as the Criminal Code) made it *possible* to impose the death penalty on a perpetrator of a delict, then any such perpetrator who committed that delict with an anti-state intent, was to be *mandatorily* punished by death.

The use of martial law regulations in the period between the two world wars culminated twice thereafter: in the early twenties an in 1931/32; however, only the latter had a practical significance. As regards the former, with Decree No. 28.123 of 1921 I.M.E, above all, riot and arson were brought under martial proceedings. This was supplemented with certain crimes[17] by Decree No. 29.307 of 1923 I.M.E, however, this supplement was repealed after only four days[18] by the Ministry of Justice Decree No. 30.004 of 1923. Finally, Decree No. 135 of 1924 I.M.E, in addition to riot and arson, ordered the application of martial law for „murder and intentional homicide committed with the use of a blasting agent or any kind of explosive", the attempt thereof, and „the alliance created for such crimes", and this Decree remained in force until 1932.

However, martial law only had an actual role from 1931, when due to the blowing up of the viaduct of Biatorbágy at dawn on 13th September[19], six days after the assassination, on 19th September, this was extended by Decree No. 10.479 of the then Minister of Justice Tibor Zsitvay to actions against authority defined by Act XXXVIII of 1920 and Act XL of 1914, collective violence against private persons (Act V of 1878, Sections 175–176), murder and intentional homicide committed with the use of firearms, crimes against public health by causing death, crimes of the causation of public hazard on iron tracks or ships, crimes directed towards the subversion or destruction of the legal order of the state and the society as defined in Act III of 1921, Sections 1–2, as well as the attempts of the above delicts. Although the assassin of Biatorbágy, Szilveszter Matuska – who was captured in Vienna for crimes committed there among other things – could not be executed as the Austrians extradited him to Hungary – after serving a six-year prison sentence imposed by them – only on the condition that no such sanction (namely the capital sanction) was to be imposed which did not exist in Austria, and so Horthy was forced to transform by grace the penalty to life imprisonment, however, several other people were not only sentenced to death under the thus enabled martial proceedings but were actually executed too.[20] The hysteria and the application of martial law ended more than one year

[14] These included, for example, that while Section 18 of Decree No. 9.550. of 1915 I.M.E. provided the opportunity for one level of appeal, according to Section 11 Para (1) of Decree No. 4.039. of 1919 M.E. there were place for appeals against the decisions of the court. Furthermore, the 1919 Regulation held that „the process, from beginning to end, shall be held before the court sitting together, and, whenever possible, going down without interruption" [Section 7 Para (2)], and also the following: „If the defendant was sentenced to death, the court… shall decide immediately whether or not to propose the convicted for amnesty. If the court did not find the convicted eligible for amnesty, then, after passing the judgement, if possible and desired by the convicted, provides a clergyman beside the convicted, and after an appropriate deadline given for the convicted for the preparation for death, the death penalty shall be implemented. If the court found the convicted eligible to be proposed for amnesty, the criminal records, together with the possibly submitted petition for amnesty, and the opinion of state prosecutor's office and the court, shall be filed immediately to the Curia of Hungary, which shall, in a closed council meeting, without justification, finally decide on the amnesty within 24 hours. If the condemned did not receive amnesty, after the promulgation of the decision thereof, the death penalty shall be carried out according to the former paragraph." [Section 11 Para (2)–(4)] All these provisions clearly lend a martial law nature to the so-called 'accelerated procedure'.

[15] Sections 17–18.

[16] Treachery, riot, murder, intentional homicide, crime against public health by causing death, robbery, arson, crime of the causation of water flooding, crimes of the causation of public hazard on iron tracks, telegraphs (telephone) or ships.

[17] These were the following: treachery, riot, murder, intentional homicide, crime against public health by causing death, all of the acts that may be subject to martial law, named by Act XXXVIII of 1920, furthermore, crimes directed for the subversion or destruction of the legal order of the state and the society (Act III of 1921, Sections 1–2).

[18] Ministry of Justice Decree No. 29.307 of 1923 was promulgated and entered into force on 2nd August 1923, while No. 30.004 of 1923 on 6th August.

[19] The assassination happened exactly at 0:20 AM.

[20] Among them, the most famous were Imre Sallai and Sándor Fürst, illegal communist leaders, who, as victims of the anti-communist hysteria, were arrested, sentenced to death and executed in July 1932 for anti-state crimes, specifically for initiating and leading an organization and movement directed for the violent establishment of the exclusive reign of the working class.

later, on 10th October 1932, when Andor Lázár, appointed to replace Zsitvay, released Decree No. 9.900 of 1932 I.M., which abolished martial law – promulgated by the decrees of 1931 and also the decrees of 1921 and 1924 that were still in force – throughout the country.

In the 1920 s and '30 s in Hungary, in addition to the introduction, extension, restriction, and abolition of martial law regulations, as well as the executions[21] on judgements of martial (and, of course, 'regular') courts, until 1939 only two (interrelated) legislative event occurred that were relevant to capital punishment: the creation and entry into force of Act II of 1930 on the Military Penal Code and Act III of 1930 on the promulgation of the Military Penal Code and on the related amendments and extensions of certain provisions of ordinary criminal law.[22] The former ordered or allowed the death penalty for six different military crimes, that was to be carried out by hanging or shooting[23], nevertheless it was not allowed to impose capital punishment on offenders who had not reached their twentieth year when committing the crime.[24]

For riot[25] all those had to be punished by death who took part in a riot in which they or any of their partners committed violence against their superior; those who „committed battery, intentional homicide or the attempt thereof or attempted murder against a member of the counterforce seconded to restore order and obedience, or against a person seconded or embarked to defend the superior"; the instigator and the leader „if they continued to participate in the riot after the appearance of the counterforce seconded to restore order and obedience"; and finally all those who „by denial of service against the enemy" frustrated or caused serious disadvantage to such service (Section 78, Point 1–4). For crime against a military guard, i.e. violence or dangerous threat against a military guard (Section 87) also those were punishable by death, who, during the implementation of this crime committed murder, intentional homicide or the attempt thereof, as well as those who, in time of war, „by force or dangerous threat deliberately prevented the guard from carrying out his lawful duties or forced him to take action", if the act resulted in serious disadvantage (Section 89). Perpetrators of desertion[26] received the most severe sanction if at the time of war „deserted from such guard station, or other such service, the leaving of which could result in serious disadvantage, or if the desertion was committed by three or more persons in mutual agreement, as well as if the perpetrator had already been punished twice for desertion", furthermore if the perpetrator deserted or attempted to desert to the enemy[27], provided that he did not check in voluntarily for thirty days. For guard duty crime[28], those guards (being simple guard, set up guard, patrol guard or commander guard) were punishable by death, who committed the act at the time of war, and caused serious disadvantage, as well as those guards or guard members, who were intended to guard a prisoner, and who intentionally abducted the prisoner, and therefore great disadvantage occurred. For the delict 'cowardice' also the most serious legal consequence had to be imposed against the person, who as commander fearing for his personal safety did not set out the necessary resistance against the enemy, and therefore gave up his post, let himself or his team captured, who hid or fled during combat operations, and those who, by discouraging his comrades, caused their desertion, surrender or diffidence.[29] Finally, for „felony committed in the line of duty" those commanders were punishable by shooting who in time of war intentionally violated one of the ten types of duty[30], if this violation caused great disadvantage in military operations.

Act III of 1930 brought two important measures in respect of our subject: on the one hand, it redefined the facts of treachery from that of the Criminal Code (Code of Csemegi), on the other hand it changed the list of crimes that could be brought under as well as the conditions for the imposition of martial law. Regarding the former: from the number of instances of treachery, the law ordered those to be punished by death who in the time of war deliberately sought to weaken the fighting ability of the Hungarian army, if serious consequences were derived therefrom, as well as those who in time of war spied for the enemy or provided assistance thereto. The latter measure identified three groups of offenses which could fall under martial procedure. The first group includes the most serious crimes, which could be assigned to martial procedure without the prior promulgation of martial law, provided that „the restoration of disturbed discipline requires the giving of a deterrent example" [Section 42 Paragraph (1)];[31] the second group included those delicts which could be assigned to martial procedure without the prior promulgation of martial law only in time of war (ergo

[21] Between 1923 and 1939 a total of 25 death sentences were carried out for common and political crimes and for delicts that fell under martial procedure (not including the military crimes).

[22] These repealed (from 1st February 1931) the previous, in many ways outdated Military Penal Code that was forced by the Austrians on 15th January 1855.

[23] The punishment of virtually all delicts was death by shooting, only the desertion to the enemy, as the most severe crime was sanctioned by hanging.

[24] Such persons were to be sanctioned by ten to fifteen years imprisonment.

[25] Section 77.

[26] Section 93.

[27] In this case only (in case of desertion or attempted desertion to the enemy) – as mentioned before – the method of execution against soldiers was hanging.

[28] Section 102, Paragraph (1).

[29] Section 107.

[30] Section 133, Paragraph (1).

[31] These included the offense of insubordination, mutiny and all those felonies against a military guard, that were punishable by death according to the Military Penal Code (as well as a few, similarly dangerous cases of the above); murder if committed in conducting or in order to conduct the past three military crimes; and the delict of cowardice.

not at any time);[32] perpetrators of the crimes included in the third group could only be held accountable under martial procedure in case of prior promulgation of martial law (nevertheless this could be done also in time of peace or war).[33] Finally, as a result of another new measure in martial proceedings capital punishment could also be imposed also on attempt, complicity and failed incitement, according to the law.

The nearly two decades of relative tranquility[34] ended in 1939; starting this year new legislation appeared every so often, which allowed the imposition of capital punishment on more and more crimes and subsequently the use of the martial proceedings. The first of these was Act II of 1939 on national defense that deserves attention in respect of the death penalty for three reasons. First, the Act as a continuation to Act II of 1930, created the facts of new crimes (which could be committed not only by soldiers) of which four were also punishable by death. Thus, according to the Defense Act capital punishment was to be imposed on those who in time of or in imminent danger of an air raid violated the regulatory provision issued in order to prevent the attack or its impact, with the intention of the occurrence of someone's death or serious prejudice to the interests of the state, if this outcome as a consequence of the offender's conduct actually occurred.[35] The same penalty had to be imposed on public officials, who intentionally committed any of the offenses defined in Sections 7–8 of Act XIX of 1915 on shipments of war (official corruption, practically), if „the act resulted in someone's death and it was foreseeable by the perpetrator",[36] or if „the act resulted in serious prejudice to the interests of defense in time of war",[37] on those who committed „vandalism endangering national defense interests", if it caused one or more deaths, and this result was foreseeable;[38] as well as those who damaged aircrafts or their accessories in time of war[39] if „the act caused more than one deaths or serious disadvantage to the operations for the protection or the security of the country, or caused the destruction of large quantities of war material".[40]

The second significant feature of the Act was that it authorized the government to extend the scope of any wartime legislation or criminal provision to the times when imminent danger of war was threatening the country, and even this (i.e. what constitutes imminent danger of war and how long) could be determined by the government itself by means of a regulation.[41] Finally, it could be considered as the third important measure of Defense Act, that it provided almost unlimited opportunity to the government for the implementation of martial law[42] in both civilian and military criminal proceedings, which, by regulation, could either be introduced to the whole or part of the territory of the country (or of the military criminal justice), in respect of any crime; and even the rules of procedure could be determined by the government (the 'Ministry').

These mandates were used too by the government. As regards the former, Decree No. 2.730 of 1941 M.E on the starting day and territorial scope of the application of specific provisions of criminal law in time of war, which ordered these specific wartime norms to be applied throughout the whole territory of the country and of the military criminal justice, from 12th April 1941 until regulated otherwise, was issued by the Bárdossy-government on 9th April, 1941, following the attack of Yugoslavia. As then the Kingdom of Hungary had not yet declared a state of war,[43] therefore wartime legislation could not be entered into force only under the Act itself, which is why it was necessary to adopt the government regulation based on the Defense Act. Not much later, on 30th June 1941, general rules were created by the Ministry that defined the time from which wartime legislation had to be applied (and the same decree brought the persons otherwise subject to civil criminal jurisdiction under military criminal jurisdiction for certain crimes). According to this decree (Decree No. 4.850 of 1941 M.E.) these rules had to be applied, in case of general mobilization from the date of promulgation throughout the whole territory of military criminal jurisdiction, in case of partial mobilization (where there is no such promulgation) from the first day of mobilization at the mobilized army groups, and in case of the country's entry into war from the date of the publication of the official statement thereof, also throughout the whole territory of military criminal jurisdiction. (The wartime particular material criminal provisions have only been abolished by Decree No. 7.300 of 1945 M.E.[44], adopted by the new interim national government

[32] This group included only one felony: espionage which was punishable by death as a form of treachery (Military Penal Code, Sections 60–63).

[33] This was possible in a wide range of crimes: these included the military offenses „against the order and discipline" (the plundering of the civilian population, battlefield looting /looting from the dead, injured or sick remaining in the battlefield/- Military Penal Code, Sections 113–115), the felonies of incitement, desertion and mutiny, delicts mentioned in Act XXXVIII of 1920, crimes listed in Section 12, Point 4 of Act LXIII of 1912 (treachery, riot, murder, intentional homicide, crime against public health by causing death, robbery, arson, crime of the causation of water flooding, crimes of the causation of public hazard on iron tracks, telegraphs (telephone) or ships); all new forms of treachery re-regulated by this Act (not only those that were punishable by death); crimes against the state according to Act III of 1921 on the protection of public and social order; and the crimes committed with the use of explosive or blasting agent [Section 1, Paragraph (3) of Act XV of 1924].

[34] This 'tranquility' obviously did not apply to the years 1931 and 1932; therefore considered to be only 'relative'.

[35] Section 190.

[36] Section 191, Paragraph (2).

[37] Section 191, Paragraph (3).

[38] Section 204, Paragraph (2).

[39] The somewhat archaic literal title of this crime was „damaging aeroplanes and objects associated therewith".

[40] Section 209, Paragraph (4).

[41] Section 219.

[42] The same (the implementation of martial law) was also made possible by another act from this period, Act XVI of 1931 on the development, direction and supply of electricity [cf. Section 61, Paragraph (2)].

[43] Hungary officially entered into war only on 26th June 1941.

[44] The adoption of which happened on 16th August 1945, while it was promulgated and entered into force 6th September.

which formed as representative of the democratic power. while the application of the provisions of wartime military criminal procedure has been abolished by Decree No. 1.740 of 1946 M.E.)

More important was, however, the government's regulation of martial law (at least regarding our subject, the death penalty), as not only quantitatively much more norms were created on the basis of this mandate, but the importance of these decrees were also far superior to that of Government Decrees No. 2.730 of 1941 and No. 4.850 of 1941. The procedural rules of civilian martial law were promulgated and entered into force by the government on 28th August 1939, based on the right included in Section 221 of the Defense Act (Decree No. 8.020 of 1939 M.E. of the Royal Hungarian Ministry), while the same regarding a subfield of military martial law, namely the martial law applicable to the mobilized army was done by Decree No. 1.420 of 1944 M.E. (by Sections 38 and 39 which covered this case specifically) on 1st May 1944.[45] The latter did not differ in any essential element from those set out in Act XXXIII of 1912 (due to its much more superficial and interleaved regulations it was not even applicable without this),[46] and with one notable exception (regarding Decree No. 9.550 of 1915 I.M.E.) the same could be said about Government Decree No. 8.020 of 1939.[47] Thus, while under the 1915 regulations the Minister of Justice, under the 1939 decree the government was mandated to the promulgation of martial law, to the determination of the areas and crimes affected by martial law as well as to the abolition of the state of siege. This could also be seen from the legislation on the actual application of martial law: while before the entry into force of Decree No. 8.020 of 1939 M.E., that is, 28th August 1939, the promulgation, abolition, extension or restriction of martial law was regulated by decrees of the Minister of Justice, the subsequent legal norms with similar content appeared in the form of government decrees.

Long before the entry into force of the ominous Government Decree No. 8.020 of 1939 (and the outbreak of World War II), three regulations (decrees of the Minister of Justice) were adopted which were about the practical applicability of martial law; Decree No. 3.431 of 1939 I.M.E. dated on 4th February ordered the promulgation of martial law regarding certain crimes throughout the country (but only in respect of the civil criminal jurisdiction and not that of the military); the number of these crimes were reduced by Decree No. 12.727. of 1939 I.M.E. on the restriction of martial law[48]; then, against the perpetrators of the same delicts the extension of martial law was ordered by Decree No. 24.168. of 1939 I.M.E.[49] „in the Transcarpathian region returned to the Hungarian Holy Crown". The scope of martial law was further extended in 1940 by one, and in 1941 by two regulations (government decrees): Decrees No 5.850 of 1940, No. 2770 of 1941 and No. 4.870 of 1941 M.E. Finally, with regard to the escalation of the war and the increase of internal tensions in 1943 and 1944 the promulgation of martial law was ordered by another four government decrees for new delicts („of course" along with the earlier crimes), in respect of both civil and military criminal jurisdiction, throughout the whole territory of the country and of military criminal jurisdiction: Decrees No. 1.020 of 1943, No. 3.940 of 1943, No. 1.130 of 1944[50] and No. 1.250 of 1944 M.E. Subsequently, after the country's borders becoming overrun by the enemy, the failed breakaway attempt, and especially after the Arrow Cross taking power (as a consequence of the breakaway attempt) the internal state of Hungary and the battlefield situation became so chaotic that its management by means of legislation would have been totally pointless, and the reign of terror of the Arrow Cross has expressly not requested it; as they did not need any normative background (no matter how formal) to the realization of the practical consequences of their inhuman ideology, in fact that would have only just been hindering them. And while the number of extinguished human lives within a given time reached an unprecedented level, yet, these executions carried out by those in power had had nothing to do with the death penalty, as it no longer had anything to do with the law either.[51]

[45] The adoption and promulgation of the decree itself happened on 29th March

[46] Of course, the martial procedures not applicable to the mobilized army were exclusively based on Act XXXIII of 1912 and Act III of 1930, thus their scope was not affected by Government Decree No. 1.420 of 1944.

[47] With the entry into force of Decree No. 8.020 of 1939 M.E., the Decree No. 9.550 of 1915 was repealed.

[48] Promulgated and entered into force on 9th May 1939

[49] Promulgated and entered into force on 25th August 1939

[50] This decree was adopted by the Sztójay-government immediately after the German invasion on 27th March 1944, it was promulgated and entered into force the next day.,

[51] Due to the above and to rational and length limits, here we consider it unnecessary to deal with the open persecution and physical liquidation of the Jews and other enemies of the system; on one hand, because thousands of books and hundreds of thousands of articles have been written on this subject, on the other hand such acts as crimes against humanity fall on the side which has to be persecuted by law and not on the one that appears as a legal sanction (thus- as have said – these actually have nothing to do with the death penalty as a legal consequence of an unlawful act).

The Institutional Framework and Methods of the Implementation of Soviet Legal Ideas in the Czechoslovakia and Hungary during Stalinism

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Abstract

The main topics of paper are the institutional framework and methods of the implementation of Soviet legal ideas and solutions during Stalinism (1949–1956). The paper concentrates on the situation in Czechoslovakia and Hungary. After the short introduction, which is dealing with the history of comparative law in these countries, follow the main part, which focuses on the concrete instruments of Soviet "legal assistance" in post-war Central and Eastern Europe. Among these instruments played dominant role the legal faculties in Budapest and Prague with their departments of Soviet law, further the ministries of justice with their legal institutes and the academic journals of affected countries. Final part of paper describes the process of constitution-making in Czechoslovakia (1948) and Hungary (1949).

Key words: *academy of sciences; codification; communist parties; constitution; Czechoslovakia; Hungary; law; legal assistance; legal transplants; ministry of justice; Stalinism.*

Introduction

The discipline of comparative law began to take shape during the long 19th century. Its institutionalisation had a number of milestones. For instance, the first university department devoted to a comparative study of jurisdiction was founded in 1831 in France. However, the *Société de la législatión comparée* was only established in Paris somewhat later, in 1869. The same city also hosted the first conference on comparative law in 1900. Further important institutions of comparative law were created between the two world wars. The interwar period was one of the golden ages of classical comparative law. Those years saw the creation of the *Académie internationale de droit comparé* (AIDC), which has been organising international conferences on comparative law every for years ever since.[1] The first of those conferences took place in 1932 in The Hague.

During that period, Central European lawyers also played a role in the development of comparative law. Actually, Hungarian scholars were significantly more active in the field than their Czechoslovakian colleagues. Elemér Balogh, a Hungarian theorist who had left the country in 1919, played an important role in the creation of the International Academy of Comparative Law.[2] Other Hungarian legal scholars also made efforts to contribute to the international scholarly scene.[3] In the Czechoslovakia of the time, whose legal theory was characterised by a combination of legal positivism and strict normativism,[4] there was no intensive interest in comparative law between the two world wars.[5] No university courses were offered in the comparative law, and no Czechoslovakian lawyers attended the specialised comparative international congresses before the Second World War, either. The situation was similar in the period between 1945 and 1948 too.[6]

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1 For the process of institutionalisation, see Knapp, Viktor: *Velké právní systémy. Úvod do srovnávací právní vědy.* C.H.Beck, Praha, 1996, pp. 8–10. (further Knapp, Viktor: cit. op. I.).

2 Prof. Elemér Balogh (1881–1955) obtained doctoral degree in law as a student of the Faculty of Law of the Royal University at Budapest on 23rd November, 1903. Balogh, who had supported the civil platform during the Hungarian Autumn Revolution in 1918, had to emigrate from Hungary. Between 1922 and 1928 he was the professor of Roman and Comparative Law at the University of Kaunas in Lithuania. Later he taught in Berlin, USA, Kanada and France. Between 1938 and 1947 Balogh lived in South Africa, where worked as lecturer at University of Johannesburg. Then he lived shortly in England and from 1947 to 1955 in Paris. Balogh was always very active in European academic circles. His main topic was Roman law and comparative law. See Hamza, Gábor: *Elemér Balogh (1881–1955) The Scholar of European Reputation of Roman Law and of Comparative Law.* http://www.kre.hu/portal/doc/sic/2008/sic3_008_hamza.pdf.

3 Szabó, Imre: *A jogösszehasonlítás szocialista elmélete (The Socialist Theory of Comparative Law)*. Akadémiai Kiadó, Budapest, 1975, p. 67.

4 Czechoslovakia had four faculties of law at that time: the Czech and German faculty in Prague, one faculty in Brno and one in Bratislava. Prague cherished the tradition of legal positivism, Brno that of legal normativism.

5 Knapp, Viktor: cit. op. I. *(Velké právní systémy…)* p. 9.

6 Blahož, Josef: *Zakladatelský význam díla Viktora Knappa pro právní komparatistiku v České republice.* In: Viktor Knapp v Československé akademii věd. In: Viktor Knapp. Vědecké dílo v proměnách času. Ed. Gerloch, Aleš. Plzeň, Aleš Čeněk, 2014, p. 426.

The situation of the until then popular field of comparative law changed radically after 1945, and even more so after 1948–49, when, under the leadership of the Soviet Union, the so called *Eastern bloc*, also known as the *socialist camp,* was formed with the aim of becoming an alternative pole. The Soviet Union, the first socialist country in the world, had already existed between the two world wars, but the international discipline of comparative law took little notice of its legal system. In actual fact, many specialists did not consider the rules that were in effect there to be law at all. But it became difficult to maintain that ignorance after World War II, although it took a while before Western legal theory recognised socialist law as a distinct legal system.

The decisive shift took place in the 1960's, with René David's famous work, *Les grands systčmes de droit contemporains*, playing a key role in the process of recognition.[7] The book, along with a certain degree of consolidation of the political relations between the capitalist West and the socialist East, and the ensuing appearance of various convergence theories, urged politicians and scientists to rethink their fundamental assumptions.[8] All of that lent new impetus to the many branches of research in comparative law – not only in the West, but also in the Eastern bloc, which began to exhibit an interest in furnishing its own explanations of the essence of its solutions to foreigners. That, however, required a scholarly dialogue with the outside world. But this is a later story, which is irrelevant from the point of view of the current article.[9]

However, during the difficult years of the Cold War in the early 1950's, the study of comparative law was very much on the defensive in the Central and Eastern European region. More precisely, opportunities to perform comparisons with Western countries grew scarce and the emphasis shifted to the study of the Soviet model and the necessity to introduce some Soviet legal solutions. But those processes fall more in the category of legal transplants (or perhaps the peculiar – and unilateral – migration of legal notions) rather than comparative law. These years represented the worst period in the history of communist dictatorship and state socialism in Central Europe. The following paper would like to present the institutional framework and various methods of how the Soviet legal solutions were transplanted into the national law in communist Czechoslovakia and Hungary.

The Soviet legal model and the Central European countries before 1948

The Soviet political and legal system was born during the Russian revolution and the ensuing cruel civil war between 1917 and 1921. In this process the Marxist-Leninist ideology played a crucial role, together with the effects of the First World War and the civil war. Despite the declared aims of Bolshevik anti-nationalism and anti-traditionalism, the Russian political and social traditions were also very important.[10]

The Bolshevik project of state-building and legal transformation was unique and ambitious, but its impact in the interwar period was very limited, at least in the official sphere. Only the extremely underdeveloped Mongolia followed the Soviet example.[11] Apart from Mongolia the Soviet Union did not have allies and good friends. But the radical left revolution and its representatives were not alone. The 20th century saw at least three similar political experiments or projects – the short-lived Soviet Bavaria, Hungary and Slovakia in 1919.[12]

The most elaborated of these was the Hungarian experiment between March and August of 1919. Hungary adopted a new socialist constitution and totally restructured her system of government. The constitution of 1919 was the first written constitution in Hungarian legal history and the second Soviet-type constitution in the world after that of Soviet Russia (1918). Naturally, the roots and predispositions of the Russian and Hungarian post-revolutionary Soviet constitutions were very similar, but this similarity was not the result of a simple process of copying.[13] The Hungarian Bolsheviks (especially the former war-prisoners) were well acquinted with the basic principles of their Soviet colleagues, but the Soviet model was as yet far from being mature at that time. The Soviet practical lawyers and legal scholars formulated the basic norms and principles of the new model only by the early 1920 s. The Hungarian revolutionaries were in 1919 real partners of the Russian Bolsheviks and not dependent vassals of Moscow. They had similar aims, mentality and political background.

The Hungarian Bolshevik experiment (Hungarian Soviet Republic) was very short-lived (only 133 days). However, Admiral Miklós Horthy's counter-revolutionary regime encompassed a much longer period (1920–1944). Obviously, this regime per-

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[7] DAVID, René: *Les grands systčmes de droit contemporains (Droit comparé)*, Paris, Dalloz, 1964, pp. 630 [Précis Dalloz].

[8] About this process see PÉTERI Zoltán: *A jogösszehasonlítás kelet-közép-európai centruma*. Állam- és Jogtudomány, LI. évf. 2010 No. 1. p. 77. Prof. Zoltán Péteri was for a long time the coordinator of the external cooperation at the Institute of State and Law of the Hungarian Academy of Sciences in Budapest. Later he was the head of the Comparative Law Department at this Institute.

[9] PERJU, Vlad: *Constitutional Transplants, Borrowing, and Migrations.* In: The Oxford Handbook of Comparative Constitutional Law. Eds.: Rosenfeld, Michel – Sajó, András. Oxford University Press, Oxford, 2012. p. 1304–1327.

[10] About the borning of Soviet legal and political system see BOSIACKI, Adam: *Utopia, władza, prawo. Doktryna i koncepcje „bolszewickiej" Rosji 1917–1921.* Liber, Warszawa, 1999, p. 401.

[11] The Bolshevik Red Army overran Mongolia in the course of its campaign against the Russian „whites" (especially ataman baron Ungern-Sternberg) in Siberia and the Far East. This action provided the background to the very interesting experiment of establishing Socialism in the predominantly nomad society in Asia. See OBRUSÁNSZKY, Borbála: *Mongólia a XX. században*. Múltunk, 2002, No. 47.

[12] The extremely short-lived Slovak experiment (three weeks) was only an "appendix" to the Hungarian Councils Republic and the consequence of the campaign of Hungarian Red Army. ORMOS, Mária: *A Tanácsköztársaság nemzetközi környezete.* In: 1919. A Magyarországi Tanácsköztársaság és a kelet-európai forradalmak. Eds. Krausz, Tamás – Vértes, Judit. L'Harmattan – ELTE BTK, Kelet-Európa Története Tanszék. Budapest, 2010, p. 9–16. and In: HAJDU, Tibor: *A Tanácsköztársaság mint a közép-európai forradalom része.* In: In: 1919. A Magyarországi Tanácsköztársaság és a kelet-európai forradalmak. Eds. Krausz, Tamás – Vértes, Judit. L'Harmattan – ELTE BTK, Kelet-Európa Története Tanszék. Budapest, 2010, p. 17–24.

[13] SZABÓ, Imre: *A jogösszehasonlítás szocialista elmélete (The Socialist Theory of Comparative Law)*. Akadémiai Kiadó, Budapest, 1975, p. 163.

secuted the communists. The Hungarian communists worked in illegality or were in emigration. The impact of the radical left and Soviet ideas on the population was very limited.

The situation in Czechoslovakia was basically different. The new democratic state did not have direct experience with communist revolution, white counterrevolution and civil war. The Communist Party of Czechoslovakia enjoyed a legal status and was a relatively integrated part of the political system. This party had strong intellectual background in the Czechoslovak society. Communists had legal journals, members of parliament, sport-clubs etc. But they did not have the direct experience with socialist state-building and transformation of law. It is possible that a number of legal scholars had leftist orientation but the majority of the Czechoslovak legal profession was moderate. Czechoslovakia between 1919 and 1938 did not even know the notion of political emigration, which was born only in the period of Second World War. London became the center of president Edvard Beneš and his government;[14] to Moscow it was the leaders of the Communist Party of Czechoslovakia (shortly KSČ) that emigrated.

The experience of the Czechoslovak emigrant politicians from Moscow was more limited than the experience of the Hungarian communist emigrants, who spent there 15–20 years.[15] But this fact did not have a big impact on the problem of Soviet legal assistance in post-war Czechoslovakia and Hungary.[16] Its influence was important in the political sphere. The transformation of the legal system was implemented primarily by the domestic lawyers under the leadership of Communist Party.

The institutional and scientifical background of the "legal transplantation" of Soviet law between 1948 and 1955

The great importance attributed to the Soviet model of state organisation and legal solutions in the Central and Eastern European region under Moscow's rule, and in particular in Czechoslovakia and Hungary, is best attested by the fact that during those years the prestigious Charles University of Prague established a separate Department of Soviet State and Law. The Budapest Faculty of Law also had a similar department during that time. The Department of Soviet Law was headed by László Névai (1914–1983), who had graduated back in 1936, joined the Communist Party in 1942 and began to teach at the Budapest Faculty of Law in 1946. Later he headed the Department of Civil Procedural Law.[17]

The introduction of Soviet law into the curriculum in Budapest after the Second World War is a very interesting story. It started in the early period of communist rule in Hungary, but before the crucial year of 1948. Ferenc Nagy as prime minister[18] of the coalition government initiated the introduction of Soviet law for the first time in 1946.[19] Therefore the Faculty of Law in Budapest organised the Soviet law seminar and László Névai became the lecturer in this course.[20] This time Névai prepared his book for habilitation and the title of this book was *The legal system of Soviet Union*.

The Czechoslovak Academy of Science, which was born in 1952 also established a separate research unit (so-called "cabinet") with the same profile, though it later merged with the Institute of State and Law of the Czechoslovak Academy of Sciences.[21] This research unit was led by professor Vladimír Procházka who was a famous communist legal expert at that time.[22] Procházka participated in the drafting of the new Czechoslovak people's democratic constitution from 1948.[23] (About this process see later.) Then he was for a short time Czechoslovak ambassador in Washington.

Procházka always maintained very good relations with Václav Kopecký, a very dangerous Stalinist politician in 1950 s. Later Procházka returned to Prague (from Washington) and he was one of the eight lawyers – the first members of Czechoslovak Academy of Sciences.[24] Logically, his political and aca-

[14] This government included the communist politicians too.

[15] Ergo, the integration of the Hungarian communists into the Soviet life and political system in the interwar period was more intensive. Béla Kun, the leader of Hungarian radical left revolution in 1919 became a member of the leadership of Komintern, Jenő Varga became the director of Academic Institute of World Economy and the later world-known György Lukács worked at the Institute of Maxism-Leninism. See Apor, Balázs: *Magyar emigránsok Szovjetunióban.* RUBICON 2008. No. 1. p. 49. The Soviet legal carrier was not very typical among the Hungarian emigrants in the Soviet Union.

[16] Most famous radical left scholar with legal degree and legal scientifical background was Elek Bolgár (1883–1955). Bolgár dealt with sociology before the First World War. He was attached to the communist movement in 1918 and during the Hungarian Bolshevik revolution worked as ambassador to Vienna, later as deputy foreign minister. Then he lived in emigration (Vienna, Moscow) for 25 years. Balogh arrived in Hungary with the Soviet Red Army in 1945. From 1946 he was a lecturer in Budapest and he worked at the Hungarian Foreign Office. Balogh was deputy minister, later he served as ambassador to Prague and London. Subsequently he became a dean of the Faculty of Humanities in Budapest. He taught at the Faculty of Law, where was head of department. Bolgár published about history of diplomacy, worker movement, legal sociology and electoral law. See http://mult-kor.hu/20090313_bolgar_elek and http://mta.hu/tortenetitar?PersonId=27701 further Molnár, Erik: *Bolgár Elek*. Akadémiai Értesítő, 1955.

[17] See Argejó, Éva: *Az 1956-os forradalom és megtorlás az ELTE Állam- és Jogtudományi Karán (The 1956 revolution and reprisal at the Faculty of Political Science and Legal Theory of the Eötvös Loránd University)*. Múltunk, 2013. p. 131, footnote no. 36.

[18] Ferenc Nagy was the prime minister of Hungary between February 1946 and July 1947. The smallholder politician was active in the Hungarian parliament in the interwar period, too. His political background was the agrarian Hungarian Smallholder and Civic Party. Later he lived as a political emigrant in the USA – Nagy was here one of the leaders of Hungarian anticommunist emigration. See Tarján M. Tamás: *1979. június 12. Nagy Ferenc miniszterelnök halála.* RUBICONLINE. http://www.rubicon.hu/magyar/oldalak/1979_junius_12_nagy_ferenc_miniszterelnok_halala/.

[19] See Schweitzer, Gábor: *A „Pázmánytól" az „Eötvösig." Adalékok a budapesti jogi fakultás történetéhez (1945–1950).* Múltunk, 2011. No. 4. p. 36.

[20] Ibid. pp. 36–37.

[21] Knapp, Karel: *Význam sovětské právní vědy pro vývoj socialistické právní vědy a marxistického právního myšlení v Československu.* Právník, Vol. XCVI, 1957. No. 9, p. 818 (hereinafter Knapp, Viktor: cit. op. II.).

[22] See Knapp, Viktor: *Proměny času*. Prospektrum, Praha, 1998, p. 137.

[23] See *Komentované dokumenty k ústavním dějinám Československa. II. 1945–1960*. Ed. Gronský, Ján. UK – Karolinum, Praha, 2006. p. 329. footnote No. 2.

[24] See Knapp, Viktor: *Proměny času.* Prospektrum, Praha, 1998. p. 137.

demic position was very strong in the first years of communism in Czechoslovakia.

The new Stalinist political regimes that became securely entrenched in both countries in 1948 and 1949 devoted a great deal of attention to ensuring that the lawyers who had qualified previously in the burgeois law schools of Czechoslovakia and Hungary become acquainted with the achievements of Soviet political science and legal theory. This was necessary not only because of the complete reorganisation of the legal systems but also because of the accelerated codification work that was being done. It was largely due to the latter reason that the Czechoslovak and Hungarian ministries of justice began to have the Soviet literature translated and made copies of the translations available to legal theorists. This was particularly important from the perspective of the civil and criminal law codification that was beginning at the time. Naturally, the legislators had to follow the pattern and the spirit of the Soviet system once they became available in that manner.

Besides the organs of the communist parties it was the ministries of justice that played the central coordinative role in the process of implementing Soviet legal patterns in Czechoslovakia and Hungary. Firstly some information about the ministries of justice in the two countries. The first minister of justice in communist Czechoslovakia was Alexej Čepička (who later became the „dangerous" minister of defence).[25] He was followed by the Slovak journalist Štefan Rais.[26] Both were gratuated lawyers from the interwar period, but this time they represented a very bad form of Czechoslovak Stalinism.

The Ministry of Justice played an important role in the process of „legal transplantation" in Hungary, too. From 1945 to 1950 this ministry was led by István Ries (former barrister), who had been for a long time a member of the Social Democratic Party. Only later, after the Second World War and the fusion of the Communist Party with the social democrats, did he join the Communist Party. The Hungarian communist secret police arrested him in the summer of 1950 and Ries died during the cruel interrogation.

The new Hungarian minister of justice became Erik Molnár, who had earned a degree from the Faculty of Law in Budapest but he was above all known as a famous Marxist historian. Before the 1944 he worked as a barrister. Molnar held various government posts between 1945 and 1956. In the 1950 s he was minister of justice two times (1950–1952, 1953–1956).[27]

The changes in the personnel of the ministries were radical in this period. The new communist regime dismissed many old civil servants and professionals. But the new regime also needed professionals with legislative experience because in 1949 the process of the complex recodification of law was started. For this work the transformed ministries established special scientific institutes (Institute of Law in Prague and Institute of State and Law in Budapest) and professional commissions from among the old (but politically loyal) and new (communist) legal scholars. In keeping with the spirit of the time representatives of the working class were also included in this project.[28]

The knowledge of the Soviet law and Soviet institutional solutions was more or less obligatory for these institutions. For the implementation of these goals the work of Russian translators proved to be indispensable. The Soviet legal norms and the works produced by the Soviet legal science had to be translated. The ministries of justice organized "voluntary" trainings and courses for legislators, too. Unlike other spheres of public administration we do not have yet information about the Soviet advisers in the process of legal codification, at least in respect of Czechoslovakia.[29]

The personal contacts with Soviet scholars and colleagues were very limited because the "iron curtain" existed not only between the socialist states and the western countries, but also between the socialist countries and Soviet Union.[30] These contacts were more or less occasional. There were more intensive contacts between the scholars and legislative civil servants living in the neighbouring people's democracies. Czechoslovakia had relatively intensive contacts with Poland, especially during the codification of their civil and family law.[31]

The process of the implementation of Soviet legal solutions into the national law was an interesting practical and theoretical research issue for the lawyers and scholars. Even Viktor Knapp, one of the most talented Czech lawyers in the postwar period,[32] formulated in 1953 the *Law of the permanent approach to the Soviet model*. In this paper Knapp cited Klement Gottwald as the father of this idea. According to Knapp this law was a scientific law,

[25] Alexej Čepička (1910–1990) in the interwar period worked in the barrister office in Ostrava. Since 1929 he was a member of the Czechoslovak Communist Party. He was the husband of the daughter of Klement Gottwald (the first communist president and communist leader). He was minister of justice from 1948 to 1950. See PERNES, Jiří – POSPÍŠIL, Jaroslav – LUKÁŠ, Antonín: *Alexej Čepička – šedá eminence rudého režimu.* Brána. Praha, 2008.

[26] Štefan Rais (1909–1975) – Slovak communist juornalist and Czechoslovak minister of justice between 1950 and 1953. He studied in Prague in early 1930-s. Rais was the minister in the period of big Stalinists processes. See Vorel, Jaroslav, Šimánková, Alena et kol.: *Československá justice v letech 1948–1953 v dokumentech. Díl I.,* ÚDV, Praha 2003.

[27] About his life and scientific carrier see Ránki György: *Molnár Erik.* Akadémiai Kiadó. Budapest, 1971.

[28] Knapp, Viktor: *Proměny času*. Prospektrum, Praha, 1998, p. 120–122.

[29] Kuklík, Jan et kol.: *Vývoj československého práva 1945–1989*. Linde, Praha, 2009, p. 126.

[30] Knapp, Viktor: *Proměny času*. Prospektrum, Praha, 1998, p. 219.

[31] Kuklík, Jan et kol.: cit. op. 126.

[32] Viktor Knapp (1912–1996) was born in Prague and studied at the Charles University of Prague. After the Second World War Knapp worked as civil servant. From 1948 to 1954 he had an important position in the office of the president. He became the professor of civil law, but he proved to be influential in the sphere of legal theory, too. From 1954 he started his academic carries at the Czechoslovak Academy of Sciences. Knapp was the director of the Institute of State and Law between 1955 and 1973. From 1964 to 1971 he represented the electoral district Krnov in parliament. He was (as a reformer) very active in 1968 – e.g. he participated in the process of the fedaralization of Czechoslovakia. After 1969 the new political course did not symphatize with him. The last active period of his life started after 1989. Knapp is the author of high number of publications in the field of civil law, legal theory, constitutional law, comparative law and legal cybernetics too.

which was valid especially in the people's democracies.[33] The Soviet law is the permanent source of inspiration for the Central and Eastern European socialist lawyers, but this law is not the subject to the legal *propedeutika* (e.g. as Roman law) within the legal education. The implementation of this model had to be creative. The methodological consequencies of this theory were the following: 1. Every socialist lawyer had to study Soviet law as a methodological assumption for his/her work. 2. Everybody had to know the peculiarities of the national law. 3. The preservation and conservation of these peculiarities was unnecessary and detrimental. These peculiarities are not substantive, their character is predominantly formal and temporary.[34]

Naturally, this theory was born in the hardest period of Central and Eastern European Stalinism and its historical validity was very limited. This theory may have helped its author in his carrier. This concept was predominantly ideological and political but we have to interpret it in the historical context. Later Knapp played a more positive role in the development of Czechoslovak law – e.g. as protagonist in the revival of comparative law from 1960-s. But it is a different story.

Experience and the results of the institution-building and Soviet „legal assistance" in Czechoslovakia and Hungary

About the process of codification of the new law we have information from scientific literature[35] and from memoires, too. At the same time, it is interesting that in his memoires published after the change of regime,[36] Viktor Knapp, who had played an active role in the civil law codification of 1950, did mention the influence of Soviet law and legal theory, but also made it clear that the work was performed by Czechoslovak scholars who didn't want to simply copy the Soviet model, but laboured to elaborate their own system while taking the Soviet model into account. Knapp did not mention any Soviet advisors.[37]

A contrary example was cited by academician Imre Szabó in one of his books published in the 1970's – at the time, he was considered one of the paramount theoreticians of socialist comparative law. He mentioned the Czechoslovak and Polish family acts adopted in 1950 as pieces of legislation that, in his view, were such mechanical copies of their Soviet predecessor that eventually they had to be replaced by new laws that were better adopted to the social conditions of Czechoslovakia and Poland.[38]

In summary, the most important task of the Czechoslovak "legislative two-year plan" dated 1948–50 was to prepare and introduce the major laws that govern the most important areas of life.[39] During that time, in Czechoslovakia almost 500 Soviet books and papers were translated, an impressive performance in its own right.[40] But that feat was probably strongly motivated by the atmosphere of fear that began to permeate the entire region. The other – and rather similar – instrument of the rapid transplantation of Soviet legal thinking and solutions was the establishment of a separate periodical by the state entitled *Sovětská věda – Stát a právo (Soviet Science – State and Law)*, which only published translations of Soviet legal literature. In Hungary very similar role was played by the *Szovjet Jogi Cikkgyűjtemény* (*Collection of Papers from Soviet Law*), starting in 1951.[41]

In addition, the Czech *Právník (Lawyer)*, one of the oldest and most prestigious legal periodicals of Central Europe, also began to publish a supplement with a similar purpose in 1951. A total of 29 Soviet scholarly articles were published, totalling 286 pages.[42] (On the other side, the publications of the scholars from Western countries were very rarely. The first articles from western lawyer *Právník* published only in 1959!)[43]

The case of *Právník* is interesting from other points of view as well. The first number of *Právník* was issued in 1861. In 1949 this journal was 87 years old. The socialist transformation started in March 1949, when the more theoretical *Právník was* united with *Právní praxe* (practical legal journal). As the new editor-in-chief Viktor Knapp was appointed, a very talented young lawyer. He was simultaneously the chief of the political department of the office of Klement Gottwald, the first Czechoslovak communist president. This personal fact may have been very important for the survival of the *Právník*. This period was very hostile towards law and lawyers. The publishing house was firstly the *Union of Czechoslovak Lawyers,*[44] then (from 1951) a responsive organ for publishing was the Institute of Law, established by the Ministry of Justice.[45] Later the journal became the organ of the Institute of State and Law of Czechoslovak Academy of Sciences.

It is interesting – though ultimately understandable in view of the secluded world of the Soviet Union – that more intense personal relationships between the scholars working at institutions of legal theory only began to form in 1956. The legal

[33] Knapp, Viktor: *Zákon stálého přibližování sovětskému příkladu – ukazatel cesty československých právníků.* Právník, 1953. No. 3–4. p. 220–221.
[34] Ibid. p. 225.
[35] See footnote 28.
[36] But Knapp wrote his memoires just before the Czechoslovak Velvet Revolution (November 1989).
[37] Knapp, Viktor: *Proměny času*. Prospektrum, Praha, 1998, p. 121.
[38] Szabó, Imre: *A jogösszehasonlítás szocialista elmélete (The Socialist Theory of Comparative Law)*. Akadémiai Kiadó, Budapest, 1975, p. 232.
[39] Kuklík, Jan et kol.: cit. op. p. 122–128.
[40] Bydžovský, Ladislav: *Pomoc sovětské právní vědy při tvorbě československého právního řádu*. Právník, 1957. No.10.
[41] The journal *Állam- és Jogtudomány (State and Law Science)*, which is the organ of Institute for Legal Studies of the Hungarian Academy of Sciences started only in 1958.
[42] Knapp, Viktor: cit. op. II. 816. o.
[43] Tomášek, Michal: *Právník v letech 1948–1989*. In: Právo a stát na stránkách Právníka. Ed. Masopust, Zdeněk. ÚSP AV ČR. Praha, 2011. p. 120. Author of this article was Paul Bastid, professor and politician from France. Topic of his paper was the new French constitution.
[44] Jednota československých právníků.
[45] Tomášek, Michal: Právník v letech 1948–1989. In: Právo a stát na stránkách Právníka. Szerk.: Masopust, Zdeněk. ÚSP AV ČR, Praha, 2011. p. 110. and p. 113.

committee of the Czechoslovakian Academy of Science, for instance, did a three-week introductory tour in Moscow, Leningrad and Kiev. Roughly around the same time, certain works of lawyers from Czechoslovakia, and, naturally other socialist countries, began to be translated into Russian, followed by publication in the Soviet Union.[46]

The training of undergraduates and aspirants (today PhD students), today known as doctoral students, from Czechoslovakia and, naturally, Hungary and other 'brotherly countries' in the Soviet Union was another matter. During the first half of 1950, it was already quite common for people to absolve all their university training in the Soviet Union. Clearly, directly or indirectly, that also contributed to the 'legal transplantation' of Soviet law and legal thinking.

The situation was similar in Hungary. The translation of Soviet legislation and scholarly works was also a priority in Hungary after 1949. There as well, the Ministry of Justice played a definitive role in the work. On 22 October 1949, the Ministry of Justice produced an interesting document entitled *The main aspects of the five-year political science and legal theory plan*. One of its sections featured the following sentence: *"The focus of scientific research needs to be shifted from the universities to the Institute of Political Science and Jurisprudence."* The planned institute was to consist of four organisational units: a department of jurisprudence, a department of public administration, a separate documentation department, which was to concentrate its efforts *"… on the documentation of material from the Soviet Union and the people's democracies, and in addition from the West…".* That department was going to employ 4–6 officials.[47] Naturally, the new institute was also to have its own library.[48]

The institute, whose beginnings I will discuss in greater detail shortly, was established in practice at the beginning of 1950. The Hungarian Ministry of Justice, to which it was subordinated, monitored its activities closely and urged that it be established as soon as possible. According to the original plans, "*The task of the Institute, as far as human resources management is concerned, is to find our lawyers, to train scholars in a planned fashion, to organise the work of lawyers working at universities and to establish scholarly working groups*".[49]

The results of the previous few months and further tasks were discussed at a meeting at the end of March 1950 at the Ministry of Justice; the emphasis shifted from the institute's role in basic research to the services that it was to provide to the ministry and other government bodies. At that meeting, a list of the Soviet material to be translated was also approved.[50] The significance of the documentation department is evidenced by the first report of the institute about the period October 1949 to March 1950, which discussed the department in its very first section. That is not in the least surprising, as according to the report, in effect the operation of the entire institute began with the organisation of the documentation department. The department immediately compiled a bibliography of the Soviet specialist literature to be procured. Procurement had already been started using various channels.[51] Another similar document also mentioned that the collection of material from, and research of the other people's democracies had also been started. The weight of that topic was also indicated by the fact that Section I of the document entitled *Report about the work of the Institute of Political Science and Legal Theory, 2nd half of 1951*[52] bore the following title: *In the field of the processing and dissemination of the results of Soviet legal theory*. Section II was about the experiences of other people's democracies.

The role of Soviet patterns and legal assistance during the constitution-making in 1948 and 1949

It follows from the foregoing that the ministries of justice of the two Central European people's democracies attached great significance during those years to the dissemination of the Soviet body of legislation to their own specialists in legal theory and in particular in the codification of legislation as fast as possible. We have also seen an outline of the infrastructure of that entire process. Naturally, that dissemination yielded quick results in many areas. In 1957, on the 40th anniversary of the Great October Revolution, the periodical *Právník* published a number of articles, already referenced in the present paper, which concerned the assistance that Soviet legal scholarship had provided to Czechoslovak lawyers. One of those papers emphasised the following major areas of law and items of legislation: the Constitution of 1948, the codification of civil, criminal and family law, the transformation of the system government, in particular as regards the public prosecutor's office, the courts of law and the administration of councils.[53] The article didn't mention the role of Soviet advisors directly, it rather referenced the importance of Soviet specialist literature and "tried and tested solutions". It is also interesting that joint scholarly conferences were not mentioned at all.

In actual fact, the adoption of the Constitution of May 1948 in Czechoslovakia only followed the pattern of the 1936

[46] Ibid. p. 818.

[47] Az ötéves állam- és jogtudományi terv főbb szempontjai *(The main aspects of the five-year political science and legal theory plan)*, 22 October 1949, Archives of the Hungarian Academy of Science, II. O. 164/1.

[48] The new institute built a rather valuable library – though, paradoxically, not using new material, but rather material from the libraries of the law schools and the Faculty of Law at the Debrecen University that had been closed down shortly before. To this day, it remains an almost unique collection.

[49] See page 1 of the document referenced in footnote 47.

[50] Jegyzőkönyv, felvéve 1950. március hó 29-én deli fél 12 órai kezdettel Ries István igazságügyminiszter hivatali helyiségében, az Állam- és Jogtudományi Intézet igazgatótanácsának első üléséről. Akadémiai Levéltár, II.O. 164/1. (Minutes, recorded on 29 March 1950, beginning at 11.30 a.m. at the office of István Ries, Minister oF Justice, about the first meeting of the board of directors of the Institute of Political Science and Legal Theory. Archives of the Hungarian Academy of Science, II.O. 164/1.).

[51] Report about the operation of the Institute of Political Science and Legal Theory between October 1949 and the end of March 1950.

[52] Report about the work of the Institute of Political Science and Legal Theory, 2nd half of 1951. Archives of the Hungarian Academy of Science II. O. 164/6. The author wishes to thank Gábor Schweitzer for providing the archival sources quoted herein, but found by him.

[53] BYDŽOVSKÝ, Ladislav: *Pomoc sovětské právní vědy pri tvorbě československého právního řádu*. Právník, 1957, No. 10. pp. 819–823.

Stalinist Soviet constitution partially. Interestingly, though interspersed with excuses, this was even mentioned in the above-mentioned 1957 paper. Naturally, the author of the paper began by noting that during the preparation of the new constitution, the Czechoslovak experts had learnt a great deal from the experiences of the 1936 Soviet constitution, but added that they also had to take into account the historical development of the Czechoslovak state, and incorporate the national and democratic revolutionary transformation that followed 1945,[54] and its consequences, in the new constitution. As a result, the assistance of Soviet scholarship was more pronounced in the regulation of other legal areas.[55]

Indeed, the 1948 Czechoslovak people's democratic constitution was created in somewhat different conditions in comparison with the 1949 Hungarian or the 1952 Polish ones. Work on the new text began in 1946, with the participation of several renowned legal scholars who had already contributed as experts to the 1920 liberal democratic constitution.[56] That had still been a coalition period, and the president of the country was still Edvard Beneš.[57] The coalition government of the communist and civic parties, led by Klement Gottwald was formed after the election in 1946.[58] The adoption of a new constitution was a crucial point of the program of the Czechoslovak coalition government. According to the original political plans the new constitution had to follow the positive traditions of the Czechoslovak constitution from 1920 and had to accept the results of the post-war "national and democratic revolution." The main questions of the constitution-making were the following: recognition of the new system of national committees (the Czechoslovak form of soviets in the Soviet Union), acceptance of nationalization in the economy and the legal solution of the sensitive Czech-Slovak problem.[59] Securing the special alliance with the Soviet Union was also very important. This program was supported by every member of the coalition government.

For the preparation of the draft the Czechoslovak National Assembly created a special commission with 36 members. Each relevant party had proportional representation there. General raporteaur of this commission was the communist Vladimír Procházka. The chairman of this commission was a member of the Czechoslovak Social Democratic Party.

The Czechoslovak Communist Party had at that time its own special constitutional commission, which prepared its project of constitution. This project carried weight because the communists comprised the strongest party in the parliament.[60] This plan displayed marked similarities with the constitution adopted in the May 1948 both in its structure and wording,[61] but the version prepared in the National Assembly by coalition parties was partially different. The communist project from 1946 was not the simple copy of the Soviet Stalinist constitution from 1936, because it was based on the postwar circumstancies in Czechoslovakia.

The non-communist parties attacked the nationalisation of the economy and tried to preserve the institution of Constitutional Court, which enjoyed a respected tradition in prewar Czechoslovakia.[62] Between the big blocks there existed at that time approximately 30 differences – 30 points for discussion.[63] The position of these parties in the process of constitution making became from day-to day weaker. The National Socialist Party sympathized with the project of the new constitution from 1947. The author of this project was professor Vladimír Kubeš from Brno. Kubeš was a national socialist expert for constitution-making. Later the Czechoslovak People's Party became sceptical to the official project of the constitution, too.

The three influential non-communist parties represented in parliament resigned from taking part in the further process of constitution-making on 18th February 1948. This fact was declared by the minister of education (Jiří Stránský). This was the beginning of the intense political crisis within the Czechoslovak government, which resulted in the total communist victory.

When, in February 1948, the Czechoslovak communists took power, the draft of the constitution was essentially complete.[64] As the new rulers did not wish to miss the symbolic date set for the adoption of the new constitution (9 May 1948, celebrated as Victory Day in the Soviet Union and as the day of the Soviet liberation of Prague in Czechoslovakia), they didn't have enough time left for a major redrafting of the text.

The preservation of the original draft of the constitution by the Czechoslovak communists after February 1948 could be attributed to other – more or less political-ideological – reasons as well. Klement Gottwald, who was at that time prime minister and also the leader of the Communist Party declared that the country did not need to skip a necessary stage of development. The draft prepared in the parliament by the common commission more or less reflected the ideas and goals of

[54] The Czechoslovak political terminology of that period used very often this notion for characterizing the political processes between the liberation of the country in 1945 and the communist victory in 1948.
[55] Bydžovský, Ladislav: cit. op. p. 820.
[56] The most famous among them were probably František Weyr, Alfred Meissner and Jiří Hoetzl. Kuklík, Jan et kol.: cit. op. p. 66.
[57] But Edvard Beneš as a last civic president did not sign the text of the new constitution and resigned from his position. Kuklík, Jan et kol.: cit. op. p. 118.
[58] The Czech and Slovak communists had in the government 7 plus 2 positions, Slovak democrats 4, Czechoslovak National Socialist Party (non nazi!) and Czechoslovak People's Party 4–4 ministers too. The Social democrats had only 3 ministers. See Kuklík, Jan et kol.: cit. op. p. 64–65.
[59] Procházka, Vladimír: *Ke vzniku ústavy 9. května*. Právník 1958. No. 5. p. 367–368. (cit. op. I.).
[60] The Czechoslovak Communist Party had there 114 mandates, the National Socialists had 55 mandates, the People's Party 46 mandates and the Slovak Democrats 43 mandates. The Social Democratic Party together with the Slovak Party of Work had 39 mandates. The Freedom Party from Slovakia had only 3 mandates. See. Kuklík, Jan et kol.: cit. op.p. 64.
[61] Ibid. p. 369.
[62] Procházka, Vladimír: cit. op. I. p. 372.
[63] Procházka, Vladimír: *Ústava devátého května a její první výročí.* Právník, 1949 (March) No. 3–4. p. 103. (Procházka, Vlaminír: cit. op. II).
[64] Procházka, Vladimír: cit. op. II. p. 103–104.

the communists. A large number of elements of the communist constitutional project from 1946 were incorporated into the draft prepared in February 1948. The communists did not need big and radical changes in the text – they wished to show the continuity between two national and democratic revolutions of 1918 and 1945.[65]

Professor Vladimír Procházka, who was an influential legal expert in this process later highlighted on two occasions (1949, 1958)[66] the differences between the Soviet constitution of 1936 and Czechoslovak constitution of 1948. The different character of the two constitutions was no problem for him, on the contrary, he pointed out these differences in his articles. This position could be presented openly only when it coincided with the official policy of the Communist Party.

There is no reason to wonder that between the Soviet model and the Czechoslovak constitution there were important similarities. This fact was noted by Procházka and also by the current Czech literature. The biggest differences between the original draft of February 1948 and the final text of the constitution of May 1948 could be found in the preamble and in the first part of normative constitutional text. The incoming communist power changed the articles about the nationalisation of the economy and introduced its own version of national committees (Czechoslovak organs of communist local government).[67]

These points represent the main priority of the communists in the process of constitution-making. The role of this party was dominant in the last phase. The central organs of the Communist Party were very active between February and May 1948. In fact, it was the Central Committe of the Communist Party that was able to make the crucial decisions concerning the chapters of the constitution, the parliament possessed only a subordinated position in this respect. The main coordinator between the central committee and the parliament was Vladimír Procházka. The parliament adopted unanimously (246 MPs) the text on 9 May 1948 in the Vladislav Saal of the Prague Castle.[68]

The massive influence that timing could have on the fate of individual documents is also demonstrated by the circumstances of the drafting and the adoption of the August 1949 Hungarian people's democratic constitution.[69] The Hungarian constitution was only adopted a little more than a year after the Czechoslovakian one, but in very different circumstances and therefore with different results.

The process of Hungarian constitution-making was very short. The idea of the adoption of a new constitution was first raised in 1948 on the congress, which united the Hungarian communists with the social democrats. The Hungarian people's democratic constitution was adopted on 18th August 1949 by the parliament elected in May 1949. This election was the first of a "new type" of (formal) voting in postwar Hungary. Accordingly every member of parliament voted for the new constitution.[70]

The Hungarian government led by Mátyás Rákosi formally appointed a special commission for the preparation of a new constitution, but in fact the draft of the constitution was produced by two professionals who worked at the Ministry of Justice at the time, János Beér and Imre Szabó.[71] Both of them used the Soviet Constitution of 1936[72] as the basis for their work. The editors preparing the text actually had to explain and justify every single significant divergence from the Soviet pattern.[73]

The complex draft was ready by 5th August 1949. Then followed a four-day (!) general discussion about this text involving all citizens of Hungary. The discussion in the commissions of the Hungarian parliament took only 15 minutes, then followed the plenary session. Next day the constitution was adopted. The new text of the constitution was published in the official journal on 20th August 1949.[74] This constitution-making was very short and effective!

In a 1989 TV documentary about the Hungarian Constitution, Imre Szabó specifically recalled the consultation at which the authors of the draft had to present the project and then justify divergences individually at a high-level political forum.[75] There were several people in the audience who actually held copies of the 1936 Soviet Constitution or its Hungarian translation. Minister of Defence Mihály Farkas in particular was making every effort to remain 'consistent' and he insisted on the Soviet text.[76] Under such conditions, any further Soviet professional advice or 'legal aid' became completely superfluous.

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65 See Procházka, Vladimír: cit. op. II. p. 373. Remark: „National and democratic revolution" was a very popular notion for the description of the events of 1918 and 1945 in the political terminology of those years.

66 See the above- cited articles by professor Procházka.

67 Kuklík, Jan et kol.: cit. op. p. 118. and Procházka, Vladimír: cit. op. II. p. 374.

68 Kuklík, Jan et kol.: p. 118.

69 This constitution was the first written constitution in Hungarian constitutional history. Before 1945 Hungary (like the UK) possessed only a so-called organic „historical constitution," comprising the corpus of different fundamental laws regulating the most important spheres of public life. (See Schweitzer, Gábor: *Fundamental Law – Cardinal Law – Historical Constitution: The Case of Hungary since 2011.* p. Journal on European History of Law. Vol. 4. 2013. No. 1. 124–125.) The Hungarian radical left regime adopted the Socialist Federative Soviet Constitution of Hungary in 1919, but it was valid only for a very short time. This document did not become a part of the traditional Hungarian constitutional thinking. The new democratic regime after the Second World War adopted the complex Law No. I. from 1946 on the Republic of Hungary, which served as temporary constitution during 1946 and 1949. But this document dealt dominantly with the structure of the state. The regulation of human rights was limited in this document.

70 See *Alkotmánytan*. Ed.: Kukorelli, István. Osiris-Századvég, Budapest, 1994, p. 34.

71 *Magyar alkotmánytörténet (Hungarian Constitutional History)*. Ed.: Mezey, Barna. Osiris, Budapest, 1996, p. 388.

72 Which was formulated, as is widely known, by Nikolai Bukharin and Karl Radek,who were later executed, and by the legal scholar Pashukanis. Ibid. p. 388.

73 *Magyar alkotmánytörténet*. Ed.: Mezey, Barna. Osiris, Budapest, 1996, p. 388.

74 Ibid. p. 388.

75 Documentary entitled "… elveszett alkotmány…" *(… the lost constitution…)*, MTV, 1989. Excerpt from the interview with Imre Szabó.

76 See the documentary referenced in the previous footnote.

According to Szabó's memoires, Mátyás Rákosi was making haste to complete the draft, because he wanted to constitution to be adopted on 20 August, the anniversary of Kingdom of Hungary's foundation in the Middle Ages. This would have resulted in shifting the emphasis of the 20 August holiday from Saint Stephen and the foundation of the state to the 'Celebration of Bread' and 'Constitution Day'. Work on the draft had actually been started in early March 1949, and the draft for discussion was complete by the beginning of August. It is interesting that Rákosi had no objections to the parts about the rights of citizens, he probably didn't see them as significant.

The situation was even more interesting in the case of the Polish Constitution adopted in 1952. Stalin himself requested a Russian translation of the text and in several places entered his own comments in the documents, suggesting 'improvements'.[77] Obviously, it would have been quite difficult not to include them. 'Luckily', the Polish already had some experience with the Polish constitutional activities of great foreign personages – in 1807, Napoleon himself had made them a gift of an imposed constitution produced – actually in French – for the Grand Duchy of Warsaw, a country he had created.[78]

However, the spread of Soviet patterns in the region had its own internal dynamic. The process varied in intensity and sometimes even in direction. In a later piece of writing, Imre Szabó, as an active eyewitness of the events of the era, divided the relatively short period from 1949 to 1956 in Hungary into two parts.

In the first part (1949–1953), Soviet legal solutions were being copied mechanically in effect. They even attempted to introduce institutions that were quite peculiar or accidental within Soviet law. The official explanation was that the Hungarian people's democracy had had no experience about those topics, so they had to adhere to the model strictly.[79] But the actual explanation had a great deal more to do with the political system and the general atmosphere of those years. That also happens to be true of the second period (1953–1956), when, as a reaction to the 'copying' of previous years, an emphasis on national aspects and solutions emerged once more.

Naturally, the effect should not be overestimated, as those variations took place within the context and political praxis of 1950's communist ideology. The differences between the two periods were clearly also connected to the conflicts between Mátyás Rákosi[80] and Imre Nagy, and the ideological context of those conflicts. The death of Josif Vissarionovich Stalin in 1953 should also be taken into account. In Czechoslovakia, there wasn't such a marked change in the first half of the 1950's, but by the second half of the decade, criticism of servile copying and mechanical repetition also became acceptable there.[81] In scholarly literature, the emphasis shifted to a considered learning process. But that was the beginning of a new era in the history of Eastern European socialism.

[77] *Polskie Konstytucje*. Wydawnictwo Sejmowe, Warsaw, 2007. pp. 12–13.

[78] Ibid. pp. 4–5.

[79] Szabó, Imre: *A jogösszehasonlítás szocialista elmélete (The Socialist Theory of Comparative Law)*. Akadémiai Kiadó, Budapest, 1956, p. 166.

[80] Mátyás Rákosi was the first secretary of the Hungarian communist party and the main Stalinist. Imre Nagy was the prime minister of Hungary between 1954 and 1956. Despite of his emigrant experience in the interwar Soviet Union, he became a reformist and patriot. The new regime led by János Kádár and established after the Hungarian revolution in 1956 executed him in 1958.

[81] See Knapp, Viktor: cit. op. II (see footnote 5).

General and Legal Meaning of Civil Society in Hungary from the Beginning till 1989*

*Ádám Rixer***

Abstract

This essay tries to show examples from the history of civil society in Hungary so we could point out some of the general and long-lasting tendencies of the sector. One of the most durable tendencies was the occasional, incoherent nature of the all time regulations: it seems that the lack of truly customised and comprehensive regulation was the chronic illness of Hungarian non-profit sector – before 1989.

Key words: *association; church; civil society; socialism; foundation; Kádár-regime.*

1. Introduction

The basic interest of each human community is that its members should be governed not only by the liberal principle of "refrain from doing what you would not want to be done to" but also by the active, altruist moral principle of "do what you would want to be done to you" [1]. "This interest of the community is transmitted to the individual by a large set of religious rules and social norms. At the time of the establishment of the individual state in Hungary some institutions appeared, which may be considered the predecessors of the present non-profit organisations, moreover, also the roots of the cooperation may be observed which today is usually referred to as the division of work between the governmental and the non-profit sector. Prince Géza and King Stephen donated part of the land confiscated from rebel pagan leaders to the Catholic Church and to the religious orders invited to Hungary".[2] As László Kecskés presents [3] this transfer of property was the exact predecessor of setting foundations later, because it fulfilled all requirements which shall be met if setting up a foundation today. The founder donated the money for permanent causes of public interest, it was not allowed to withdraw it, but the founder had the right to give instructions for using the revenues originating from the property. The tendency which ran through the medieval history of the Kingdom of Hungary is that the foundations were usually established for religious-educational purposes. Achieving these goals and the management of the property required the founding natural or legal entity to establish an organisation. These were usually schools, higher education institutions, which were supervised by the founder (or the legal person, usually church entity appointed by it). As the establishment of a foundation required approval by the king – in case of the Roman Catholic Church as result of the right of patronage – the foundations were also supervised by the king.[4]

2. Relationship of the civil society and the church

The role of churches (religious orders) was not only to spread Christian dogmas and through them beliefs, but also the support of those in need. According to the rules of the gospel donation was a Christian obligation, either to – obviously religious – institutions, or to specific individuals in need. In addition to donations from the king the religious orders received lands, parts of land also from other secular persons who by donating these wished to contribute to the support of the most desperate. This means, therefore that the secular power (the king), religious organisation and private donators have taken – if sometimes not proportionate – role together in the management of social problems from the very beginning. "Along with monasteries several non-religious fraternities (fratres conversi) and brotherhoods were established. Their usual role was to take over the economic and charity tasks, cultivate the lands, operate inns and hospitals, and provide alms for the poor. From this it was only one more step to establish hospital brotherhoods independently from monasteries in an era when corporate spirit was in the air and made a long row of different organisations come into being for a variety of causes." [5]

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1 Matthew's Gospel 7:12.: "So whatever you wish that others would do to you, do also to them, for this is the Law and the Prophets.". The Holy Bible, English Standard Version, 1994, p. 622.

2 KUTI Éva, Hívjuk talán non-profitnak… [May it be called non-profit…], Non-profit Kutatócsoport, Budapest, 1998, p. 18.

3 KECSKÉS László, Az alapítványi jog fejlődése [Development of the law of foundations.], *Magyar Jog* 1988/2. p. 110.

4 BÉLI Gábor, Magyar jogtörténet. A tradicionális jog [Hungarian legal history. Traditional law], Dialóg Campus, Budapest – Pécs, 1999, p. 55.

5 SOMOGYI Zoltán, A középkori Magyarország szegényügye [Poverty issues of medieval Hungary], Stephaneum, Budapest, 1941, p. 20.

In addition to fulfilling their original economic functions the associations of craftsmen and the guilds also aimed at organising mutual assistance among their members as well as public services (performance of public tasks) which become necessary in the interests of the community.[6] Towns and their citizens – as soon as they found themselves strong enough – made attempts to transfer institutions which provide public services into town competence. Private donators establishing charity foundations trusted the management of foundations to the prestigious citizens or leaders of the city, or, if possible, to the town authority.

Institutions established in the way described above „were neither classic non-profit, nor classic public institutions, they rather represented something in the middle. By favour of their founders they had some founding capital, their property was often increased with legacies and special donations (e.g. for the establishment of benefices), their operation was facilitated by smaller-larger private donations, but at the same time they also received support from the city." [7]

3. Civil society and its deadlock

Till the end of the 15th century the way of development of Hungarian economy and society (and thus of Hungarian charity institutions and voluntary organisations) was rather similar to the development which took place in other European countries. The central power found its allies in the citizens of towns against the power ambitions of landlords and the church, and in return for this support it provided privileges which facilitated the establishment of the "third order" in Hungary.[8]

In the 16th century the European development as a whole arrived to a critical point. The new form of division of work and the establishment of "European world economy" pushed Eastern-European countries to the periphery. This was the point when Hungarian charity institutions and voluntary organisations also lost the way followed by the more developed countries of Europe to suffer all traumas and fight with all forced solutions which "are still present in collective memory, form the community's answer given to challenges and indirectly also influence the attitude of today's non-profit organisations." [9]

The next two centuries, which were called by István Bibó the dead end of the development of Hungarian society made the self-organisation of society and the normal operation of self--activist organisations completely impossible. The Turkish invasion made the second villeinage permanent, stabilised the allegiance of noblemen and the gentry established (and strengthened) after the peasant revolt led by Dózsa. Social relationships became permanent, the development of towns stopped even in areas which were not under Turkish rule. Naturally, in lack of developed citizenry those voluntary organisations also remained vestigial which should have worked as the immune system of the society against external invasion and internal suppression. Those "small circles of freedom" and citizens' self--activities, which in Western societies were motivators of development could not be established and operated.[10]

This situation did not change significantly after the end of the Turkish rule, because the Habsburgs' policy rather held back the development of citizenry and the integration of society, instead of speeding it up. As leading power of counter--reformation, Catholicism was made to be state religion again, by this not only paralysing Protestant churches, but also preventing Catholic Church from making its institutions into the starting points of voluntary organisations.[11] According to the regulation of the time valid for foundations in 1715 and 1723 the operation of the foundations was supervised and controlled by the ruler and the members of the governor-general (see later). However, the further Hungarian development of the life of foundations and associations was significantly held back, for a long time, by the unbalanced internal political situation and wars fought in the territory of the country.[12]

4. Civil renewal in Hungary. Expeditious organisations of the Enlightenment and the Reform Era

After they expulsed the Turkish army and defeated the Rákóczi freedom fight the Habsburgs prepared for a longer stay in Hungary. During the reforms implemented in the first decades of the enlightened absolutism (introduction of a new tax system, regulation of the rights and obligations of villains, reform of education, social care and health care) their attention was also directed to charity and volunteer organisations.[13] After examining the content of the Corpus Iuris Hungarici the public law status of church charitable foundations seems to be obvious, which is fundamentally different from the division principle of the valid Constitution. The public law status of the time may be best traced back to the consistent application of the right of patronage according to act LXX of 1723, which reserved the supervisory rights over all charitable foundations to the king, and "the state authority could disregard from the supervision of the church charitable foundations" only upon decree nr. 9,555/1863 of the council of the governor-general.[14]

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[6] KUTI, op. cit. p. 20.

[7] CSIZMADIA Andor, A szociális gondoskodás változásai Magyarországon [Changes of social care in Hungary.], MTA Állam- és Jogtudományi Intézete, Budapest, 1977, p. 17.

[8] KUTI, op. cit. p. 23.

[9] Ibid.

[10] KUTI, op. cit. p. 24.

[11] Ibid.

[12] BOCZ János, A non-profit szektor strukturális átalakulása Magyarországon. A magyar non-profit szektor az 1990-es évek elejétől a 2000-es évek közepéig. PhD. értekezés [Structural changes of the non-profit sector in Hungary. The Hungarian non-profit sector from the beginning of the 1990s till the middle of the 2000s. PhD dissertation], Budapesti Corvinus Egyetem Szociológiai Doktori Iskola, Budapest, 2009, p. 119.

[13] KUTI, op. cit. p. 25.

[14] SZUROMI Szabolcs, A kegyes alapítványok jogállása Magyarországon a korábbi és a hatályos egyházjog, valamint az állami egyházjogi normák tükrében [Legal status of charitable foundations in Hungary with regard to the previous and valid church law and the state church law norms], *Jogtörténeti Szemle* 2004/1. p. 17.

It shall be also mentioned that – much later – the Codex Iuris Canonici regulated the activities of charitable foundations (pia fundatios) in canons 1544–1551, which – among others – were established to perform holy acts, the usual form of which was the operation of hospitals, alms-houses, boarding schools and twighlight homes.[15]

Due to the destruction of majority of archive sources there are information about foundations only from the 19th century. It is known from the research of Magdolna Balázs that in majority of foundations of the 19th century the donator – just like today – set forth charity, educational, cultural or scientific goals and tried to establish their conditions in forms of donation of property or money.[16] Setting up foundations was motivated – in addition to charity and humanity – by belonging to a community and the intention of self-expression. For example, for women the charity provided opportunity for participation in public life and to increase social presence and acknowledgement. It is also important that setting up a foundation or making contribution to a foundation – unlike the present practice – did not result in any material gain in any sense, it did not reduce the public debts or tax with the value of donated assets or real estate. For example, charity foundations were primarily set up for establishing orphanages, care homes and alms-houses, but as time passed by their role – in line with the all-time social needs – was extended and transformed.

Reading societies established in the 1790 s were practically societies with social policy goals, "political association in the program of which there were reading and culture, as tools for social transformation, and weapons for fight against Austrian colonisation".[17] After the exposure and elimination of the Hungarian Jacobin movement not only reading societies were banned, but the closure of public libraries was also ordered. When in 1811–12 – some – libraries were reopened their activities were under strict control of authorities, dedicated decree of the emperor stated that the newly established libraries "may not be attached to either reading rooms or scientific societies".[18]

In the more relaxed political atmosphere of the Reform era (1825–1848) the voluntary association of citizens received new motivation too. Societies, reading clubs, casinos, and literary associations were an important basis for the reform movement aiming at the industrialisation of the country, the elimination of the feudal legal system and national independence. In addition to the goals of self-education and dialogue several associations formulated other civil and national aims in their statutes which perfectly resembled to "the cultural, economic, education and humanitarian directions of reform policy, such as the development of agriculture, industry and commerce, the sponsorship of arts, literature and theatre, improvement of Hungarian language, facilitation of urbanisation and civilisation, enhancement of morality and good taste, support of the poor, etc.".[19] Even though the leading force of the reform movement was represented by the nobility and the forming intellectual class, the social activity of lower social classes also increased. In addition to associations – composed of aristocracy and gentry – and casinos the number of societies of civil society and workers also increased in the 1830–1840s, just like the number of "low class casinos" and the voluntary organisations of peasants.[20]

The large number of societies and clubs gave space to the citizens' activity, and in case of certain organisations the elements of community leisure time and political activity can hardly be separated from each other, subsequently. In the 1830s civilian activities became especially popular: "Let us join together! This is the motto of our era, since it has been announced by honourable count István Széchenyi. (…) For a decade several organisations and associations have been formed almost every day for reaching all kinds of scientific, artistic, humanitarian and material goals, they join together people from all classes, as these associations are based solely on equality."[21] More and more political groups were established, among them the Conversation Club in 1834. "The special Reform era feature of Hungarian public life was the explosion of publicity."[22] As Pál Vasvári put it: „And people, who want to shed light on the horizon under such circumstances, still meet."[23]

Among associations (collegia) were literature-art and scientific associations, such as the Kisfaludy Association established in 1836.[24] The Honi Iparvédegylet (National Industry Protection Society) was officially established on 6 October 1844 upon the initiative of the nobility, but it gained significant influence also among citizens, craftsmen, guild workers and peasants. At the time of the general meeting held in November of the year following its establishment the Védegylet was proud to have 138 regional organisations, which were real civil organisations.

Act XVIII of 1848 (act on the press) establishing the freedom of press was the first to declare in Hungary that "everyone shall be free to express and spread his thoughts freely through the press".

In summary: the blooming of the life of associations was not only a side effect, but an organic element of the reform movement, too. It is not surprising, therefore, that after defeating the revolution and freedom fight of 1848 the Habsburg court did all it could to dissolve or at least paralyse associations.[25]

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15 Ibid., p. 16.
16 BALÁZS Magdolna, Az alapítványi élet indulása Magyarországon [The beginning of foundations in Hungary], *Esély* 1991/1. pp. 22–40.
17 KUTI, op. cit. p. 27.
18 Ibid.
19 Ibid.
20 Ibid., p. 28.
21 HORVÁTH Mihály, Polgárosodás, liberalizmus, függetlenségi harc. Válogatott írások [Rising of the middle class, liberalism, freedom fight. Selected essays], Gondolat, Budapest, 1986, p. 25.
22 MEZEY Barna, Magyar alkotmánytörténet [Hungarian constitutional histroy], OSIRIS, Budapest, 1996, p. 199.
23 VASVÁRI Pál, Irányeszmék [Guidelines], Magvető, Budapest, 1988, p. 24.
24 BÉLI Gábor, Magyar jogtörténet. A tradicionális jog [Hungarian legal history. Traditional law], Dialóg Campus, Budapest – Pécs, 1999, p. 55.
25 KUTI, op. cit. p. 29.

5. Charity and voluntary organisations from the start of absolutism till the end of World War II

Even though after the fall of the revolution of 1848/49 not all associations were banned, the majority were dissolved, threatened, or under constant persecution. A parallel should be drawn between these events, and those similar attitudes which may be observed after 1948, and in the period starting with 1957.

However, the majority of organisations established before 1848 survived this period and had the strength to restart its activities after shorter or longer break, moreover, despite all difficulties new organisations were also established. Due to the order of November 1852 the blooming life of associations typical in the Reform era somewhat stopped, it was put under the supervision of authorities, in line with the principles of the given period. The number of casinos and reading societies, which were the most significant in Hungary, was approximately 180 just before 1848 in the territory of the present day Hungary. After the Compromise – differently from the statutory regulations of the hereditary provinces – the enforcement of the right to association was subject to the provisions of orders.[26] At the end of the 1870s approximately 230 casinos (with 25,000 members) and 460 reading clubs (with 31,000 members) operated in Hungary, while the total number of associations (without industrial and waterworks associations) reached 2,700, with membership of approximately 600,000.[27]

After the Compromise of 1867 the development increased. It was further facilitated by the dissolution of guilds in 1872 (act VIII of 1872, with a more popular name the "industry act"). The act itself referred to the practice that in the future craftsmen may continue cooperation within the profession, the representation of their interests and the organisation of social services in form of associations.

Moreover, it shall not be forgotten that at this time civilian movements also had some nationalistic features. "With the constitutional reform of 1848 the gravity force of Hungarian nobility lifestyle was lost, the bonds which had attached nationalities to the Hungarian nation broke up, nationalities used freedom and equality received from Hungarian nobility to influence foreign powers, and against the fraternity, and by the establishment of nationality civil classes the balance between nationality efforts and the new Hungarian state was lost" – wrote Imre Mikó.[28]

In the examined period the main factors of the support of the poor were social charity societies; in the first years of the 20th century approximately 300–400 societies managed public subsidies. Among religious organisations the Catholic Social Mission Association established in 1908, the Reformed Lórántffy Zsuzsanna Society established in 1891 and several Israelite women's associations shall be mentioned. The role of secular organisations shall not be forgotten either, for example the Hungarian Society of the Red Cross (1879) or the Budapest General Public Donation Association (1908).

The relationship of the state to non-profit organisations was controversial, which was shown also in the legal regulations. Even though a set of acts and orders (such as act V of 1878 on felonies and misdemeanours, act XV of 1883 on the budget of counties, act XXI of 1886 on local authorities, act X of 1909 on income tax, and decrees nr. 9555/1863, nr. 16031/1886, nr. 16784/1900 and nr. 10271/1924) contained regulations which stipulated the establishment, operation, registration and governmental supervision of foundations and public foundations, these legal regulations somehow did not form a complete system of laws.[29] Their enforcement was insufficient and partial, and the majority of the organisations managing foundations did not operate in compliance with law. In the whole period only one draft act was prepared (in 1928) which could have resulted in comprehensive regulation, but this never entered into force.[30]

The legal regulation of societies was much stricter. According to decree nr. 1873/1394 the official approval had to be acquired for the founding document of the newly established organisations, and operation could start only after the arrival of the approval *(the details of statutory rules made in the 1980s are very similar!).* Decree 1875/5008 stated that "nationality society may be formed only as literature or cultural society; in case of political and workers' societies it is not possible to form branches".[31]

Act XLIII of 1912 authorised the Ministry of the Interior to prohibit the establishment of new societies, and to dissolve the earlier registered voluntary organisations in case of war. *As the entering into force of the act was facilitated by decree nr. 1914/5735, it was not allowed to establish any societies for two years.* This ban was somewhat facilitated by government decree 1916/1442, but for the establishment of new societies the permission of the Ministry of the Interior was needed in the future. The Ministry also had the right to limit the activities of societies which were considered dangerous for the state, and in some cases it could completely ban their operation. This regulation – except for a short intermezzo when the Károlyi-government ensure the freedom of association and assembly in common act III of 1919 – practically remained unchanged till 1945. The strict conditions made it somewhat more difficult, but not impossible for almost all sectors, professional, religious and age groups of society to establish its own societies (even without state approval). It was another sign of mistrust against the civil sector that their increased supervision and control was also regulated, which practically made the permission of the establishment of new societies by the ministerial approval of the founding document an authority decision which could be exercised with discretion.

Local authorities regularly checked societies working on their territory and made annual reports to the Minister of the Interior about their lawful operation. According to the order "the close

[26] GYÁNI Gábor – KÖVÉR György, Magyarország társadalomtörténete [Hungary's social history], OSIRIS, Budapest, 2003, p. 106.
[27] Ibid.
[28] MIKÓ Imre, Nemzetiségi jog és nemzetiségi politika [Nationality law and nationality politics], Minerva, Kolozsvár, 1944, p. 39.
[29] KUTI, op. cit. p. 34.
[30] Ibid.
[31] Ibid.

supervision of the operation and management of those societies shall be performed which receive authority or social support. This control shall cover the establishment of whether the financial management of the society may be considered appropriate regarding the fulfilment of the public interest goal set forth in the founding document, and whether *expenses* (administrative, etc.) are proportionate with the *achieved results*." Those which did not fulfil this condition were considered useless (general decree of the Ministry of the Interior nr. 181. 001/1937). In addition to the general prohibitions serious legal limitations were introduced against certain organisations, including racial (Jew laws) and directly political restrictions. For example, the operation of youth organisations operating at universities and colleges were placed under authority control. The minister for religion and public education was responsible for it, thus it could regulate "which preconditions the university and college students have to fulfil in order to be member of societies or society-like organisation which are not under university or college authority." (Act XXXIX of 1940 on the application of university or college students)

In the 1920s, 1930s and 1940s the "majority of the personal and financial burdens of caring for the poor was still carried out by private donations, mainly by the society caritas". In the 1930s approximately 900 social institutions worked all over the country with this purpose: in Budapest 77 societies and a large number of church communities cared for the poor, among them 13 operated public kitchens.[32]

The social and cultural diversification, the process of the late rising of the middle class in a country which was slowly leaving feudalism behind had its effect also in the self-organisation of society. The newly (or repeatedly) established social classes obviously established their voluntary organisations, which did not only strengthen group identity, but also carried on a lot of interest protection, social, cultural and leisure activities. In addition to the already operating organisations of the nobility, intellectuals and citizens (and partly upon their example) societies of workers, craftsmen and village people were formed one after the other in the last decades of the 19th century and in the first decades of the 20th century. Due to this the forming and operation of associations was a mass phenomenon in Hungary during the period between the two world wars, it became part of everyday life of society.

All in all it may be concluded that in the period before World War II Hungary had a developed association sector. However, the role of associations in the provision of services was rather small. In 1932 one-fifth of all associations operated in the field of health care and social services, but these were mainly self-aiding societies. The rate of real charity organisations barely reached 6%[33], and their activities were mainly limited to helping the poor in the cities. The extremely low rate of societies taking part in education further dropped between 1878 and 1932.[34]

The situation of foundations was different, because they had traditionally strong ties to charity goals, but – in lack of members – they played less active part in the organisation of society. Due to their nature foundations participated in the improvement of social services mainly as supporters and financers. It often happened that different welfare services were realised upon the cooperation of private foundations and state institutions. The donations of foundations, as well as the majority of private donations and legacies helped the work of social and education institutions run by the state. It was a common phenomenon to find "foundation beds" in hospitals and "benefices" in schools, at universities, orphanages, care institutions and alms-houses. It also happened several times – on the contrary – that the government contributed to the establishment of foundation service provider organisations by material assets or by providing land or building.[35] The aim to concentrate resources was shown in the orders through which in the 1920s fund raising was regulated, but it was clearly visible during the introduction of the new social policy model (which was known under the name Egri Norma [Eger Norm], then Magyar Norma [Hungarian Norm]).[36] The starting point of the new model was that churches, voluntary organisations and authorities have better chances to fight spreading poverty together than any of them acting alone. It introduction – as so-called Hungarian Norm – was stipulated for towns by decree nr. 1936/172.000 of the minister of the interior, but – with the permission of the chief constable – larger villages were also allowed to adopt it.[37]

The relatively quick dissolution of traditional communities started already in the early years of the war. The "levente" movement started its attack against the numerous, diverse, non-military movements and organisations in 1941–42.[38] In parallel with this the social participation of certain communities was limited, and later the elimination of a complete race group took place.

6. Associations and social organisations after World War II and in the era of state socialism

Government decree 529/1945 abolished extreme right organisations, while act I of 1946 on the form of state of Hungary declared the freedom of association, moreover, act X of 1946 on the valid protection of fundamental rights realised – among others – the system of sanctions applicable in case of the violation of the right to association (including its hampering). *The gap between practice and the possibilities ensured by law grew endlessly. From 1947 autonomous organisations were targeted with rather various tools.* Nationalisation, public body established by law or transformed, centrally determined operating system were among these tools, just like deletion from the land register

[32] GYÁNI – KÖVÉR, op. cit. p. 377.
[33] Magyar statisztikai évkönyv [Hungarian statistical yearbook], Budapest, 1934. p. 70.
[34] Ibid.
[35] KUTI, op. cit. p. 37.
[36] Ibid., p. 39.
[37] CSIZMADIA, op. cit. p. 95.
[38] HANKISS Elemér, Kelet-európai alternatívák [Eastern-European alternatives], Közgazdasági és Jogi Könyvkiadó, Budapest, 1989, p. 67.

or abolition. This means that the not prohibited organisations were put under full party and state control, just like the *new type of "social organisations"* established artificially from above, *which, however, received state support*.

The vanishing process of structurally centralised, traditional communities sped up in the second half of the 1940s. The KALOT (National Body of Catholic Agricultural Young Men's Associations) had about half million members and more than three thousand local organisations at the end of the 1930s, and at the time of its abolition in July 1946 it still ran 631 local organisations. Its twinning organisation, KALÁSZ – for the associations of women – had approximately 950 local organisations in 1940 and 576 at the time of its abolition in 1946. And the KIOÉ, the Soli Deo Gloria and the Boys Scout Association have not been mentioned yet.[39]

The majority of the societies was tousled and dissolved, while those surviving the prohibitions were placed under full scale party and state supervision. The establishment of new expeditious organisations was prevented by forces of power, instead of them centrally organised, so-called social organisations were established artificially.[40] "The proliferation of communities would make decision making more difficult, it would disturb administration and would make social order less transparent" – describes the attitude of the era Hankiss.[41]

For the description of the transforming communities of the era we shall consider the differences between direct and ideal communities. Members of a community of ideas may live far from each other in space; they are tied together by the knowledge of shared values and goals without actually knowing each other. The same was true for religious denominations or members of the humanity movement in the 16th century,[42] but internationalist goals give completely new meaning for the notion, especially in a social environment where the primary goal is to completely eliminate the organic structures of the past. However, in the group and interpersonal relations of the new era not only the emergence of new processes, but also the establishment of very "traditional" phenomena may be observed, too: for example, Johan Galtung calls the system of personal dependencies and relationships clearly observable in state socialism "new feudal" organisation.[43]

Foundations were considered even more suspicious by the central power than societies, in so far as "from the aspect of the central power the foundations seem to be dangerous, especially in the fields (in education, culture, social policy) which the central power wants to control."[44] The Rákosi-system abolished foundations, moreover, eliminated the institution of foundation from the Hungarian legal system. Decision 474/1948 of the Economic Council ordered the dissolution of public foundations and their merger into state budget, and statutory rule 2/1949 stipulated that the establishment and operation of private foundations shall be subject of the approval of the competent minister, based on the goal set forth in the founding document.

Based on the legal approach of the time act IV of 1959 on the Civil Code wished to solve the problem of donating the property of private persons to public goal by introducing the institution of *undertaking obligation for public interest*, which was partly similar to the institution of foundation, but by the undertaking of obligation for public interest *no new legal entity was established*. The establishment of foundation became possible again due to the modification of the Civil Code in 1987. Statutory rule 11 of 1987, by establishing articles 74/A–74/F of the Civil Code made it possible for private and legal persons to establish foundation for public interest goal set forth in its founding document. The legal personality of the foundation was declared by the law.

The Constitution of 1949 ensured the freedom of association only for "workers". Based on authorisation set forth in decree nr. 7330/1946 M.É. the minister of the interior gradually eliminated those associations the establishment of which was not initiated by the state.[45]

After the intermezzo of 1956 the modification of the Constitution in 1972 recognised the freedom of association for citizens, instead of "workers", but it did not change the detailed rules of the exercise of this freedom. This means that the statutory rule 35 of 1970 on associations remained in force, and it stipulated that the start of the organisation works of associations also had to be reported to the state administrative authority competent upon the goal of the association. Moreover, ten years later further restrictions were stipulated in a new law (statutory rule 29 of 1981 on the modification and revised text of statutory rule 35 of 1970 on associations). According to this the competent authority was free to ban the first steps of organisation if it believed that the goal of the association was in violation of state, social or economic order.

Citizens almost exclusively established politically neutral – mainly public culture and leisure (sport) – associations which seemed to be harmless in the opinion of the central power.[46] "Social and mass organisations, movements, primarily trade unions, co-operatives and youth organisations have important role in expressing the interests of groups and individuals. Frequent consultations among the party and the government, and the representatives of such organisations – at different levels – contribute to the review and negotiation of interests, which has been a long time used and working practice of our party" – explains János Kádár, first secretary of the MSZMP KB (Hungar-

[39] Ibid., p. 68–69.
[40] KUTI, op. cit. p. 45–46.
[41] HANKISS, op. cit. p. 70.
[42] Ibid., p. 66.
[43] GALTUNG, Johan, Feudal Systems, Structural Violence and the Structural Theory of Revolution, *Peace and Social Structure* 1978/3. pp. 51–73.
[44] KUTI, op. cit. p. 46.
[45] Ibid., p. 48.
[46] Ibid., p. 49.

ian Socialist Workers' Party Political Executive Committee) of the time.[47] "Mass organisations and movements are directed by the party with ideal and political tools" – stated the 12th congress of the MSZMP – by preserving the "revolutionary leading team" feature of the party. "The primary goal of mass organisations is to motivate – in diverse forms, at all levels of society – for the better performance of actual political, social and economic tasks and represent the interests of their members."[48]

From the end of the 1970s and the beginning of the 1980s the authorities were suspicious about the seemingly politically neutral organisations of citizens (youth clubs, film clubs, amateur theatre clubs, intellectual societies, dance clubs, etc.), but abolitions were rare. Due to the movements starting at the beginning of the 1980s the Presidential Council modified the statutory rule 35 of 1970 on associations with the statutory rule 29 of 1981 and statutory rule 27 of 1983. It did it in a way that the organisation work could start only upon the prior written permission of the authority, and the actual work of the association could start only after the approval of the statute by the authority and after the registration. This was regulated without any court remedies, which meant that the authority was free to prohibit the establishment of associations without consequences, with administrative measures.[49]

Among conflicts and temporal prohibitions, the central power still tolerated the operation of the various organisations (SZETA, public colleges, aviation universities) of the opposition which later became the driving force of the change in the system – it tolerated it but occasionally tried to hinder them.

The legal "rehabilitation" of foundations already happened before the political changes, in 1987, as with the statutory rule 11 of 1987 of the Presidential Council of the People's Republic of Hungary the institution was reintroduced into the Civil Code.

Two years after the official acknowledgement of the institution of foundation the Parliament enacted act II of 1989 on the right to association with which it established the legal guarantees of the freedom of association. Article 1 of the act states that "The right of association is a fundamental freedom to which everyone is entitled and which the Republic of Hungary recognizes, while ensuring its free exercise. Under the right of association everyone has the right to form organizations or communities with others or to participate in the activities thereof."

The act on the right to association abolished all previous statutory rules and modified the Civil Code. This was the time when direct state administrative supervision of associations was abolished, too. Changes originating from the approval of the democratic constitution(al reform) (act XXXI of 1989 on the modification of the Constitution) may be summarised in a way that association was granted organisational, economic and social autonomy which it deserved in line with constitutionalism, but the regulation was maybe too brief about associations and social organisations (e.g. only three articles in the Civil Code).

The settlement of the legal status of foundations and associations, therefore, preceded political transition, which shows that the development of the civil sector was not only consequence, but – at least partly – anticipatory of the changes.[50]

6.1 The notion of civil society in the Kádár-regime

Civil society, as a key notion has been mentioned already in the Kadarian authoritarian regime, when "democratic players want to understand themselves, and it is also an important factor in the newer analyses of the problems of democratic transition."[51] These analyses focus on the shift from authoritarian power, the transition which may be divided into two – less artificial – phases. The first one is the phase of "liberation" (which may be defined by the restoration and extension of individual and group rights), which is followed by the second phase of „democratisation". The success of Hungarian transition (including the political transition of 1989–1990) significantly depended on the revival of "civil society". The notion used in different analyses means the network of formalised groups and organisations among families, small groups and bodies and organisations which may be definitely considered "state representative" which mediated between the INDIVIDUAL, the STATE, the private and community sector. The organisations of the Hungarian society of the transition – contrary to clans, mafias, clicks, clubs and underground movements already have public, civil status which is related to the „acknowledged right to be" and to the ability to "openly discuss (…) common issues and publicly step up for the protection of lawful interests."[52] In addition to the representation of interests other authors stress the notion of self-expression, and there are some who interpret the revival of civil society in a way that it reaches its peak in a strongly mobilised and concentrated form which is characterised by the "mobilization of masses" and "people's movement", and when "the different groups and levels of the civil society temporarily develop one single collective identity."[53]

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[47] KÁDÁR János, A szocializmus megújulása Magyarországon. Válogatott beszédek és cikkek 1957–1986 [Renewal of socialism in Hungary. Selected speeches and articles 1957–1986], Kossuth, Budapest, 1986, p. 262.

[48] A Magyar Szocialista Munkáspárt XII: kongresszusa. 1980. március 24–27. [12th Congress of the Hungarian Socialist Workers' Party, 24–27 March 1980] MSZMP publication, Budapest, 1980. p. 138.

[49] HANKISS, op. cit. p. 100–101.

[50] KUTI, op. cit. p. 53.

[51] ARATÓ András – COHEN, Jean, Civil társadalom és demokratikus átmenet Latin-Amerikában és Kelet-Európában [Civil society and democratic transition in South-America and in Eastern-Europe], *Mozgó Világ* 1992/7. p. 17.

[52] KIS János, Korlátainkról és lehetőségeinkről [About our limits and possibilities], in: *A monori tanácskozás,* Illegális kiadvány [Monor discussions, Illegal publication], 1985. p. 8.

[53] SZILÁGYI Ákos, Ezerkilencszáznyolcvannégyen innen és túl (A negatív utópiák társadalomképe) [Here and beyond nineteen-eighty-four (Social vision of negative utopias)], Magvető, Budapest, p. 130.

The mentioned notion of the mass is also used with two meanings.[54] On the one hand: in the liberalising Kadarian authoritarian state specific and well distinguishable levels of civil society get into moving: intellectual groups, middle class (!) organisations, human rights organisations, professional associations, movements of industrial workers, etc. These groups, societies, organisations do not melt into one unrecognisable mass even in the "melting pot" of democratic transition. On the other hand, the fora of civil society which resuscitated like a phoenix bird are usually "public" and not "mass events", in so far as it becomes clear that even beyond parties "the exercising and learning of citizenship may bloom though the discussion of everyday problems".[55]

There is an important aspect which explains why the change in the system, the political transition did not have a wide base covering all social levels and groups: "The fact that for the first time in the history of man the group of intellectuals becomes a ruling power prohibits the emergence of different class ideologies and the establishment of the organic intellectual group of suppressed classes."[56] One of the most important questions of the transition is the problem of identity of the masses of peasants and workers. The reasoning of the ideologists of the Kadarian socialism was convincing, power belongs to workers, therefore workers' organisations are not needed any more. Under the label of modern, caring, atheist state almost all social issues were excluded from the scope of individual and community responsibility, the interest revealing, aggregating and representative role taking of trade unions gradually fade away, and they are replaced by bodies controlling (!) workers, even though they are called trade union. Maybe the strongest dysfunction of these trade unions is that they include everyone from the sectorial minister to unskilled workers, making it impossible for workers to represent their own values and prohibiting the establishment of a workers aristocracy, as result of an organic development. I shall refer to Szelényi, who stated that "[in Hungary] workers sense some kind of class dichotomy, they have strong sense of identity, moreover, they are able to observe the conflicting features of class relationships, but they miss the feeling of class totalitarianism and the vision of any other alternative".[57]

Based on the Hungarian literature of the past three decades the domestic notion of civil society may be defined as follows (with significant simplification): A notion which is often used in sociology and political literature, which refers to a self-organising community of independent citizens, which is separate from state power. In these definitions of the idea of civil society it is an important factor that people are able to harmonise their lives and activities without the intervention of the state, to protect their interests against the state if necessary, and to limit the excessive power of state power.[58]

7. Summary, i.e the main historical features of the Hungarian history of civil (voluntary) organisations

The development of the Hungarian civil/non-profit sector – as we interpret it today – was historically characterised by intermissions and a partly organic institutionalisation. The development of the non-profit sector of the times since the transition has been strongly influenced by behavioural patterns established during the previous decades, or even centuries. It is possible to understand the present processes only if we manage to discover those elements of historical experiences which are still present in the collective memory, i.e. "seem to have outstanding importance from the aspect of today's problems and development perspectives".[59]

Cooperation between the state and the non-profit sector has historically had four very important areas, namely

a) establishment of social policy,
b) financing of welfare services,
c) specific service provider activities and
d) establishment of regulatory frameworks.

The state "has never been in a situation in which it could have formed social policy on its own, even though it had made several (sometimes aggressive) attempts to monopolize this role. In the first centuries the directions of the development of social and educational services were determined by the most important service providers and financers, which means that churches, kings, and somewhat later town magistrates and guilds all had some influence. As the positions of the government have strengthened continuously during the centuries, the techniques of social participation had to be improved as well".[60]

No matter which historical period is under examination, the strange duality (double pressure) of striving for independence (autonomy) and the need for external financial tools – indirectly or directly provided by the state – has always been observable regarding the examined organisations. Direct and indirect state support has been popular already in the middle ages, the activities of charity organisations were assisted by royal donations, different privileges and tax allowances. "The foundations of the first (church-run) hospitals were established by the generous donations of King Stephen. Before the invasion of the Tartars King Béla IV exempted all hospitals of the country from paying wine tax. In the support of non-profit organisations the state has used the same financing techniques ever since, the only thing that has changed is that the specific forms of appearance has widened and some sort of guarantee elements have been built in to the system."[61] State

[54] KIS, op. cit. p. 8.
[55] Ibid., p. 10.
[56] KONRÁD György – SZELÉNYI Iván, Az értelmiség útja az osztályhatalomhoz [The way of the class of intellectuals to class power], Gondolat, Budapest, 1989, p. 112.
[57] SZELÉNYI Iván, Új osztály, állam, politika [New class, state, politics], Európa, Budapest, 1990, p. 44.
[58] See: ÁGH Attila, Az önszabályzó társadalom [Self-regulating society], Kossuth, Budapest, 1989.
[59] KUTI, op. cit. p. 53.
[60] Ibid., p. 58.
[61] Ibid., p. 60.

donation based on individual decisions has been more and more supplemented by frequent, sometimes contractually guaranteed form of governmental support. From the present techniques of state support of non-profit organisations only the tax allowances available for the donator may be considered new.[62]

During the existence of the kingdom – in addition to the primacy of the Catholic Church – the king has always tried to establish guarantees for providing certain parts of the churches' income to the caretaking of the poor, and it also founded and supported several charity institutions. Moreover, for the citizens of royal free cities the king ensured a set of rights, by this enabling them to establish those secular charity institutions which are not under the influence of the Catholic Church any more.[63] With the spread of Protestantism the Catholic Church directed its attention – in addition to (and sometimes instead of) the issues of the poor and of health care – to education, as a strategic field where it could enlist (or in the given situation regain) followers.

Moreover, it is important to stress that in addition to needs and expectations emerging from the church directly or from other organisations through the dogmas of the church from the 19th century an important "pushing force" of the development of civil society was the establishment and development of nationality movements.

The historical development of the relationship between the state and voluntary organisations has been – all along – characterised by the various combinations of fluctuation, cooperation and confrontation.[64] By the beginning of the 1980s the division of the virtual unity of central power and society has become clear; the (civil) "society has begun its detachment from the traditional provider state".[65] This period is also the time of "division" of society; an alternative or "political" civil society[66] is also born, the members of which are primarily bound together by "the linguistic culture of criticism", and due to partly this, partly their conspirative-illegal methods they are unable to widely spread their norms (patterns) of ethics and the organisation of society. In the 1980s the notion of civil society – which was part of common talk through intellectual groups – had radical political meaning: it was characterised by the resistance against power, the participatory democracy and by the third way.[67]

There were some periods of time when due to political reasons there was no legal possibility to establish civil organisations, as we interpret them today (1914–16), or even though the regulations made it formally possible, but the new establishments or the operation of already existing organisations were made impossible by administrative means.

Artificial communities[68] established during socialism could not become real communities, and some of the alternative movements started their operation under the aegis of social organisations (Hazafias Népfront, KISZ-organisations) established artificially as supporters of the regime.

The communist regime that took over Hungary in 1947 and lasted more than 40 years halted the development of the voluntary sector, destroying and vilifying civil society. The government banned most of the voluntary associations. What remained of the voluntary sector was nationalized and brought under state control. The right of association was denied, and there was also no way to set up a foundation. On paper, the communist regime had the loftiest declarations concerning the right of association. However, in practice, any application of such declarations and written laws would have been inconceivable.[69]

The 1956 Revolution revealed that communist governments had been able to dissolve most of the voluntary organisations, but they could not completely eradicate citizens' autonomy, solidarity and private initiatives. The failed revolution was followed by a tacit compromise: a more flexible version of state-socialism was developed. Gradual reforms were introduced in the economy, more freedom was granted to people in their private life. Reforms, gradual changes, realization of the poor performance of state delivery systems, all led to a more tolerant government attitude towards civic initiatives. From the 1980s this change speeded up, and after the mid-1980s it became obvious that the crisis of the system was so fundamental that any fine-tuning would have been useless. There was a need for a major overhaul.[70]

"This gradual process of reforms explains the fact that the rehabilitation of civil society was long underway before the final collapse of the communist system in Hungary. One of these steps was the 'rehabilitation' of foundations: the legal provisions pertaining to them reappeared in the Civil Code in 1987. By the time the breakdown of the Soviet Bloc had made fundamental political changes feasible in 1989, civil society organisations were numerous, developed and widespread enough to become important actors of the systemic change. Since then, they have developed together with other institutions of the economy and society, trying to find appropriate answers to the challenges created by the process of transition."[71]

The Hungarian (and in a broader sense Central-Eastern-European regional) history of the development of civil society is a partial explanation for the question of why new Central-European democracies did not build the post-1989 political system on participatory, finely tuned social coordinative proce-

[62] Ibid.
[63] KUTI, op. cit. p. 53.
[64] KUTI, op. cit. p. 56.
[65] BIHARI Mihály (ed.), A többpártrendszer kialakulása Magyarországon 1985–1991 [Establishment of multi-party system in Hungary 1985–1991], Kossuth, Budapest, 1992, p. 32.
[66] CSIZMADIA Ervin, A társadalom és a mai rendszer [Society and today's system], *Valóság* 1991/4. pp. 22–34.
[67] GYŐRFFY Gábor, A non-profit szervezetek ismérvei és tevékenységük [Features and activities of non-profit organisations], in: TÖRÖK – VINCZE (eds.), Alapfokú kézikönyv civil szervezetek számára [Basic manual for civil organisations], NIOK – SOROS, Budapest, 1998, p. 19.
[68] HANKISS, op. cit. p. 70.
[69] NAGY Renáta – SEBESTÉNY István, Methodological Practice and Practical Methodology: Fifteen Years in Non-profit Statistics, *Hungarian Statistical Review* (2008) 86(12) p. 114.
[70] Ibid.
[71] Ibid.

dures and institutional system, interpreting parliamentarism as the parliamentary monopoly of making politics. During their research Anheier and Seibel concluded that during the political transition the relationship of state and society was characterised by cooperative segmentation, its basis was provided by intellectuals, it was voluntary and the typical organisations of the sector were service provider foundations.[72]

In the opinion of one of the most important Hungarian authors, Éva Kuti one of the most durable tendencies – in addition to the before mentioned, incorporating the events which happened after the examined period – is the occasional, incoherent nature of the all time regulations: "it seems that the lack of truly customised and comprehensive regulation is the chronic illness of Hungarian non-profit sector. Transparent, permanently and consistently enforced rules applicable for all organisations have been missed for a long time, and have not been established until today. It is a question whether such "ideal" situation can be established at all, ever."[73]

[72] ANHEIER, Helmut – SEIBEL, Wolfgang, A non-profit szektor és a társadalmi átalakulás [Non-profit sector and social transition], *Európa Fórum* 1993/3. p. 27.
[73] KUTI, op. cit. p. 61.

The Reception of the French Commercial Law on the Polish Lands in the First Half of the 19th Century*

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Abstract

The French Commercial Code of 1807 (Code de commerce) was in force on the Polish lands for 125 years and originated the functioning of the commercial law in Poland as a separate field, giving birth to many institutions connected therewith. Despite its obvious flaws, it enabled then a step forward in business relations, contrary to the Russian law, even if its potential was partly wasted. The adoption of the French commercial law in the Duchy, however, happened in a specific way. Compared to other acts, it did not arouse too much interest, which was de facto a natural consequence of the contemporary political and social circumstances. Undoubtedly, the character of the reception cast a shadow on the whole period of the presence of the code on the Polish lands. The article provides detailed analysis of the circumstances connected with its introduction.

Key words: *French Commercial Code; Code de commerce; commercial law in Poland; Duchy of Warsaw; Kingdom of Poland; stock exchange; maritime trade; freedom of business activity; commercial tribunal; insurance; translation; legal language; commentaries.*

The French Commercial Code of 1807 (*Code de commerce*) was in force on the Polish lands for 125 years and originated the functioning of the commercial law in Poland as a separate field, giving birth to many institutions connected therewith. It was introduced on the territory of the Duchy of Warsaw soon after *Code civil* and *Code de procédure civil*. The circumstances connected with its introduction had a major impact on the entire subsequent period of the presence of the code on the Polish lands. 24th March 1809 is commonly regarded to be the formal date of its reception, when *Prawo stanowiące przyjęcie Kodexu Handlowego Francuzkiego dla Księstwa Warszawskiego* [The Law Establishing the Adoption of the French Commercial Code for the Duchy of Warsaw] was passed.[1] However, the use of some of the regulations of *Code de commerce* was sanctioned as early as on 23rd May 1808 if they were referred to by the Civil Code of 1804.[2]

The adoption of the French commercial law in the Duchy, however, happened in a specific way. First, what is commonly emphasised, is the fact that it happened without resistance. It was an exceptional situation, as in the case of the civil law, the doubts of the society and the Polish authorities with regard to the adoption of individual institutions and French principles gave birth to a national dispute led by the Catholic church, while in the case of the criminal law they prevented its adoption successfully. The members of the Council of State[3] emphasised first of all the necessity of the introduction of the Commercial Code as an addition to *Code civil* and as its inseparable element. Particularly since, owing to certain provision in the Civil Code which referred to *Code de commerce*, this latter body of laws was employed even prior to its formal reception.

Because of the lack of access of the Duchy to the sea, it was argued that the regulations of Book II of the code (concerning the maritime law) were admittedly unjustified, but in principle it was agreed that the adoption of the French act will solve Polish problems with bankruptcies. As a result, at the session of the Council of State on 21st February 1809 a report by K. Woyda and S. Staszic was presented, which recommended the adoption of the code without Book II, which the Council concurred with without any debate "not having sufficient time"[4].

The draft was put on the agenda of the Sejm. The lack of objections during the sittings, however, resulted more from the lack of awareness than from deep analysis of the contents, for most of the representatives were landowners who were not much

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1 Dziennik Praw Księstwa Warszawskiego [The Journal of Laws of the Duchy of Warsaw] (hereinafter: DPKW), v. I, p. 239. On 9th June 1810 its use was extended onto the area of the newly incorporated provinces; DPKW, v. II, p. 220.

2 On the strength of *Przepisy tyczące się organizacji oraz atrybucji władz sądowych i osób do składu sądownictwa należących* [The Regulations Concerning the Organisation and the Attributes of Judicial Authorities and the People Belonging to the Composition of the Judiciary].

3 Session 271 in the Royal Palace on 14th February 1809; B. Pawłowski, T. Mencel, *Protokoły Rady Stanu Księstwa Warszawskiego* [The Records of the Council of State of the Duchy of Warsaw], Toruń 1965, v. II, part 1, p. 84 and on.

4 Ibidem, p. 101. At session no. 289 on 11th March 1809 the Council made a decision to submit the draft in that shape to the Sejm, having made merely editorial amendments.

interested in the subject. In count F. Skarbek's opinion, none of them explored the commercial act and few read it, which meant that the adoption of *Code de commerce* in the Duchy "was a real act of blind submissiveness driven by indifference to the law"[5]. This seems to have been possible bearing in mind the fact that the draft of the commercial act was finally given some attention only at the ninth out of 13 sittings of the House of Representatives on 20th March 1809, part of which was actually pointless because of the lack of ready drafts to discuss[6]. The deputies were first of all preoccupied with taxes and the army. A lot of time was also devoted to the organisation of the sittings[7].

The core of the works on the subject matter was moved to the Commission of the civil legislation appointed on 11th March, whose composition, however, was subject to changes[8]. Thus, its permanent members had 8 days to read the act of 648 articles, while the newly appointed ones only 3[9]. At that time, after arrangements with the Council of State a decision was made to adopt the commercial act as a whole in the French language[10]. The very draft of the code was handed out in merely 48 copies on the day preceding the discussion[11]. The only person who took the floor with regard to the subject matter was I. Stawiarski, for T. Byszewski confused commercial matters with taxes. Bearing in mind the fact that that event is regarded as the one which laid the legal foundations for the development of the industry, the trade and the credit in the 19th century on the Polish lands, the attention paid to the act was disproportionately meagre in light of its importance.

Unfortunately, not all the institutions provided for by the code could be put into practice at once, which mainly concerned the stock exchange. Special controversies were aroused by Book II, which dealt with the problem of the maritime trade, completely irrelevant in the Duchy. Despite arguments on the possibility of applying those regulations on the inland waters "the hopes […] for a closer connection with the sea had to be squashed"[12]. Another important problem was also the aforementioned rejection of the French criminal law, which the commercial code referred to.

Undoubtedly, the character of the reception cast a shadow on the whole period of the presence of the code on the Polish lands. It was upheld in the Kingdom of Poland, yet its functioning in both the Duchy and the Kingdom was not accompanied by deeper reflection. First of all, the basic problem was the translation of *Code de commerce* into Polish[13], which was frequently undertaken by people who were completely unprepared for the task. A model example was W. Skorochód-Majewski, who only knew a little French and nothing about business relations at all, which he admitted himself in the introduction to the first edition[14]. Nevertheless, his translation finally had two successive editions[15]. It must be emphasised at the same time, sort of justifying some serious mistakes in those translations, that W. Skorochód-Majewski, who was "left almost on his own and with his own powers, could not at the time of his work draw on the learning and explanations of the authors who later carried that learning so far: there were not yet Delvincourts, Pardessuses, Vincents, Nougiers, Rogrons, Bravards; at home commercial concepts unfixed, you can say, misunderstood, in a word, almost nowhere to seek scholarly help from. Was the first translator of the Commercial Code supported at his work with any public counsel whatsoever, taught with enlightened critique? – No, he was not; even the mistakes made by him acquired, as it were, the power of the law. Exceptional indifference and people's carelessness of the call of the contemporary epoch!"[16].

This task was also undertaken by outstanding Polish lawyers like A. Heylman[17], who had already familiarized himself with

[5] F. Skarbek, *Dzieje Księstwa Warszawskiego z przedmową Piotra Chmielowskiego* [The History of the Duchy of Warsaw with a Foreword by Piotr Chmielowski], Warszawa 1898, v. II, p. 109.

[6] Among others the third sitting on 13th March 1809 and the fourth one on 14th March 1809. Compare M. Handelsman, *Dyariusze Sejmów Księstwa Warszawskiego, zeszyt 1, Dziennik posiedzeń izby poselskiej sejmu r. 1809* (The Diaries of the Sejms of the Duchy of Warsaw, Book I, the Journal of the Sittings of the House of Representatives of the Sejm of 1809) Warszawa 1913, pp. 11–12.

[7] Ibidem, pp. 1–48.

[8] Originally the commission was composed by: T. Byszewski, W. Lalewicz, M. Stokowski, S. Jarociński, and I. Stawiarski. However, at the sixth sitting of the House it was argued that W. Lalewicz and S. Jarociński could not perform their duties because of illness. M. Skrzypiński and A. Bielski were appointed in their place.

[9] Bearing in mind the fact that on 19th March copies of the draft were passed to some of the deputies while on 20th March the draft was supposed to be discussed at the sitting of the House.

[10] Which was noted in one sentence in the documentation of session of the Council of State no. 299 of 17th March 1809. B. Pawłowski, T. Mencel, op.cit., p. 177.

[11] 107 persons took part in the voting: 85 were in favour, 22 against; supplement to „Gazeta Warszawska" no. 23 of 21st March 1809, p. 430.; supplement to „Gazeta Korrespondenta Warszawskiego" no. 23 of 21st March 1809, p. 344. What's significant, in the official journal of the Sejm the number of the votes was not noted at all, which was not the case in other votings. Compare M. Handelsman, *Dyariusze…*, p. 31.

[12] I. Stawiarski, *Rzecz o potrzebie przysposobienia kodeksu handlowego francuskiego za prawo Księstwa Warszawskiego* [A Thing on the Need of Adaptation of the French Commercial Code as the Law of the Duchy of Warsaw], a speech at the sitting of the House of Representatives on 20th March 1809, p. 9.

[13] More on the topic: A. Klimaszewska, *O tłumaczeniach francuskiego Kodeksu handlowego z 1807 roku na język polski* [Of the Translations of the French Commercial Code of 1807 into Polish], „Czasopismo Prawno-Historyczne", v. LXIV, book 1, Poznań 2012, p. 139 and on.

[14] W. Skorochód – Majewski, *Kodex handlowy z zlecenia Jego Ministra Sprawiedliwości przetłumaczony przez Walentego Majewskiego wezwanego iako Notaryusza Publicznego* [The Commercial Code upon the Commission of the Minister of Justice translated by Walenty Majewski Called for as a Notary Public], Warszawa 1808.

[15] In 1811 and 1834.

[16] J.C. Sławianowski, *Uwagi nad kodexem handlowym przez J.Ro. Warszawa w druk. S. Orgelbranda, 1845, IV i 95 str.* [Comments on the Commercial Code by J.Ro. Warszawa in the printing house of S. Orgelbrand, 1845, IV and p. 95], „Biblioteka Warszawska", v. XXI, I/1846, p. 364.

[17] A. Heylman, *Kodex handlowy przekład z przypiskami przez Augusta Heylmana, sędziego appellacyjnego* [The Commercial Code, Translation and Notes by August Heylman, Judge of Appeal], Warszawa 1847.

a breadth of literature on the subject and could draw from the experience of their predecessors. Nonetheless, the gap separating the levels of the French and Polish legal languages was too large. Thus, the basic discussion focused in fact around the definitions of individual concepts of the extraordinarily developed French legal language, which did not have their equivalents in the Polish language and which concerned institutions not covered by the Polish legal regulations earlier. In consequence, there appeared works in this style, among others *O współce handlowéj prostéj (association en participation)* [Of Simple Commercial Company] by A. Heylman[18] or *Co znaczy wyraz opposition użyty w artykule 149 kodexu handlowego* [What the Word Opposition Used in Article 149 of the Commercial Code Means] by A. This[19]. Translations of famous French commentaries were also common. An interpretation of the commercial law by J.A. Rogron was issued in the Polish language by J. Szymanowski[20], while S. Godlewski published A. Boistel's work[21]. As time passed, there also appeared commentaries by Polish authors, among others by J. Szymanowski[22], and S. Bełza[23], which were compendia of the French thought with some remarks on the differences in the Polish system, and single publications within the scope of the law of the bills of exchange[24].

In any case, not negating this mannerism, which, as a natural consequence of the adoption of elements of a foreign legal order, was also present in discussions concerning the substantive and procedural civil law[25], it is worth noting that in the case of the Commercial Code, that was actually all in that matter.

On the one hand, there was the evident difficulty of the translation of the very *Code de commerce,* on the other, the problem of the consistency of individual terms in the translations of other French codes then in force, when each translation was issued by a different author. An exception to this rule were the collections by J.H.S. Rzesiński[26] and S. Zawadzki[27] containing translations of all the three codes which were in force on the Polish lands; nevertheless, even they did not manage to avoid numerous inaccuracies and mistakes, which were, anyway, pointed out in the appearing critical reviews. Two of those, concerning the translation by J.H.S. Rzesiński, were published in "Biblioteka Warszawska" in 1846: J.C. Sławianowski's *Uwagi nad kodexem handlowym przez J.Ro.*[28] and the one that was only signed with the initials: *Trzy kodexa Francuzkie wydał J.H.S. Rzesiński, przez F.Z.* [Three French Codes issued by J.H.S. Rzesiński,by F.Z.][29]. A. Heylman himself, having completed his translation, published a critical comparison of all the translations issued at that time[30].

It is worth emphasising that the problems emerging among the representatives of the Polish science and practice did not arise only from the limitations of the native language, but also from the flaws of the Commercial Code itself[31], whose biggest problems were numerous loopholes, some obsolete solutions and a bad legislative technique, rated lowest in comparison with the other Napoleonic codifications. The French themselves, trying to manage the situation, started already in 1838 an over 150-year-long process of amending the code itself and

[18] Idem, *O współce handlowéj prostéj (association en participation)*, „Biblioteka Warszawska", IV/1849, p. 269 and on.

[19] A. This, *Co znaczy wyraz opposition użyty w artykule 149 kodexu handlowego*, „Themis Polska", v. V, s. 3, pp. 401–409.

[20] J. Szymanowski, *Wykład prawa handlowego przez J.A. Rogrona, adwokata przy Radzie Stanu i przy Sądzie Kassacyjnym Francuzkim, przełożył Jan Szymanowski, podprokurator przy Sądzie Appellacyjnym Królestwa Polskiego z dodaniem przypisów z najcelniejszych autorów czerpanych, jakoteż własnych uwag zastosowanych do prawodawstwa i jurysprudencji krajowych* [An Interpretation of the Commercial Law by J. A. Rogron, a Lawyer at the Council of State and the French Court of Cassation Translated by Jan Szymanowski, the Assistant Prosecutor at the Court of Appeal of the Kingdom of Poland with Notes Taken from the Most Brilliant Authors as Well as His Own Notes Applied to the Home Legislation and Jurisprudence], Warszawa 1848.

[21] A. Boistel, *Wykład prawa handlowego przeł. z fr. S. Godlewski* [An Interpretation of the Commercial Law Translated from French by S. Godlewski], Warszawa 1877.

[22] J. Szymanowski, *Wykład Kodexu Handlowego, Dzieło pośmiertne* [An Interpretation of the Commercial Code, Posthumous Work], Warszawa 1865.

[23] S. Bełza, *O upadłościach i bankructwach, wykład księgi III. Obowiązującego Kodeksu handlowego*, [Of Failures and Bankruptcies, an Interpretation of Book III of the Commercial Code in Force], Warszawa 1891.

[24] Among others *Kto może wystawiać weksle* [Who Can Issue Bills of Exchange] by A. Heylman, „Themis Polska", v. III, s. 3, pp. 238–256; very short comments by A. This, *Czy weksle przedawnione mają jako cywilne rewersa prawne znaczenie* [Whether Overdue Bills of Exchange, as Civil Pawn Notes, Matter Legally], „Themis Polska", v. II, s. 1, pp. 70–74. More on A. This's scholarly output: W. Witkowski, *Aleksander This i Jan Kanty Wołowski: wybitni prawnicy Królestwa Polskiego* [Aleksander This and Jan Kanty Wołowski: Outstanding Lawyers of the Kingdom of Poland], Lublin 2001.

[25] To give an example, it is worth noting a publication by J. K. Wołowski *Co znaczy wyraz „valablement" użyty w ustępie art. 481 kodeksu postępowania sądowego?* [What Does the Word „Valablement" Used in a Paragraph of Article 481 of the Code of the Court Procedure Mean?], „Themis Polska" 1828, v. I, s. 1, pp. 62–70; by A. Helman, *O mylności teorii komentatorów kodeksowych francuskich jakoby w art. 481 kodeksu procedury cywilnej wyraz valablement miał znaczenie wyrazu suffisamment* [Of the Incorrectness of the French Commentators on the Code Claiming that the Word Valablement Has the Meaning of the Word Suffisamment], [in:] Idem, *Zbiór rozpraw jurysprudencyjnych* [A Collection of Jurisprudential Treatises], Warszawa 1865.

[26] J.H.S. Rzesiński, *Trzy kodexa francuzkie. Cywilny, postępowania sądowego i handlowy. W przekładzie poprawnym, z dołączeniem związkowych między sobą artykułów* [Three French Codes. The Civil Code, the Code of the Court Procedure and the Commercial Code in a Correct Translation with the Addition of the Cross-Related Articles], Kraków 1845.

[27] S. Zawadzki, *Prawo cywilne obowiązujące w Królestwie Polskiém wydał Stanisław Zawadzki, refferent Kom. Rzą. Sprawiedliwości* [The Civil Law in Force in the Kingdom of Poland issued by Stanisław Zawadzki, Officer of the Government Committee of Justice], Warszawa 1860–1863, v. I-III.

[28] J.C. Sławianowski, *Uwagi…*, p. 362 and on.

[29] Compare critical reviews: *Trzy kodexa Francuzkie wydał J.H.S. Rzesiński, przez F.Z.*, „Biblioteka Warszawska", v. XXI, I/1846, p. 167 and on.

[30] A. Heylman, *Porównanie pobieżne sześciu tłómaczeń Polskich kodexu handlowego Francuzkiego odnośnie do początkowych jego rozdziałów* [A Brief Comparison of Six Polish Translations of the French Commercial Code with Regard to Its Beginning Chapters], [in:] Idem, *Zbiór rozpraw jurysprudencyjnych* Warszawa 1871, book II.

[31] More on the subject: A. Klimaszewska, *Code de commerce – francuski Kodeks handlowy z 1807 r.* [Code de commerce – the Commercial Code of France of 1807], Gdańsk 2011, passim.

the decodification of the commercial law, which consisted in regulating individual issues in the very complex legislation around the code. What's significant, *Code de commerce* in its Polish version did not develop parallelly to its model. It was not subject to the changes which took place in native France, which often happened in the countries which had adopted it. What is interesting, however, is the fact that despite the lack of force of individual French amendments on the Polish lands, the standards of the code were often interpreted with the help thereof[32].

This does not mean, however, that it was used in the Kingdom of Poland without any changes. The most important one was the entry into force of *Urządzenie kupiectwa* [The Rules of Commerce][33] on the strength of the decision of the Viceroy of the Kingdom in the Council of State issued on 11th January 1817, which was brought in according to the propaganda slogans "for the industry in Warsaw to likewise come to the glorious condition."[34] Theoretically, "merchants' confraternities as well as craftsmen's congregations in need of improvement and management […] [were] put into effect and a new stimulus for the growth and accumulation to the industry was given"[35], also with a view to the development of the export of Polish products. Nevertheless, analysis of the regulations of the decision shows clearly that while striving for corporate organisation of commerce and licence fees for business activities, the most fundamental legislative achievement (and there were not many of them!) brought in on the strength of the French code was wasted, for the regulations of *Urządzenie* were explicitly contradictory to the idea of the freedom of business activity expressed in the flagship article 1 of *Code de commerce*, according to which it was enough to carry out commercial activities repeatedly and "treat them as your own employment"[36].

The attempts to create a uniform separate system of the commercial judiciary, fashioned after the French model, were unsuccessful as well. Only Warsaw had a separate commercial tribunal[37]. On the remaining territories of the country it was the civil tribunals of the first instance that tried commercial cases. Since the beginning of the existence of the commercial tribunal an assembly of merchants-electors elected a judge of a court of appeal as the president and a judge of a civil tribunal of the first instance as the deputy president. The election of the latter was not provided for by the regulations of the Commercial Code itself, but on the basis of the decree of the King of Saxony, the Duke of Warsaw, of 6th April 1812[38]. Appeals in commercial cases were to be filed to the Court of Appeal and to the 9th Ruling Department of the Senate, pursuant to the act of the Senate of 26th March 1842[39]. The act also repealed those regulations of *Code de commerce* according to which decisions of a commercial tribunal in cases concerning the subject of the dispute below PLN 1600 were final and the appeal was not permitted.

The changes which took place within the scope of the civil law were not without an effect on the content of the standards contained in the Commercial Code[40]. *Code de commerce* was not a separate act; it was designed as an "overlay" on the code of 1804, without which the commercial code could not be used. That legislative method manifested itself not only in numerous referring regulations but also in the very process of defining the subject matter of the act on the principle of completing the "main" legal act[41], which *Code civil* was considered to be already at the stage of the creation of the Commercial Code. Thus, all the changes in this matter were not insignificant for *Code de commerce.*

However, irrespective of its accessorial character with regard to the Civil Code, *Code de commerce* was an unquestioned stimulus for the development of the Polish system of the commercial law, influencing *de facto* its systematic evolution. First of all, on 12th April 1817 the question of the merchants and brokers' stock exchange in Warsaw got regulated. It was obvious already at the moment of the promulgation of the Commercial Code itself that a separate legal act within that scope had to be passed, for the Commercial Code did not contain regulations in that matter (besides three general provisions), which in France was regulated by directives of 19th March 1801, 19th April 1801 and 16th June 1802. In consequence, on 12th May 1817 the first Polish stock exchange, called Giełda Kupiecka Warszawska [Merchants' Stock Exchange of Warsaw] was opened in the Saxon Palace. Later its seat was moved to the grounds of Marywil. Initially the object of the trade was limited to bills of exchange, bonds and mortgage bonds. It was not until the end of the 19th c. that the trade of shares developed. At this point it is worth mentioning that in its original shape the stock exchange

[32] It concerned, among others, changes to article 42 of the Commercial Code introduced by the act of 31st March 1833, the law of 10th April 1825 on the safety of sailing and the maritime trade or the flagship amendment of *Code de commerce* of 28th May 1838 within the scope of bankruptcies.

[33] Dziennik Praw Królestwa Polskiego [The Journal of Laws of the Kingdom of Poland] (hereinafter: DPKP), v. IV, p. 159.

[34] F.M. Sobieszczański, *Rys historyczno-statystyczny wzrostu i stanu miasta Warszawy od najdawniejszych czasów aż do 1847 roku* [A Historical and Statistical Outline of the Growth and the Condition of Warsaw since the Earliest Times until 1847], „Biblioteka Warszawska", v. III/1848, p. 279.

[35] Ibidem.

[36] Article 1: "Merchants are they who carry on commerce and make it their habitual profession"; translated after: J. Rodman, *The Commercial Code of France with the Motives, Or Discourses of the Counsellors of State, delivered before the Legislative Body, illustrative of the Principles and Provisions of the Code. Translated from the French, with the Explanatory Notes, and a Complete Analytical Index*, Stanford 1814, p. 87.

[37] Its jurisdiction covered a district identical with the district of the Warsaw civil tribunal of the first instance.

[38] DPKW, v. IV, p. 291.

[39] DPKP, v. XXIX, p. 399.

[40] Among others through the entry into force of the mortgage act of 1818 (DPKP, v. V, p. 295.), *Prawo o przywilejach i hipotekach* [The Law of Privileges and Mortgages] of 1825 (DPKP, v. IX, p. 355.) and the Civil Code the Kingdom of Poland of 1825 (DPKP, v. X, p. 3) in place of the Introductory Title of Book I and Title V of Book III of Napoleon's Code.

[41] Contrary to the Germanic model of the commercial law.

did not have the legal personality and was denied financial independence, which changed only in 1872.[42]

Also, by virtue of the decision of the Viceroy of the Kingdom of 11th February 1817 two annual fairs were introduced, which were to take place on the grounds of Marywil in May and November[43]. They certainly brought in considerable income to the city. Nevertheless, the rigorous tariffs passed in 1824 put off merchants coming from other countries. In 1825 the Viceroy of the Kingdom J. Zajączek ordered the complex to be pulled down.

The subject of insurance was also recognised. It's true that the regulations of the Commercial Code referred literally to marine insurance; nonetheless, the common world-wide doctrine accepted the application thereof *per analogiam* to land insurance, which was also adopted on the Polish lands. Thus, by virtue of the ukase of 29th December 1842 (10th January 1843) "the directorate of insurance" was established. The Administrative Council also issued a lot of decisions within that scope, among others the one of 13th (25th) July 1843, 7th (19th) August 1843, 5th (17th) April 1844, 18th (30th) July 1844, 1st (13th) May 1845.

Therefore, the adoption of the Commercial Code in the Duchy of Warsaw and the maintenance thereof in the Kingdom of Poland should nonetheless be assessed rather positively. Recessionary as it may have seemed in the 19th-century France, it was a breeze of the West and modernity in the Polish conditions. Despite its obvious flaws, it enabled a then significant step forward in business relations, contrary to the Russian law, even if its potential was partly wasted. Compared to other acts, it did not arouse too much interest, which was *de facto* a natural consequence of the contemporary political and social circumstances. However, the lack of emotions connected therewith determined to a certain degree the longevity of *Code de commerce* on the Polish lands, for it formally remained in force until 1934. Paraphrasing words of the judge of the court of appeal J.C. Sławianowski, owing to the French code *we moved a step forward but we did not reach the destination; nevertheless, there was a hope that we would soon achieve that too*.

[42] Compare *Ustawa Giełdy Warszawskiej* [The Act of the Warsaw Stock Exchange] of 24th October (6th November) 1872; Zbiór Praw i Rozp. [A Collection of Laws and Directives] of 1872, no. 97 p. 1842.

[43] The first two (of 12th May and 3rd November 1817), due to the construction works in progress on the grounds of Marywil, took place on the Saxon Square (today: marshal Józef Piłsudski Square). Compare F.M. Sobieszczański, op.cit., p. 280.

Rechtliche und organisatorische Grundlagen des Funktionierens der Arbeitslager in Polen in den Jahren 1945–1950

(The Legal and Organizational Principles of the Labor Camps in Poland 1945–the 1950s.)

Pawel Kacprzak *

Abstract

After the end of WW2, numerous labor and detention camps were set up in Poland, whose purpose was mainly aiming at the resettlement of Germans. In the Census list, there were Polish citizens and locals who had been detained from the recovered areas. These hearings were reached by Soviet troops (NKVD), the local Polish authorities and in particular by the Ministry of public Security. A special group was formed by camps for forced labor at the service of the coal industry Administration. In all the forced labor camps, the inmates were subjected to repression, which also led to deaths among them. There were also the extremely poor living conditions, the chaos in organizing the matters, the falty approval of the stock orders, and the acceptance of retaliation against the Germans and their own „traitors of the Nation". This led to the gradual dissolution of the camp, including the resettlement of Germans, the control of the local population, the economic fiasco of the company and the international context.

Key words: *World War II; forced labor camps; Poland.*

Der Sieg über das faschistische Deutschland eröffnete, unabhängig von internationalen rechtlichen Sanktionen und von Forderungen der Siegermächte, das komplexe Feld der „Strafe für die Deutschen". In juristischer Hinsicht stellte man in den Ländern, die von Deutschland besetzt oder angegriffen wurden, die offensichtliche Forderung, juristische Grundlagen herauszuarbeiten, die die Verfolgung und Bestrafung deutscher Kriegsverbrecher und Kollaborateure sanktionierten. Dies um so mehr in Polen, das Opfer eines brutalen deutschen Überfalls wurde und katastrophale Vernichtungen und menschliche Verluste erlitt. Im Zuge der schrittweisen Befreiung des Landes und des sich abzeichnenden Sieges erwartete die dezimierte Gesellschaft die Bestrafung der Kriegsverbrecher und Kollaborateure (nicht unbedingt durch die „Lubliner Regierung", die von der entschiedenen Mehrheit der Polen als Usurpation angesehen wurde).[1] Angesichts der Verantwortung des Okkupanten für das Ausmaß der auf polnischem Gebiet von ihm verübten Verbrechen verlangte man nicht nur die Bestrafung der Mitglieder des faschistischen Apparats, sondern auch „eine Abrechnung mit den Deutschen" als Akt einer historischen Gerechtigkeit. Die damit verbundenen Vergeltungsgefühle waren nicht nur im polnischen und in benachbarten Völkern gegenwärtig, sondern auch in den westeuropäischen Gesellschaften verbreitet.[2]

Nach dem Ende des Zweiten Weltkrieges bestand eine der Repressionen gegen die deutsche Zivilbevölkerung darin, sie in Lagern und anderen Haftanstalten zu isolieren und ihre Ausbeutung als billige, in den meisten Fällen kostenloser Arbeitskräfte. Die Lager, deren gemeinsamer Nenner, unabhängig von ihrer Verschiedenheit, die Zwangsarbeit der Internierten war – daher wird in der Literatur am häufigsten der Begriff des Arbeitslagers mit verschiedenen Funktionen verwendet[3] –, bestanden in Polen im Prinzip von 1944 bis 1951.[4] Die Diskriminierung der deutschen Bevölkerung war nicht der einzige Grund ihrer Etablierung und ihrer Funktionsweise. Die Lager waren in hohem Maße nach sowjetischem Muster errichtet und waren gleichzeitig ein Teil des Komplexes, den man als das stalinistische Repressionssystem in Polen bezeichnete. Im Nachkriegspolen waren diese Lager in keinerlei Hinsicht eine polnische Besonderheit.[5]

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1 W. Roszkowski (A. Albert), *Historia Polski 1914–1991* [Geschichte Polens…], Warszawa 1992, S. 133 f.

2 W. Stankowski, *Obozy i inne miejsca odosobnienia dla niemieckiej ludności cywilnej w Polsce w latach 1945–1950* [Lager und andere Haftanstalten für die deutsche Zivilbevölkerung in Polen in den Jahren 1945–1950], Bydgoszcz 2002, S. 36–44.

3 *Ibidem,* S. 128, P. Madajczyk, *Przyłączenie Śląska Opolskiego do Polski 1945–1948* [Der Anschluss des Oppelner Schlesiens an Polen 1945–1948], Warszawa 1996, S. 237–243; *ibidem*, *Obozy pracy i odosobnienia dla Niemców w Polsce po II wojnie światowej,* [Arbeitslager und Haftanstalten für Deutsche nach dem Zweiten Weltkrieg], *„Studia Śląskie",* Bd. LIX, 2000, S. 103; E. Nowak, *Obozy w Polsce po 1945 roku (ze szczególnym uwzględnieniem Śląska)* [Lager in Polen nach 1945 (mit besonderer Berücksichtigung Schlesiens], *„Studia Śląskie",* Bd. LV, 1997, S. 221.

4 Es gibt Hinweise zur Verschiebung der oberen Zeitgrenze, siehe *Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym, 1945–1954. Wybór dokumentów* [Sonderkommission zur Bekämpfung von Wirtschaftskriminalität und Sabotage], Einl. u. Bearb. D. Jarosz, T. Wolsza, Warszawa 1995, S. 9.

5 W. Stankowski, *Obozy…*, S. 31–103.

Allgemeines über die Lager und anderen Haftanstalten

Die in Polen in den Jahren 1944–1950 bestehenden Lager und andere Haftanstalten für die Zivilbevölkerung lassen sich in vier Kategorien einteilen:

- Sowjetische Lager, die nach dem Vorbeizug der Front, in der Regel von polnischen Einheiten des NKWD errichtet wurden. Als Lager für zeitweilige Internierung der Kriegsgefangenen waren sie gewöhnlich nicht sehr stark durchorganisiert. Die Mehrheit wurde nach einigen Monaten der polnischen Seite zusammen mit den Gefangenen übergeben.
- Lager, die als Arbeitslager qualifiziert wurden, die die polnische Seite von den Russen übernahm oder neu einrichtete. Sie wurden seit der Jahreswende 1944/1955 aufgrund staatlicher Gesetzgebung und Verordnungen des Ressorts/Ministeriums für Öffentliche Sicherheit geschaffen. Diese Lager waren in hohem Grad durchorganisiert.
- Zwangsarbeitslager der Zentralverwaltung der Kohleindustrie mit einem hohen Organisationsgrad.
- Andere Lager, die durch lokale Behörden errichtet wurden, „wilde Lager". Bisher nur wenig erforschte Lager und andere Haftanstalten mit repressivem Charakter, die hautsächlich durch örtliche Behörden ohne klare Kompetenzen eingerichtet wurden. Sie waren unterschiedlich organisiert.

In der Aufzählung wurden die Lager der Spezialkommission zur Bekämpfung von Wirtschaftskriminalität[6] und Sabotage nicht berücksichtigt, die im Kontext der „Internierung" der deutschen Zivilbevölkerung nur eine Randbedeutung hatten, sowie Kriegsgefangenenlager.[7]

Die Grenzen zwischen den einzelnen Lagerarten waren unscharf, hauptsächlich wegen Kompetenzwirrwarr, unterschiedlichen Interessen und Pressionen zwischen den handelnden Subjekten. Dies trifft z. B. auf die sowjetischen Lager zu, nachdem sie der polnischen Seite übergeben wurden, sowie auf die unklaren Verhältnisse zwischen der Gruppe kleiner Lager, die durch die lokalen, manchmal selbst ernannten Behörden eingerichtet wurden. Ebenso fließend waren die Abgrenzungen zwischen den kleinen Lagern und anderen Inhaftierungsorten. Da das Thema der vorliegenden Arbeit die organisierten Lager sind, die typische Charakteristika einer bestimmten Repressionsweise aufweisen, muss zunächst diese Frage geklärt werden. In bisherigen polnischen Bearbeitungen gibt es Unterschiede in den angaben zur Zahl und Art der Objekte, was verständlich ist, wenn man den kurzen Zeitraum der Erforschung und den niedrigen Erhaltungsgrad der Quellen berücksichtigt. Noch größere Unterschiede im Zahlenmaterial ergibt der Vergleich mit deutschen Aufzählungen. Die polnischen Autoren gehen von höchstens etwa 500 Lagern[8] aus und verorten die meisten in Zentralpolen (auf einer Nord-Süd-Linie: Danzig – Bromberg – Warschau – Lodz-Oberschlesien). Nach deutschen Berechnungen[9] betrug die Zahl der Lager 1255, wobei die Hälfte in den nach 1945 zu Polen zugefügten Gebieten lag. Diese Frage, obwohl sie weitere Nachforschungen (Durchsicht der Dokumentensammlungen in deutschen Archiven und in polnischen Lokalarchiven) erfordert, lässt sich teilweise mit den unterschiedlichen Datenbasen der deutschen Aufzählungen erklären. Diese bestehen aus mündlichen und schriftlichen Berichten und vor allem aus Fragebogenberichten sowie den vom Suchdienst des Deutschen Roten Kreuzes erstellten Berichten. Voraussetzung dafür, einen Ort der Absonderung als Lager zu bezeichnen, waren subjektive Informationen, die auf den Zwang zum Aufenthalt an diesem Ort, auf Arbeit und Unterdrückung hinwiesen. So fanden sich auf der Liste auch Orte, an denen nur zeitweilig Menschen zusammengefasst wurden, öffentliche Gebäude, Stadtteile u. ä., an denen die deutsche Bevölkerung „kaserniert" und isoliert wurde. Sie alle besaßen keine dauerhafte Beaufsichtigung (was allerdings nicht bedeutet, dass die Deutschen dort keinen Verfolgungen ausgesetzt wurden).

In polnischen Arbeiten wird der Begriff „Lager" verwendet, wenn in einem Dokument, das von einem Organisations-, Verwaltungs-, oder Aufsichtssubjekt verfasst wurde, das Wort „Lager" auftaucht. Die Frage nach deren Anzahl und deren Definition sind immer noch ein Problem der Forschung und können zu Kontroversen führen. Dagegen wird der repressive Charakter der Lager auch bei polnischen Autoren nicht angezweifelt. In diesem Zusammenhang ergeben sich aber Grundsatzfragen, auf die, trotz großer Verdienste der Historiker, eine erschöpfende Antwort nur schwer gegeben werden kann.

Ein Problem hängt mit dem vorher nie gekannten Anwachsen der Migrationsströme in der letzten Phase des Krieges und den ersten Monaten nach Kriegsende. War es in der sich damals dynamisch verändernden Wirklichkeit, in den extrem schwierigen Verhältnissen und der instabilen Lage der Handelnden (dies betrifft vor allem die polnische Seite) möglich, das Problem der deutschen Zivilbevölkerung so zu regeln, dass einige ihrer Teile in den Internierungs- und Isolierungsorten von der übrigen Bevölkerung nicht zeitweilig abgesondert werden mussten, wo es objektiv nicht möglich war, entsprechende Verhältnisse zu schaffen, die sie traumatischen Erlebnissen, der Gefahr von Epidemien, der Gefahr, die Gesundheit oder sogar das Leben zu verlieren, nicht aussetzten? Die Antwort, allein nach der Einordnung der historischen Fakten zwischen dem Sommer und sagen wir Ende 1945 muss lauten: Nein, es gab keine Bedingungen, die ein Vermeiden solcher Situationen garantieren konnten, im besten Fall gab es sie in eingeschränktem Maße. Diese These wird gestützt durch ähnliche Probleme in anderen Ländern, vor allem in Deutschland und in der Tschechoslowa-

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[6] Siehe Fußnote 4.

[7] J. Kochanowski, *W polskiej niewoli. Niemieccy jeńcy wojenni w Polsce 1945–1950* [In polnischer Gefangenschaft. Deutsche Kriegsgefangene in Polen 1945–1950], Warszawa 2001.

[8] So E. Nowak, *Obozy w Polsce…* [Lager in Polen…], S. 221; B Kopka, (*Obozy pracy w Polsce 1944–1950. Przewodnik encyklopedyczny* [Lager in Polen 1944–1950. Enzyklopädisches Handbuch], Warszawa 2002) stellte die Existenz von 206 Arbeitslagern in Polen von 1944 bis 1950 fest.

[9] H. Nawratil, *Vertreibungs-Verbrechen an Deutschen. Tatbestand, Motive, Bewältigung.* München 1984, S. 57; *40 Jahre Arbeit für Deutschland – die Vertriebenen und Flüchtlinge,* Ulstein 1989, S. 40.

kei.[10] Eine *ad hoc* Gleichsetzung des ganzen „Lagerkomplexes" mit Repressionssystemen ist daher riskant. Um so mehr als die Beurteilung auf der Grundlage heute anerkannter Normen der Menschenrechte erfolgt. Diese sollten in ihren Grundsätzen unverändert bleiben, allerdings nicht in Imponderabilien, die – ob wir es wollen oder nicht – durch objektive Erfordernisse einer bestimmten Zeit erzwungen werden.

Eine Binsenwahrheit dagegen ist die Behauptung, dass ein Vergleich oder sogar Gleichsetzung der Lager nach dem Krieg mit den in Polen während des Krieges bestehenden nationalsozialistischen Lagern auf keinen Fall zulässig ist (obwohl es einige seltene solche Versuche in der deutschen Literatur zum Thema gibt[11]). Die letzten waren Instrumente der Durchführung von Ausrottungsplänen ganzer Völker (Juden, Roma, in langfristiger Perspektive auch der Slawen). Etwas anderes ist die Aufzeichnung persönlicher Erfahrungen eines Menschen als Opfer von Repressionen, der die Tatsachen mit Hilfe des ihm zur Verfügung stehenden Begriffsapparats beschreibt, etwas anderes wiederum die Bestimmung der Problematik im Gesamtzusammenhang des historischen Diskurses. In diesem Fall ist die Relativierung von Ereignissen, die sich qualitativ und quantitativ unterscheiden, unzulässig.

Rechts- und Organisationsgrundlagen für die Errichtung der Lager

In dem hier interessierenden Zeitraum bildeten sechs grundsätzliche staatliche Dokumente die Grundlage für die Errichtung und die Aufrechterhaltung der Lager durch das Ressort für die Öffentliche Sicherheit (ab dem 1. Januar 1945 Ministerium für die Öffentliche Sicherheit, im Folgenden RBP und MBP).[12]

Am 31. August 1944 hat das Polnische Komitee der Nationalen Befreiung ein Dekret herausgegeben über die Strafzumessung für faschistisch nationalsozialistische Kriegsverbrecher, die der Tötung und der Misshandlung von Zivilpersonen und Kriegsgefangenen schuldig waren, sowie für Verräter des polnischen Volkes.[13] Das Dekret (nachher bis 1949 mehrmals novelliert), das ab nun „sierpniówka" [vom polnisch „sierpień" = August; Anm. d. Übers.] hieß, sollte alle Angelegenheiten regeln, die mit der Bestrafung der Kriegsverbrecher und der Kollaboration polnischer Bürger mit dem nationalsozialistischen Besatzer ab dem 1. September 1939 zusammenhingen. Es war chronologisch gesehen der dritte Rechtsakt in Europa, in dem es um die Bestrafung der Kriegsverbrecher ging. Zuständig für die Verurteilung dieser Verbrecher und der Kollaborateure sollten die im Dekret aufgeführten „Sonderstrafgerichte" sein. Deren Tätigkeit wurde durch ein nachfolgendes Dekret vom 12. September 1944 über die Errichtung von Sonderstrafgerichten für die Taten der faschistisch-nationalsozialistischen Verbrecher sanktioniert.[14] Dieses in der polnischen Rechtsprechung bis dahin unbekannte Gerichtsorgan, das sich aus einem Berufsrichter und zwei Schöffen (manchmal zwei Richtern und drei Schöffen) zusammensetzte, wurde mit außerordentlich weitgehenden Befugnissen ausgestattet: standrechtliche Verfahrensweise, Endgültigkeit und Rechtskraft der Urteile.[15]

Die im Polnischen Komitee der Nationalen Befreiung, vor allem in seiner kommunistischen Spitze herrschende Überzeugung von der Zweckmäßigkeit der Inhaftierung der „Verräter der Nation" fand ihren Ausdruck in der vom Leiter des Ressorts für Öffentliche Sicherheit Stanislaus Radkiewicz am 30. Oktober 1944 herausgegebenen geheimen Instruktion über die „Festnahme und Arbeitslagereinweisung der Verräter der Nation, sog. ›Volksdeutsche‹" (so im Original)[16]. Der Volksverräter wurde definiert als polnischer Bürger, der während der deutschen Besatzung seine Zugehörigkeit zur deutschen Nationalität oder seine deutsche Herkunft erklärt oder praktisch sich daraus ergebende Privilegien genossen hat. Die Verantwortung für die Organisation der im Titel erwähnten Lager und die Durchführung der „Liquidierungsaktion der ›Volksdeutschen‹" übernahm das Ressort für Öffentliche Sicherheit, insbesondere die Woiwodschaftsämter für Öffentliche Sicherheit mit Unterstützung der Bürgermiliz und der lokalen Nationalratabteilungen (diese als „Volksfaktor").

Eine Bestätigung der Instruktion von Radkiewicz ist das vom Polnischen Komitee der Nationalen Befreiung am 4. November 1944 angenommene Dekret über Sicherungsmaßnahmen gegenüber Volksverrätern.[17] Es bestimmte, dass polnische Bürger, die während der Besatzung im Generalgouvernement und im Bereich Bialystok die Zugehörigkeit zur deutschen Nationalität erklärten und daher besondere Rechte und Privilegien genossen, „festgehalten, auf unbestimmte Zeit in Gewahrsam (Lager) genommen und zur Zwangsarbeit eingesetzt" werden sollten. Ihr Vermögen und das der mit ihnen lebenden Familienmitglieder wurden eingezogen. Sie verloren auf unbestimmte Zeit ihre allgemeinen, ihre Bürgerrechte, ihre Ehrenrechte, die elterlichen und die Fürsorgerechte. Die Verhaftung und die Einweisung in eine Haftanstalt (fungibel Lager) oblagen dem Prokurator des Sonderstrafgerichts. In der Praxis wurden die Angelegenheiten der Verhafteten und in Lagern Einsitzenden zu internen Angelegenheiten des Sicherheitsapparats, ohne Möglichkeit einer Ein-

[10] W. Stankowski, *Obozy…*, S. 48–73 u. 79–93.

[11] Z. B. P. Ther, *Deutsche und polnische Vertriebene. Gesellschaft und Vertriebenenpolitik in der SBZ/DDR und in Polen 1945–1946,* Göttingen 1998.

[12] Das Dekret vom 16. November 1945 über die Bildung der Kommission zur Bekämpfung von Wirtschaftskriminalität und Sabotage nicht mitberücksichtigt. Dz. U. RP 1945, Nr. 53, Pos. 302.

[13] Dz. U. RP 1944, Nr. 4, Pos. 16; siehe A. Kochański, *Polska 1944–1991, Informator historyczny* [Polen 1944–1991. Ein historischer Führer], Bd. 1, *Podział administracyjny. Ważniejsze akty prawne, decyzje i enuncjacje państwowe (1944–1956)* [Verwaltungsgliederung. Die wichtigsten Rechtsakte, staatliche Bekanntmachungen], S. 31.

[14] Dz. U. RP 1944, Nr. 4, Pos. 21, nach *ibidem,* S. 34.

[15] Sawicki, B. Walawski, *Zbiór przepisów specjalnych przeciwko zbrodniarzom hitlerowskim i zdrajcom narodu z komentarzem*. [Sonderverordnungssammlung gegen nationalsozialistische Verbrecher und Volksverräter mit Kommentar], Kraków 1945, S. 48.

[16] AAN Polnisches Komitee der Nationalen Befreiung, Sign. 1/80, S. 3–4.

[17] Dz. U. Nr. 11, Pos. 54, nach: J. Sawicki, B. Walawski, *Zbior przepisow…*, S. 42.

flussnahme seitens der ordentlichen Gerichtsbarkeit. Die Verwahrungsorte selbst sollten dem Leiter des Ressorts für die Öffentliche Sicherheit unterstellt werden. Die Einweisung in eine Haftanstalt auf unbestimmte Zeit und die Zwangsarbeit wurden nicht als Strafe, sondern als rechtliche Präventivmaßnahme angesehen. Das Dekret war in Kraft bis zum 17. Juni 1946.

Zur Zeit der Verkündung des Dekrets konnte es auf dem bis dahin befreiten polnischen Territorium nur auf eine kleine Anzahl von Personen angewandt werden, wenn man von Missbräuchen absieht (die obigen Verordnungen wurden in einer Zeit der starken Richtungswende der Repressionen verkündet; am 30. Oktober wurde ein Dekret zum Schutz des Staates erlassen,[18] dessen Repressivität sich gegen die politische Opposition richtete). „Die Herbstdekrete wurden angewendet gegen festgenommene Mitglieder verschiedener deutscher Organisationen, echte Kollaborateure und Mitglieder der polnischen Heimatarmee und des antikommunistischen Untergrunds. Zwischen Bug und Weichsel gab es praktisch keine deutschen Zivilisten. Als Instrument der Segregation oder in größerem Ausmaß der Bevölkerungspolitik außerhalb des ehemaligen Generalgouvernements waren sie wenig brauchbar." [19]

Die Lage änderte sich diametral Anfang des nächsten Jahres mit der Befreiung von Gebieten, die vom Besatzer 1939 unmittelbar ins Reich inkorporiert wurden. Zu diesem Zeitpunkt ergab sich das Problem, echte Kollaborateure von Opportunisten und Opfern zu unterscheiden. In diesen Gebieten entstand mit aller Macht – und kehrte auf die Tagesordnungen zurück – die Frage nach der Reglung des Problems der Staatsbürgerschaft, vor allem als Folge der durch den Besatzer eingeführten Volkslisten (*Deutsche Volksliste* – DVL). In Oberschlesien z. B. wurde sie von 95% der Bevölkerung unterschrieben[20], von nicht viel wenigeren im Danziger Pommern. Die Verifikation und die Rehabilitation sollten dieses Problem lösen. Die erste Rechtsregelung war das am 28. Februar 1945 verkündete Gesetz über den Ausschluss feindlicher Elemente aus der polnischen Volksgemeinschaft.[21] Dieses Dokument, das ein misslungener Versuch war, das Problem zu lösen, wurde dem Landesnationalrat zur Beschlussfassung nicht vorgelegt und wurde einen Tag nach der Verabschiedung des Gesetzes über den Ausschluss feindlicher Elemente aus der polnischen Volksgemeinschaft (am 6. Mai 1945) ungültig.[22] Dieses Gesetz, das durch ein Dekret vom 24. September novelliert, dann noch zwei Mal verändert und schließlich am 17. Juni 1946 aufgehoben wurde, regelte in ebenso verwickelter wie umständlicher Weise das Verfahren, in dem den Polen, die die Volksliste unterschrieben haben, ihre Staatsbürgerschaft wieder zuerkannt wurde oder nicht (mit den sog. Wiedergewonnenen Gebieten betraf dies etwa 2,5 Millionen Personen). Das Gesetz führte im Rehabilitationsverfahren eine Differenzierung ein, in Abhängigkeit davon, ob die Aufnahme in die Volksliste freiwillig geschah oder erzwungen wurde. Gleichzeitig wurde bezüglich der Personen, die die Rehabilitierung nicht beantragten oder einen negativen Bescheid erhielten, das Urteil des Amtsgerichts aufrechterhalten: „Einweisung des Antragstellers auf unbestimmte Zeit in eine Haftanstalt (Lager), Zwangsarbeit, Verlust auf Dauer der allgemeinen, der Bürgerrechte, der Ehrenrechte, der elterlichen und der Fürsorgerechte, sowie Beschlagnahme des ganzen Besitzes. Darüber hinaus konnte das Gericht die Beschlagnahme des Besitzes der mit dem Antragsteller zusammenwohnenden engen Familienmitglieder anordnen."

Das am 28. Juni 1946 verkündete Dekret über die strafrechtliche Verantwortlichkeit für den Abfall von der Nationalität während des Krieges 1939–1945[23] bezog sich auf in Lagern internierte Volksdeutsche. Er bestimmte ein Datum, den 31. Oktober 1947, als letzten Termin der Klageerhebung gegen diese Personen. In einer Novelle vom März 1947 zu diesem Dekret fanden sich Bestimmungen, die eine Freilassung aus dem Lager ermöglichten (bereits vorher im Runderlass Nr. 3 vom 14. Januar 1947 des Ministers des Inneren erklärt).

Der letzte Rechtsakt zur Regelung des Problems der Nationalität war das Dekret über den Ausschluss von Personen deutscher Herkunft aus der polnischen Gesellschaft vom 13. September 1946.[24] Er stellte eine Ergänzung zum vorhergehenden Dekret dar. Volljährige Personen, die ihre polnische Staatsangehörigkeit verloren haben, sollten ausgesiedelt werden und ihr Eigentum verfiel. Das Recht, ein Verfahren zu eröffnen, um die Umstände aufzuklären, die zum Verlust der Staatsangehörigkeit führten, stand den Behörden für die Öffentliche Sicherheit zu, die sich der Kreis- und Gemeindevolksräte bedienten. Dies stand in Verbindung mit dem Recht (auf der Grundlage des Anhangs Nr. 3 zur Instruktion über die Vorgehensweise gegenüber den Volksdeutschen vom 14. Januar 1947[25]), Personen mit negativen Urteil zu verhaften und in Lager einzuweisen. Das Dekret galt offiziell bis zum 10. April 1948, wurde aber praktisch bis Juli 1950 angewandt.

Das Gesetz vom 20. Juli 1950 hob die Sanktionen und Einschränkungen für die Bürger auf, die ihre Zugehörigkeit zur deutschen Nationalität erklärt hatten.

Sowjetische Lager

Das Problem der sowjetischen Lager ist wenig erforscht, weil es nur wenige Dokumente gibt und die russischen Archive nicht zugänglich sind. Die vorhandenen polnischen Arbeiten betreffen Westpolen, einzelne Regionen oder Ortschaften.

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[18] Dz. U. Nr. 10, Pos. 50.

[19] *Niemcy w Polsce 1945–1950. Wybór dokumentów* [Deutsche in Polen 1945–1950. Dokumentenauswahl], Bd. 1: *Wladze i instytucje centralne. Województwo olsztynskie,* Auswahl und Bearbeitung der Dokumente W. Borodziej, C. Kraft, Warszawa 2000, S. 53.

[20] *Niemcy w Polsce 1945–1950. Wybór dokumentów*, Bd. 2: *Polska centralna. Województwo śląskie* [Auswahl und Bearbeitung der Dokumente], I. Esser, J. Kochanowski, Warszawa 2000, S. 308.

[21] Dz. U. Nr. 7, Pos. 30.

[22] Dz. U. Nr. 17, Pos. 96, nach: J. Sawicki, B. Walawski, *Zbior przepisow…*, S. 71–72.

[23] Dz. U. Nr. 41, Pos. 237, Nach: *ibidem,* S. 153–154.

[24] Dz. U. Nr. 55, Pos.3106, nach: J. Sawicki, B. Walawski, *Zbior przepisow…*, S. 164.

[25] AAN, MBP, 10/7.

Die sowjetischen Sicherheitsorgane und die ihnen unterstellten Militäreinheiten hatten die Aufgabe, die besetzten Gebiete von feindlichen faschistischen Elementen zu befreien.[26] Dieser in sich dehnbarer Grundsatz wurde in breitem Maße auf die Zivilbevölkerung in den Gebieten angewendet, die nach Kriegsausbruch ins deutsche Territorium eingegliedert wurden. Man wandte Sippenhaft an und man berücksichtigte grundsätzlich nicht, in welcher Gruppe der deutschen Volksliste sich jemand befand. Die Praxis zeigte, dass das eigentliche Ziel darin bestand, diese Bevölkerungsgruppen zur Zwangsarbeiten vor Ort auszunutzen und sie zur Sklavenarbeit in der Sowjetunion abzutransportieren.[27]

In der ersten Jahreshälfte 1945 haben die Militäreinheiten des NKWD in ganz Polen ein Netz von Übergangslagern errichtet. Witold Stankowski charakterisiert sie als typische Deportationslager.[28] Die Sowjets hatten auch Gefängnisse. Die einen und die anderen unterstanden den Bevollmächtigten des NKWD an der weißrussischen und ukrainischen Front.[29] In die Lager kamen Kriegsgefangene, autochthone Bevölkerung, Deutsche und Polen. Ein Teil der Gefangenen wurde in die Sowjetunion deportiert. Dies geschah u. a. mit 15 000 Bergbauarbeitern aus Oberschlesien[30] (ein Teil wurde anschließend 1946 nach Polen in der Gruppe „deutsche Gefangene polnischer Abstammung" gebracht und im Lager Flatow interniert[31]). Die Internierten wurden meist eingesetzt zur Demontage- und Transportarbeiten, die mit dem Abtransport der „Kriegstrophäen", d. h. der Industrieanlagen und anderer Wirtschaftsgüter in die UdSSR verbunden waren, aber sie wurden auch in den landwirtschaftlichen Betrieben eingesetzt, die der sowjetischen Kommandantur unterstanden. In Oberschlesien arbeiteten sie auch in den Bergwerken für die Bedürfnisse der sowjetischen Wirtschaft. Manche der dortigen Lager, z. B. Gleiwitz – Laband und Tost erfreuten sich eines besonders schlechten Rufs, wegen der schlechten Verhältnisse und der dort herrschenden hohen Sterblichkeit.[32]

Beginnend mit dem Sommer 1945 wurden die Lager den polnischen Sicherheitsbehörden auf Kreis- oder Woiwodschaftsebene, auch der Miliz übergeben. Manche wurden mit den Insassen dem Ministerium für Öffentliche Sicherheit übergeben (als kleine Entschädigung für die deportierten Polen). Im Herbst wurden der polnischen Seite die Kriegsgefangenenlager in Niederschlesien (Christianstadt/Bober, Lauban, Neuhammer, Sagan) mitsamt über 40 000 Gefangenen übergeben.[33] Typisch war, dass die Russen nach der Übergabe der Lager an polnische Stellen sich unberechtigterweise einen Anspruch auf diese Objekte anmaßten. Auch der Rechtsstatus der von den polnischen Behörden übernommenen Deutschen war nicht geklärt.[34] Wegen fehlender Quellen ist es oft nicht möglich, genaue Daten der Übergabe der Lager und der Gefangenen zu bestimmen. Allgemein wird angenommen, die Aufhebung der letzten Lager war Anfang 1947 abgeschlossen.[35]

Die Arbeitslager des Ministeriums für Öffentliche Sicherheit

In der Organisationsstruktur des am 21. Juli entstandenen Polnischen Komitees der Nationalen Befreiung, der neuen „Herrschaft des Volkes" unter sowjetischem Kuratel, schuf man sofort ein Resort für die Öffentliche Sicherheit. An seiner spitze stand Stanislaw Radkiewicz von der Polnischen Arbeiterpartei. Dem Resort (ab Januar 1945 Ministerium) wurden alle Angelegenheiten des Straffvollzugs anvertraut. Bereits im August 1944 wurde ihm, nach einer einmonatigen Episode im Justizministerium, das Gefängnisreferat eingegliedert. An seine Stelle wurde am 3. Oktober die Gefängnisabteilung eingerichtet. Nach einem Monat wurde sie in Abteilung für Gefängnisse und Lager umbenannt (ab Januar 1945 Departement für Gefängnisse und Lager; im Folgenden DWiO), seit August 1946 Gefängnisdepartement des Ministeriums für die Öffentliche Sicherheit. Sein Sitz war Lublin und ab März 1945 Warschau.

Von Anfang an orientierte sich das Ressort in hohem Maße am stalinistischen Gefängnissystem, dessen integraler Bestandteil ein ausgebautes Lagernetz war. Von Anfang an haben auch die von Kommunisten dominierten Spitzen des Ressorts einen entscheidenden Einfluss auf das Zustandekommen von Rechtsakten gehabt. Obwohl sie mit weitreichenden Befugnissen ausgestattet waren, überschritten ihre (vor allem die der lokalen Führer) Handlungen den rechtlichen Rahmen. Obwohl das Dekret vom 12. September 1944 und die folgenden festlegten,

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[26] B. Kopka, *Obozy pracy*, S. 33; S. Biernacki, *Instrukcje działania wojsk NKWD na terenach opanowanych przez Armię Czerwoną* [Verfahrenanleitungen für die Streitkräfte des NKWD auf den von der roten Armee beherrschten Gebieten], in: „Biuletyn Głównej Komisji Badania Zbrodnii przeciwko Narodowi Polskiemu – IPN" [Bulletin der Hauptkommission zur Erforschung der Verbrechen am polonischen Volk – IPN], Bd. XXXIII, 1991; M. Golon, *Polityka radzieckich władz wojskowych i policyjnych na Pomorzu Nadwiślańskim w latach 1945–1947* [Politik der sowjetischen Militärbehörden in Weichsel Pommern 1945–1947], Toruń 2001.

[27] W. Jastrzębski, *W dalekim obcym kraju. Deportacje Polaków z Pomorza do ZSSR w 1945 r.* [In einem fernen, fremden Land. Deportationen von Polen in die UdSSR 1945], Bydgoszcz 1990.

[28] W. Stankowski, *Obozy…*, S. 122.

[29] Golon, *Przyczyny deportacji ludności niemieckiej z Pomorza Gdańskiego do obozów pracy w ZSSR w dokumentacji radzieckich władz bezpieczeństwa* [Gründe für die Deportation der deutschen Bevölkerung in Arbeitslager der UdSSR in Dokumenten der sowjetischen Sicherheitsbehörden], in: *Ludność niemiecka na ziemiach polskich w latach 1939–1945 i jej powojenne losy* [Die Deutschen auf polnischem Gebiet 1939–1945 und ihre Schicksale nach dem Krieg], Redakt. W. Jastrzębski, Bydgoszcz 1995, S. 160–170.

[30] Y. Woźniczka, *Z działalności polskiego i radzieckiego aparatu represji na Górnym Śląsku* [Tätigkeiten des polnischen und sowjetischen Repressionsapparats in Oberschlesien], in: *Obozy pracy przymusowej na Górnym Śląsku* [Zwangsarbeitslager in Oberschlesien], Redakt. A. Tpola, Katowice 1994, S. 63.

[31] B. Kopka, *Obozy pracy…*, S. 174.

[32] *Ibidem*, S. 40.

[33] *Ibidem*, S. 133–134, 137–138, 160–161, 175–176.

[34] M. Maruszczak, M. Paździora, *Obozy jenieckie w górnictwie węglowym Górnego Śląska w latach 1945–1949* [Kriegsgefangenenlager im Kohlebergbau in Oberschlesien 1945–1949], in: *Obozy pracy przymysowej na Górnym Śląsku,* Redaktion A. Topola, Katowice 1994, S. 63.

[35] B. Kopka, *Obozy pracy…*, S. 41.

dass die sich aus ihnen ergebenden Untersuchungen die Prokuratoren der Sondergerichte durchführen sollten, haben die Sicherheitsorgane ihre Befugnisse überschritten und verhafteten und internierten in Arbeitslagern Deutsche, autochthone Bevölkerung und auch in sehr weit gefasster Interpretation „Volksverräter".[36]

Boguslaw Kopka[37] unterscheidet unter organisatorischen Gesichtspunkten drei Hauptetappen in der Geschichte der Lager des Ministeriums für Öffentliche Sicherheit:

1) die Herausbildung der Organisationsstrukturen (Oktober 1944–Oktober 1945),
2) Phase des intensivsten Ausbaus (Oktober 1945–1947),
3) stufenweise Auflösung der Lager und Suche nach neuen Lösungen durch das Ministerium (1948 bis Jahreswende 1950/1951).

In der ersten der von Kopka vorgeschlagenen Phasen hat sich das Departement bemüht, die entstehenden Lager und andere Internierungsarten in den Griff zu bekommen, die unkontrolliert durch die neu entstehenden lokalen Organe der Macht eingerichtet wurden. Diese Bestrebungen konnten nur in geringem Maße auf die Übernahme der Kontrolle über die sowjetischen Lager ausgedehnt werden.

Das wichtigste Ereignis war die Einrichtung durch den Runderlass Nr. 42 (5) des Ministers für Öffentliche Sicherheit Stanislaw Radkiewicz und des Direktors des Departements für das Gefängnis- und Lagerwesen Teodor Duda[38] von vier Zentralen Arbeitslagern am 25. April 1945 in Warschau, Jaworzno, Potulitz (Woiwodschaft Pommern) und Krzesimow (Woiwodschaft Lublin). Potulitz wurde anschließend zum Sitz der im Juni errichteten Arbeitslagerdirektion Pommern.[39] Sie wurde im Zuge einer weiteren Reorganisation aufgelöst und drei Bezirksdirektionen für Gefangenenarbeit in Bromberg (mit Sitz in Netze), Kattowitz, und Warschau eingerichtet, die direkt dem Departement unterstanden.[40] Diese Zwischenstrukturen in der Verwaltung der Lager im ganzen Land sollten die Beschäftigung und maximale Ausnutzung der Arbeitskraft der Internierten der im Ausbau befindlichen aber schlecht verwalteten und unproduktiven Lagermaschinerie rationalisieren (dafür bekamen sie die alleinige Entscheidungskompetenz).[41] Das Leben im Lager regelte die vom Departement im Mai 1945 herausgegebene „Vorläufige Instruktion über die einstweilige Organisation der Arbeitslager."[42]

Die ziemlich chaotischen Reorganisationen (z. B. wurde das Zentralarbeitslager Krzesimow nach etwa zwei Monaten aufgelöst und in eine „Agrarkolonie" umgewandelt, das Zentralarbeitslager in Warschau wurde in ein Arbeitslager zurückverwandelt.) zeugen von den Schwierigkeiten beim Ausbau der Lager. Das herrschende Chaos wurde auch durch die tatsächlich vorhandene polnisch-sowjetische Doppelherrschaft beeinflusst, die in den neu angegliederten Gebieten bestand.

Die Entstehung der Bezirksdirektionen für Gefangenenarbeit eröffnet nach B. Kopka die zweite Phase des Bestehens der Lager. Sie ist gekennzeichnet durch deren dynamischen Ausbau. Darunter muss man vor allem das Anwachsen der Gefangenenzahlen verstehen. Dies geschah u. a. infolge der Auflösung der sowjetischen Lager. Manche wurden dem Ministerium für Öffentliche Sicherheit mit ihren Insassen übergeben. Das Wachstum des „polnischen Gulags" war auch stark verbunden mit den Kämpfen um die Macht im Lande sowie der Liquidierung der Strukturen der bewaffneten Untergrundorganisationen und in anderer Hinsicht auch mit dem immer größer werdenden Bedarf an Arbeitskräften.

Die Unterstellung der Arbeitsverwaltung in den Lagern der ausschließlichen Aufsicht und Verwaltung der Bezirksdirektionen für Gefangenenarbeit erbrachte nicht die erhofften wirtschaftlichen Auswirkungen. Es gab viele Gründe dafür. An erster Stelle könnte man die Versorgungsschwierigkeiten nennen. Zu den zweifelsohne wesentlichsten gehörte die Tatsache, dass sie innerhalb dreier Organisationssysteme funktionierten (eine senkrechte, eine lokale und eine mittelbare in Gestalt der Bezirksdirektionen für Gefangenenarbeit) und dass sich daraus Auseinandersetzungen um Zuständigkeiten ergaben. Das führte zu einer immer größeren Krise der Bezirksdirektionen. Die Folge war deren Auflösung durch einen Befehl des Ministers für Öffentliche Sicherheit vom 5. Mai 1947.[43] Ihre Aufgaben wurden verteilt auf die Abteilung für die Häftlingsarbeit des Gefängnisdepartements des Ministeriums für Öffentliche Sicherheit (Arbeitseinsätze) und auf die lokalen Gefängnisabteilungen der Ämter für Öffentliche Sicherheit auf Woiwodschaftsebene (Verwaltung).

In der dritten Phase häuften sich die ungünstigen Faktoren. Das Lagerwesen, das auch früher unzureichend war, wurde wirtschaftlich immer unrentabler.[44] Nach einer Zeit des „Hochs" wurde die Verminderung der Zahl der Verhafteten unvermeidlich. Dazu trugen bei: die Aussiedlung der Mehrheit der deutschen Bevölkerung aus Polen, das Ende der Verifikation der autochthonen Bevölkerung und die Rehabilitierung der Volksdeutschen, schließlich die Repatriierung der deutschen Kriegsgefangenen. Diese geschah auf Grund der Vereinbarungen der Moskauer Konferenz vom April 1947, die beschloss, die deutschen Kriegsgefangenen in die alliierten Staaten bis Ende 1948 zurückzuschicken. Polen verpflichtete sich hierzu erst im Oktober 1948 und beendete diese Aktion deutlich nach dem festgesetzten Termin (Sommer 1950).[45]

Die letzten Lager des Ministeriums für die Öffentliche Sicherheit in Jaworzno, Lissa, Potulitz und Sikawa (Lodz) wurden

[36] B. Kopka, *Obozy pracy*…, S. 38–48.
[37] *Ibidem*, S. 39.
[38] AAN, MBP 10/3.
[39] Runderlass Nr. 67(3), DWiO AAN, MBP 10/3.
[40] Runderlass Nr. 96 DWiO vom 15. Oktober 1945, AAN, MBP 1/89.
[41] B. Kopka, *Obozy pracy*…, S. 45–46.
[42] CA MSWIA, MBP, 1317.
[43] CA MSWiA, MBP, 22439 (42/1c).
[44] W. Stankowski, *Obozy*…, S. 293–303.
[45] M. Maruszczak, M. Pazdziora, *Obozy jenieckie*…, S. 33.

in den Jahren 1949–1950/51 aufgelöst.[46] Das Lager in Mielecin wurde an die Spezialkommission zur Bekämpfung von Wirtschaftskriminalität und Sabotage „ausgeliehen" und bestand bis Ende 1950.[47] Die Arbeit der Häftlinge und der Lagerinsassen übernahmen die 1948 entstandene Zentren für Häftlingsarbeit. Nach den Recherchen von B. Kopka unterstanden in der Zeit 1945–1950 dem Ministerium für Öffentliche Sicherheit bzw. seinen lokalen Abteilungen 129 Lager.[48]

Die Zwangsarbeitslager der Zentralverwaltung der Bergbauindustrie

Die Einrichtung der Lager der Zentralverwaltung der Bergbauindustrie wurde von den ökonomischen Bedürfnissen des zerstörten Polens diktiert.[49] Ein grundlegendes Bedürfnis war, die Bergwerke in Betrieb und die Kohleförderung in Gang zu setzen. Wegen der enormen Verkleinerung der Bergbaubelegschaften infolge der Flucht der deutschen Bevölkerung aus Oberschlesien und der Deportation der Bergleute in die UdSSR war es notwendig, der Bergbauindustrie eine beträchtliche Zahl neuer Arbeitskräfte zu sichern. Darauf bezog sich der Beschluss des Ministerrats vom 11. April 1945 über die Erhöhung der Kohleförderung und die sofortigen Hilfsmaßnahmen für die Kohleindustrie der Republik Polen. Die geforderte Zahl von 60000 Arbeitern[50] konnte man erreichen, wenn man Kriegsgefangene, Häftlinge und Internierte beschäftigte. Die Verwirklichung solcher Ideen förderten die lokalen Machthaber in Oberschlesien mit dem Woiwoden von Schlesien-Dombrowa, General Zawadzki an der Spitze.[51] Indem man die Infrastruktur der Lager aus der Kriegszeit (deutsche Lager bei den Bergwerken für Kriegsgefangene und Zwangsarbeiter[52]) ausnutzte, begann man bei einzelnen Bergwerken Arbeitslager einzurichten. B. Kopka stellte in Oberschlesien 76 solcher Lager fest.[53] Im Auftrag der Zentralverwaltung der Bergbauindustrie wurde der ganze Komplex durch das Büro zur Mobilisierung von Arbeitskräften verwaltet. Es gab im Juni 1945 eine „Hausordnung für Zwangsarbeitslager bei Betrieben der Kohleindustrie" heraus.[54] Arbeitskräfte erreichte man hauptsächlich durch Internierung deutscher Kriegsgefangener. In diese Lager kam die überwiegende Mehrheit der von den Russen im Herbst 1945 übernommenen Gefangenen aus den Lagern in Niederschlesien.[55] Die Mehrheit der Lager trug den Namen „Arbeitslager für Kriegsgefangene". Dies entsprach nicht ganz der Wahrheit, denn etliche Prozent der Insassen waren Inhaftierte der Arbeitslager des Ministeriums für Öffentliche Sicherheit und Personen, die auf Grund einer Verurteilung durch die Spezialkommission zur Bekämpfung von Wirtschaftskriminalität und Sabotage zur Zwangsarbeit eingewiesen wurden.[56] Ende Dezember 1945 arbeiteten in Bergwerkslagern etwa 35000 Gefangene, Ende 1946 waren es 25–26000. In etwa die gleiche Zahl Gefangener bestand bis 1948. Mitte des nächsten Jahres waren es nur noch nicht ganz 5000.[57]

Die Ineffizienz der Zwangsarbeit, die aus der komplizierten Verwaltungsstruktur folgenden Verwicklungen, die Verpflichtungen in Naturalien (Kohle) und Geldzahlungen für das „Ausleihen der Zwangsarbeitskraft" vom Ministerium für Öffentliche Sicherheit, dann die seit Oktober 1948 erfolgte stufenweise Repatriierung der deutschen Kriegsgefangenen führten zur Auflösung der Lager. Formal trat dies Ende 1949 ein.[58] Anfang Mai 1950 befanden sich in den Bergwerkslagern lediglich 205 Deutsche.[59]

Andere Lager

Zur Kategorie der anderen Lager gehören alle Objekte, die sich außerhalb der bisher beschriebenen Strukturen befanden und die in den Quellen als „Lager" bezeichnet werden. Hierzu gehören auch solche, die von den Forschern gegenwärtig zu den Lagern gezählt werden, unabhängig von den festgestellten Organisations- und Verwaltungsstrukturen, also auch die, die in der Literatur als „wilde Lager"[60] und die „Grauzone" der Problematik darstellen.

Deren Ursprung ist zu suchen in der ungestümen und unkontrollierten Errichtung von Lagern und anderer Haftanstalten für die deutsche Bevölkerung, die die Befreiung immer weiterer Regionen Polens und die Eingliederung neuer begleitete. Neben den sowjetischen Sicherheitsorganen wurden die Lager durch die lokalen Organe der Öffentlichen Sicherheit, der Bürgermiliz und die Stadtverwaltungen errichtet. Das bekannteste, größte und am besten dokumentierte Lager, das innerhalb lo-

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[46] B. Kopka, *Obozy pracy*…, S. 48.
[47] *Komisja Specjalna do Walki z Nadużyciami i Szkodnictwem Gospodarczym, 1945–1954. Wybór Dokumenów* [Kommission zur Bekämpfung von Wirtschaftskriminalität und Sabotage 1945–1954. Eine Dokumentenauswahl], Einleitung und Bearbeitung D. Jarosz, T. Wolsza, Warszawa 1995.
[48] B. Kopka, *Obozy pracy*…
[49] B. Kopka, *Obozy pracy*…, S. 48; W. Stankowski, *Obozy*…, S. 125–126.
[50] AAN, MBP, 3/2.
[51] Zur Rolle des General Zawadzki siehe B. Linek, *Polityka antyniemiecka na Gornym Slasku w latach 1945–1950* [Antideutsche Politik in Oberschlesien 1945–1950], Opole 2000, S. 160ff.
[52] J. Molenda, *Obozy jenieckie i podobozy pracy w latach okupacji hitlerowskiej w rejencji katowickiej* [Kriegsgefangenenlager und Arbeitsunterlager während der faschistischen Besatzung in der Region Kattowitz], in: *Obozy pracy przymusowej na Górnym Śląsku* [Zwangsarbeitslager in Oberschlesien], Redakt. A. Topola, Katowice 1994.
[53] B. Kopka, *op. cit.*, S. 48–53.
[54] J. Kochanowski, *W polskiej niewoli*…, S. 96.
[55] Siehe Fußnote 34.
[56] J. Kochanowski, *W polskiej niewoli*…, S. 102–104.
[57] B. Kopka, *Obozy pracy*…, S. 53.
[58] B. Kopka, *Obozy pracy*…, S. 53.
[59] J. Kochanowski, *W polskiej niewoli*…, S. 108.
[60] W. Stankowski, *Obozy*…, S. 135ff.

kaler Verwaltungsstrukturen bestand, war das in Lamsdorf,[61] das durch die Kreisverwaltung in Falkenberg errichtet wurde. Dieses Lager entstand auf Grund einer Verordnung des schlesischen Woiwoden General Aleksander Zawadzki vom 18. Juni 1945[62] und wurde vom Kreisamt für Öffentliche Sicherheit in Falkenberg beaufsichtigt.

Neben den großen Lagern in Oppelner Schlesien waren die meisten in Westpolen errichteten Lager kleine Einheiten mit der Zielsetzung, die Deutschen vor der Aussiedlung zurückzuhalten und als Arbeitskräfte auszunutzen. Die Aufsichtsgewalt übten selbst ernannte Leiter und Kommandanten aus, die oft auch Urheber solche „Initiativen" waren. Entsprechend behandelten sie auch die Lager als ausschließlich ihnen unterordnet. Sie beuteten die Gefangenen wirtschaftlich aus und hatten daraus Vorteile. Daher versuchten sie das Bestehen dieser Einrichtungen vor der Öffentlichkeit geheim zu halten. Oft wussten die höheren Instanzen nichts von deren Existenz.[63]

Die Erfassung der Lager, der verschiedenen Haftanstalten und Gefängnisse, in denen man die Deutschen einwies und festhielt, begann nach Beendigung der Kriegshandlungen in der Abteilung für das Gefängnis- und Lagerwesen. In den Verhältnissen, die nach Kriegsende herrschten, hing die Möglichkeit der Registrierung von einer Benachrichtigung aus den einzelnen Gebieten ab, und zwar durch die Leiter der Gefängnisse (Haft) oder Lagerkommandanten (was, wie oben gezeigt, nicht immer in deren Interesse lag). Zu diesem Zeitpunkt gab es einen Teil der beschriebenen Objekte nicht mehr. Die Zusammenstellung der Abteilung für das Gefängnis- und Lagerwesen vom 24. April 1945 weist 113 Objekte auf und darin nur vier Lager.[64] Zumindest in diesem Punkt ist die Liste unvollständig.[65] Man kann annehmen, dass man sich damit nicht beeilte, die „wilden Lager" nachzuweisen (in ihnen wurde keine Dokumentation geführt; sie konnte aber auch nach der Aufhebung einer Internierungsstätte absichtlich vernichtet worden sein). Einen Teil hat das Ministerium für die Öffentliche Sicherheit in die neu eingerichteten Zentrallager eingegliedert. Diese Aktion wurde von den einzelnen für das betreffende Gebiet zuständigen Zentrallagern durchgeführt. Nach der Übernahme wurden die bisher nicht erfassten Lager zu ihren Teillagern. Das löste das Problem der „wilden Lager" nicht, vor allem wenn man zu ihnen auch die kleineren, in der zweiten Hälfte 1945 von den Gemeinden eingerichtete Lager zählt.

Die Auflösung der Lager, die den zentralen Arbeitslagern nicht unterstanden, wurde wahrscheinlich in der ersten Hälfte 1946 vollzogen. Die Deutschen wurden in das für das jeweilige Gebiet zuständige Zentrallager überführt.[66]

[61] E. Nowak, *Cień Łambinowic. Próba rekonstrukcji dziejów obozu pracy w Lambinowicach w latach 1945–1946* [Der Schatten von Lamsdorf. Rekonstruktionsversuch der Geschichte des Arbeitslager in Lamsdorf 1945–1946]. Opole 1991.

[62] *Niemcy w Polsce 1945–1950. Wybor Dokumentow,* Bd. 2: *Polska centralna. Wojewodztwo slaskie,* wybor i opracowanie dokumentow I. Esse, J. Kochanowski, warszawa 2000, S. 358–359.

[63] W. Stankowski, *Obozy*…, S. 108f.

[64] Okolnik Nr. 42 DWiO, ACOSSW-K, Okolniki, Sign. 931.

[65] AAN, MAP, Sign. 766.

[66] AAN, MAP, Sign. 766.

Security of Post-German Movable Property in the First Years after the End of World War II in the Light of Selected Cases Considered by the Regional Court in Gorzów Wielkopolski*

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Abstract

The end of the World War II meant change of the borders of Polish state. Under the Treaty on Polish – Soviet state border of 16th August 1945 Poland lost to Soviet Union the area between a line marked by the Treaty of Riga and so called the Curzon Line. By virtue of winning nations' decision in return for territorial loss in the East, Poland obtained eastern parts of Germany with Opole, Wrocław and Szczecin.

A major problem after joining the Polish former German territories was the economic degradation of these lands. The article was devoted to the norms of criminal law concerning protection of the post-German property on the so-called Recovered Territories. The author based on selected judgments of the Regional Court in Gorzow Wielkopolski present the practice of judicial courts of general jurisdiction relating to the crimes from so-clled looting art. 43 Little Penal Code and misappropriation of movable property from the post- German lands art. 44 Little Penal Code.

Key words: *Little Penal Code; judgments; crimes; Regional Court in Gorzów Wielkopolski.*

The end of the World War II meant change of the borders of Polish state. Under the Treaty on Polish – Soviet state border of 16th August 1945 Poland lost to Soviet Union the area between a line marked by the Treaty of Riga and so called the Curzon Line[1]. By virtue of winning nations' decision in return for territorial loss in the East, Poland obtained eastern parts of Germany with Opole, Wrocław and Szczecin.

The Penal Code which was valid since 1932 stipulated in art. 262§ 1 liability for misappropriation of movable personal property. That offence carried a penalty of imprisonment or detention up to 3 years[2]. In order to meet criteria of the prohibited act defined in art. 262§ 1 of Penal Code property did not have to be entrusted to a perpetrator earlier or found by him/her[3]. Both cases were normalized separately in art. 262§ 2 and 3 in Penal Code of 1932.

A legal act which regulated the question of misappropriation in special circumstances of war was a decree of 30th October 1944 on state security[4]. Criteria of misappropriation were defined in art. 9 of this decree. That rule indicated that whoever during war period takes from another person someone else's movable property with the intention of misappropriation by means of violence or threatening to assault that person immediately or by making that person unconscious or helpless is subject to imprisonment or death penalty. The maximal imprisonment sentence for that above mentioned offence was 10 years as a general part of the penal code of the Polish Army was applied for all the offences provided by the decree on state security.

Undoubtedly, the provision of art. 9 of the decree on state security constituted *lex specialis* in reference to a form of the prohibited act defined in art. 262§ 1 of the Penal Code. Qualifying criteria were mainly a perpetrator's mode of action. Special period of wartime during which that offence may have been committed shall be also taken into consideration.

After the war, misappropriation of movable personal property was still subject to a separate regulation. Its criteria were defined in art. 29 of a decree of 16th November 1945 on severe crime during the period of Poland reconstruction[5]. At the same time that decree did not include any conflict of law rules with the rules of still valid Penal Code of 1932. As it seems, these particular rules should have been recognised as a special regulation in reference to art. 262§ 1 of the Penal Code as in order to meet criteria of an offence of art. 29 of the decree the misappropriated movable personal property had to be left unattended due to wartime or other exceptional occurrence. In other cases of misappropriation, a rule of art. 262§ 1 was applied.

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1 Journal of Laws 1947, no 35, item167.

2 Journal of Laws 1932, no 60, item 571 regulation of the president of the Republic of Poland of 11 July 1932 Penal Code.

3 J. Makarewicz, Kodeks karny z komentarzem, Lwów 1938, p. 597

4 Journal of Laws 1944, no 10, item 50

5 Journal of Laws 1945, no 53, item 300

The decree of 16th November 1945 on severe crime during the period of Poland reconstruction was replaced by a new, extended decree with the same title of 13th June 1946[6], commonly known as a little penal code. The new version of the decree on particularly severe crime during the period of Poland reconstruction included a regulation concerning misappropriation in art 43[7]. That rule was the exact repetition of the wording of the rule of art. 29 of the waived decree of 16th November 1945.

An offence, which criteria were defined in art. 43 of the Little Penal Code was included by representatives of legal doctrine of that time in the group of particularly severe crimes for the national economy[8]. It was also noted that it had different subject than the offence of theft of art. 257 of Penal Code 1932 because the subject of a theft was someone else's movable property which was property of a third party but in this case a subject of an offence of art. 43 of the Little Penal Code was a movable object which did not have to be in possession of someone else[9].

It shall be pointed out that the subject of a crime of art. 43 of the Little Penal Code did not necessarily have to post-German abandoned property. The subject to be protected by this rule was any movable personal property left without sufficient security due to wartime or any exceptional occurrence. The Supreme Court showed that criminal penalty provided in art. 43 of the Little Penal Code also included misappropriation of found objects which were left without sufficient security due to wartime[10]. Grounds on which a perpetrator acted were not important as far as meeting criteria of an offence defined in art. 43 of the Little Penal Code. The Supreme Court contested an opinion expressed by the Regional Court in Pasłęk which stated that seizure of abandoned and not sufficiently attended car motor for a national institution does not constitute a crime.[11] Judicature stated unequivocally that the intention of misappropriation shall not be connected with intention to gain benefits which a perpetrator may have.[12]

It was not significant in what part of the country that movable property could be found. Thus, the provision of art. 43 of the Little Penal Code was applied without regard to the fact if the property was located on the area which belonged to Poland before 1939 or if the area became part of Poland after World War II. Nevertheless, the Supreme Court stated expressly that any post-German movable property given to settlers alongside with all households or farms without taking inventory constitutes not sufficiently secured property due to wartime.[13]

The provision of art. 43 of the Little Penal Code did not waive the above mentioned provision of art. 262 of the Penal Code but constituted solely *lex specialis* to that. The Supreme Court indicated that misappropriation of post-German property which is sufficiently secured by an institution shall be qualified as an offence of art. 262 of the Penal Code, but not as an act of art 43 of the Little Penal Code.[14]

The other provision which secured abandoned post-German property was the provision of art. 44 of the Little Penal Code which prohibited taking away property from the area of the so-called Recovered Territories.[15] It shall be noted that it was enough to try to take away such property to meet criteria of that offence even if that turned out to be futile. The Supreme Court indicated that taking away movable property from the Recovered Territories which had been brought there earlier from other parts of the country or from abroad did not meet the criteria of an offence of art. 44 of the Little Penal Code.[16]

The provision of art. 44 of the Little Penal Code was basically a general rule as it referred to the art. 66 of the Little Penal Code which, in turn, authorized a minister of the Recovered Territories to make an regulation concerning prohibition of taking away movable property from the area of so called Recovered Territories.

It shall be pointed out that despite the fact that so-called looting (szaber) constituted a significant economic problem in the first years after the end of World War II, a suitable regulation by the minister of the Recovered Territories, which was

[6] Journal of Laws 1946, no 30, pos. 192.

[7] Art. 43§ 1 of Little Penal Code whoever misappropriates or takes with the intention to misappropriate someone else's movable property which is left without sufficient security due to wartime or due to other exceptional occurrence is subject to sentence of imprisonment, art. 43§ 2 of the Little Penal Code, in cases of acts of lesser significance the court may apply extraordinary mitigation of punishment, and when a perpetrator took necessities of a little value out of poverty – even release from punishment.

[8] M. Siewierski, Mały kodeks karny komentarz orzecznictwo, issue 2, Łodź 1949, p. 100.

[9] Ibid. W. Bogucki, Mały kodeks karny (znowelizowany) z objaśnieniami i przepisami związkowymi, Warszawa 1946, p. 59, ibid. Mały kodeks karny (compiled by A. Wendel), Warszawa 1946, p. 10.

[10] Cf. Sentences of the Supreme Court of 14th January 1949, ref. no. PoK 991/48, legal information system, number 1674288.

[11] Cf. Sentence of the Supreme Court of 7th May 1948, ref. no. ToK 325/47, legal information system Lex, number 1674318.

[12] Ibid.

[13] Cf. Sentence of the Supreme Court of 10th October 1946, ref. no. K 1150/46, legal information system Lex, number 161751.

[14] Cf. Sentence of the Supreme Court of 4th December 1946, ref. no. K 1539/46, legal information system Lex, number 161893.

[15] Art. 44§ 1 of the Little Penal Code: Whoever violates the prohibition of taking away movable property from the area of Recovered Territories is subject of imprisonment sentence up to 3 years and fine, art. 44§ 2 of the Little Penal Code, in cases of less significance the court may pass a sentence of detention or fine.

[16] Cf. a decision of the Supreme Court of 29th September 1950, ref. no. KO 421/15, Orzecznictwo Sądu Najwyższego z zakresu materialnego prawa karnego (1945–1957), eds. S. Śliwiński, Warszawa 1958, p. 831.

compliant with the general norm of art. 44 of the Little Penal Code, was made as late as on 17th February 1948.[17] Therefore, it happened over a year and a half after the Little Penal Code came into effect. Until that time, taking away of movable property from the so-called Recovered Territories was not an offence. Courts sitting on the area of the western part, inter alia, the Regional Court in Zielona Góra shared that position.[18]

The offence of violation of prohibition concerning taking away movable property from the area incorporated to Poland after the end of World War II was considered an intent crime.[19] The decree did not stipulate liability for an accidental, unintentional taking away of movable property from the area of the so-called Recovered Territories. Whereas, it shall be noted that a perpetrator did not have to act with the intention of misappropriation, the intention of taking away movable property was sufficient here.

The commented provision stipulated also a case of a lesser significance. In accordance with art. 44§ 2 of the Little Penal Code an act qualified as a case of a lesser significance carried a penalty of detention or fine, whereas the basic type of this offence of art. 44§ 1 of the Little Penal Code carried a penalty of imprisonment up to 3 years and fine which should be sentenced obligatorily apart from sentence of imprisonment.

The jurisdiction of the Regional Court in Gorzów Wielkopolski included northern part of current Lubusz and Wielkopolska Voivodeship. They were areas which bordered from one side the Soviet occupation zone of Germany and from the other side areas which were part of Poland before 1939. Cases of proceedings in relation to offences stipulated by the decree of 13th June 1946 on severe crimes during the period of Poland reconstruction or so called the Little Penal Code including also cases of proceedings in relation to acts of art. 43 of the Little Penal Code and 44 of the Little Penal Code belonged to material jurisdiction of the Gorzów Regional Court apart from other criminal cases. The cases were examined in Fifth Criminal Division of the Gorzów court in accordance with provisions regarding proceedings of the decree and they were examined by a three--person composition consisting of one professional judge and two lay judges.

In the archives of the Regional Court in Gorzów Wielkopolski in the National Archive in Gorzów Wielkopolski there were case files in relation to 30 cases concerning offence of art. 43 of the Little Penal Code as well as 90 cases concerning the offence of art. 44 of the Little Penal Code. Moreover, files of other 24 cases concerned cumulatively qualified acts, both of art. 43 of the Little Penal Code and 44 of the Little Penal Code. It shall be pointed out that in general in the archives of the Gorzów court there are 1016 criminal cases. Therefore, cases concerning misappropriation and taking away movable property constitute over 14% of all the cases which remained. It may indicate certain overrepresentation of such cases in regional courts whose seats were located on the so called Recovered Territories.

It shall be noted that in the Regional Court in Kraków in the years 1946–1950 solely 42 cases concerning the offence of 44 of the Little Penal Code were examined but there were not any cases qualified as an act of art. 43 of the Little Penal Code.[20]

Perpetrators of two types of the offences described here were mainly men. Women constituted a minor percentage of perpetrators. The question of perpetrator's gender looked similar in reference to crime of art. 44 of the Little Penal Code in case of people who were brought to the Regional Court in Kraków.[21] It is worth giving a few examples of factual circumstances of the cases examined by Gorzów Regional Court to illustrate type of acts of art. 43 of the Little Penal Code and art. 44 of the Little Penal Code.

One of the cases of art. 44 the Little Penal Code examined by Gorzów Regional Court was a case of J.Cz. who was detained on 21st February in 1948 on the platform of the railway station in Poznań because his heavy baggage aroused suspicion in officers of the Milicja Obywatelska (Civic Militia).[22] As it turned out later J.Cz. was carrying in his baggage an electric motor which he took from Zarzyn a town in Sulęcin County.

The indictment was handed up to the Regional Court in Gorzów Wielkopolski on 31st May 1948. The prosecuted man was accused of committing a crime of taking movable property from so called Recovered Territories without appropriate permit or an act provided for in art. 44§ 1 of the Little Penal Code.[23] No preventive measure was used towards the prosecuted man and he remained at large.

The first trial took place on 15th November 1948 but the accused man did not appear as he was not delivered summons in a correct way.[24] The next trial was scheduled on 10th January

[17] Journal of Laws 1948, no. 11, item 82, Regulation of Minister of Recovered Territories of 17th February 1948 on prohibition of taking away movable property from the Recovered Territories, modified by the regulation of Minister of Recovered Territories of 14th September 1948 on modification of the regulation of 17th February 1948 on prohibition of taking away movable property from the Recovered Territories (Journal of Laws 1948, no. 49, item 375) was replaced by regulation of the Prime Minister of 3rd January1951 on prohibition of taking away movable property from the Recovered Territories (Journal of Laws 1951, no. 2, item 11) which limits the above mentioned prohibition only to post-German machines, apparatuses and technical tools which were not in possession of state-owned companies or which were fit for other purposes than solely for household purposes. Complete revoking of limitations connected with taking away movable property from the Recovered Territories took place when a new penal code came into effect in 1969.

[18] Official letter of the president of Regional Court in Zielona Góra to the president of Court of Appeal, ref. no. AP ZG 89/433/5/, k. [b.p. a].

[19] K. Siemaszko, W trudnym okresie odbudowy państwa. Tak zwany mały kodeks karny w orzecznictwie Sądu Okręgowego w Krakowie w latach 1946–1950, Warszawa 2015, p. 301.

[20] K. Siemaszko, W trudnym okresie odbudowy państwa. Tak zwany mały kodeks karny w orzecznictwie Sądu Okręgowego w Krakowie w latach 1946–1950, Warszawa 2015, p. 302.

[21] Ibid.

[22] Report of an officer of the Milicja Obywatelska of 27th February 1948, National Archive in Gorzów Wielkopolski [further as AP GW], ref. no. 66/309/33, k.1.

[23] Indictment in relation to J. Cz. of 31st May 1948, AP GW, ref. no. 66/309/33. k.11.

[24] Minutes of the court session of 15th November 1948, AP GW ref. no. 66/309/33, k. 19.

1949. The prosecuted J.Cz. appeared in person and after the court proceeding, a sentence was passed.[25]

The Regional Court in Gorzów Wielkopolski in the judgement of 10th January 1949 found the accused J.Cz. guilty but it acknowledged that the action of the accused met criteria of prohibited act defined in art. 44§ 2 of the Little Penal Code that is a case of an act of lesser significance.[26] In reference to the above mentioned the court sentenced J.Cz. To 5.000 zł fine with possibility to exchange it to detention in case of unrecoverability.[27] That decision was not subject to any measures of ordinary appeal.

Another offence with relation to crime of art. 44 of the Little Penal Code examined by the Regional Court in Gorzów Wielkopolski was a case of M. Sz. and I.W. who were suspected that on 15th April 1948 jointly and in agreement they took away a lawnmower from Dębowiec in Skwierzyna commune to Sieraków in Międzychód County. An indictment was filed to the Regional Court in Gorzów Wielkopolski on 23rd July 1948.[28] No preventive measures were used towards the prosecuted men.

An objection was raised towards the indictment by the defence attorney of I.W. He made plea for a discontinuation of proceedings.[29] The defence attorney indicated that in this particular case there were proceedings conducted registered in the Gorzów court under another file number. The Regional Court in Gorzów Wielkopolski discontinued the proceedings in this case on 8th October 1948.[30]

A case of E.F seems highly interesting. He was accused that in August 1949 he urged J.F. by writing a letter to him, to take away from the Recovered Territories 1 rubber twist band and 3 textile bands from Gądków Wielki in Rzepin County to Ostrówek in Wieluń County.[31] No preventive measure was used towards the prosecuted, he remained at large.

The Regional Court in Gorzów Wielkopolski found E.F. guilty as charged and he was sentenced on 6th March 1950 to the fine of 10.000 zł.[32] No appellation was lodged in relation to that sentence.

In that case the sentenced man was brought by the court for incitement of an act of art. 44 of the Little Penal Code. It shall be noted that the above mentioned movable property was not taken away without permission from the western territories. Criminal liability for incitement of art. 44 of the Little Penal Code broadened a lot the range of security resulting from that provision which could have led to criminal liability for acts which could not have constituted considerable threat to the law system.

In the studied archive of the Regional Court in Gorzów Wielkopolski there were also files of cases concerning attempt to commit a crime of art. 44 of the Little Penal Code. An example of such case was a case of W. brothers. They were suspected of attempt to commit a crime of art. 44 of the Little Penal Code as on 1st March 1948 they allegedly hid 2 harvesting machines, 1 grinder, 1 iron tiller, 1 clock, 2 electric motors, 4 turned wheels, 2 metal wheels with tyres, 1 sideboard, 1 tyre in box cars at a railway station of Laski in Rzepin County.[33] The attempt of taking away of movable property from the western territories was stopped by the Milicja Obywatelska.

W. brothers were temporarily detained by a decision of the Municipal Court in Słubice of 3rd March 1948.[34] The court which used preventive measure indicated that the detention should be revoked on the day when the suspected paid a deposit of 6000 zł. The suspected paid the deposit and on 9th March 1948 were released from detention.[35]

The indictment was filed to the Gorzów Regional Court on 26th April 1948. In the sentence of 27th September 1948 the Regional Court in Gorzów Wielkopolski found both suspected guilty of alleged crime and sentenced both of them to 6 months of imprisonment and fine of 30.000 zł.[36] In the substantiation the court emphasised that both prosecuted men confessed to committing the crime but also expressed an opinion that the act was harmful activity for national economy which constituted an aggravating circumstance. At the same time the Regional Court noticed that both brothers did not have a criminal record and they wanted to improve equipment of their farm located in central Poland which could be considered a mitigating circumstance.[37]

Both brothers filed for cassation to the Supreme Court. The Supreme Court in the sentence of 23rd July 1949 dismissed the cassation.[38] In substantiation the Supreme Court indicated that W. brothers attempted to take away from the Recovered Territories a considerable amount of movable properties, thus the court of first instance did not aptly qualify the act committed by them as an act of lesser significance.[39]

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25 Minutes of the court session of 10th January, AP GW ref. no. 66/309/33. k.22.
26 Sentence of the Regional Court in Gorzów Wielkopolski of 10th January 1949, AP GW ref. no. 66/309/33, k.24.
27 Ibid.
28 An indictment in relation to the case of M.Sz. And I.W., AP GW ref. no. 66/309/32., k.2.
29 An objection for the indictment of 31st August 1948, AP GW ref. no. 66/309/32, k.8.
30 A decision of the Regional Court in Gorzów Wielkopolski of 8th October 1948, AP GW ref. no. 66/309/32, k. 11.
31 An indictment in relation to the case of E.F., AP GW, ref.no. 66/309/40, k.34.
32 A sentence of the Regional Court in Gorzów Wielkopolski of 6th March 1950, AP GW, ref. no. 66/309/40, k. 57.
33 A report of an officer of the Milicja Obywatelska of 1st March 1948, AP GW, ref. no. 66/309/68, k.1.
34 A decision of the Municipal Court in Słubice of 3rd March 1948 on applying of temporary detention penalty, AP GW, ref. no. 66/309/68, k.15.
35 Information from the Municipal Court in Słubice for the Prosecutor of the Regional Court in Gorzów of 15th March 1948, AP GW, ref. no. 66/309/68, k.23.
36 A sentence of the Regional Court in Gorzów Wielkopolski of 27th September 1948, AP GW, ref. no. 66/309/68, k.71.
37 A sentence of the Regional Court in Gorzów Wielkopolski of 27th September 1948, AP GW, ref. no. 66/309/68, k.74.
38 A sentence of the Supreme Court of 23rd July 1949, ref. no. PoK 279/49, AP GW, ref. no. 66/309/68, k. 85.
39 Ibid.

Another example of a case in relation to the crime of art. 43 of the Little Penal Code examined by the Regional Court in Gorzów Wielkopolski is the case of M.W. detained on 4th August 148 during baggage check at the railway station in Stare Kurowo.[40] There were a sewing machine, electric pot and carpet in his baggage.[41] The suspect tried to take away the movable property from the Recovered Territories to Poznań.

An indictment was lodged to the Regional Court in Gorzów on 30th October 1948 accusing M.W. of misappropriation to the detriment of the Treasury of post-German property insufficiently secured due to wartime and taking away movable property from the Recovered Territories without proper permit.[42] It shall be pointed out that no preventive measures were applied towards the accused.

The Regional Court in Gorzów Wielkopolski in the judgement of 7th November 1949 found M.W. guilty of committing the act of art. 44§ 2 of the Little Penal Code (an act of lesser significance). He was sentenced to a fine of 15.000 zł for that crime. At the same time the court acquitted M.W. of committing an offence of art. 43§ 2 of the Little Penal Code[43].

Another case in relation to the crime of art. 43 of the Little Penal Code was the case of S.M. He was detained on 23rd September 1947 at the railway station in Rzepin while he was attempting to take away a kitchen stove from the Recovered Territories to Nowy Tomyśl located near Poznań.[44] While he was detained the suspect tried to bribe an officer of the milicja with 2000 zł in exchange of release and possibility to take the kitchen stove with him. No preventive measures were used against the suspect. An indictment was filed to the Regional Court in Gorzów Wielkopolski on 23rd January 1948. S.M. was accused of misappropriation to the detriment of the Treasury of movable property insufficiently secured due to wartime and taking away movable property from the Recovered Territories without proper permit that is a crime of art. 43 of the Little Penal Code.[45]

The Regional Court in Gorzów Wielkopolski passed a sentence on 16th August 1948 and found S.M. guilty of both offences committed by him which were considered cases of a lesser significance. Thus, S.M. was sentenced to 2 weeks of detention. No measures of ordinary appeal were lodged to the Court of Second Instance.

Another case in relation to the crime of art. 34 of the Little Penal Code worth mentioning is the case of F.H. In June 1947 in locality Rokitno he allegedly misappropriated a post-German raker which was left insufficiently secured due to wartime.[46] An indictment was filed to the Regional Court in Gorzów on 26th February in 1948 which accused F.H. of committing a crime of art. 43 of the Little Penal Code. During court proceedings the suspect said that he took the raker which had been left on the field as a head of the Skwierzyna County published a circular which asked Polish farmers to take away abandoned post-German farming equipment from the fields.[47] During the following trial the former head of the Skwierzyna County confirmed that a circular which the accused was talking about had been published. It was passed both orally and in written to village administrators of particular villages.[48]

Due to facts which were established during the court proceedings, the Regional Court in Gorzów Wielkoploski on 4th October 1948 passed a sentenced in which F.H was acquitted of charges of committing a crime of art. 43 of the Little Penal Code. At the same time it shall be noted that no measures of ordinary appeal were lodged to the Court of Second Instance.

Having analysed cases of offences provided for by art. 43 of the Little Penal Code and art. 44 of the Little Penal Code examined by the Regional Court in Gorzów it shall be noted that objects which were misappropriated were mainly movables of a relatively small value such as a carpet, kitchen stove or other type of kitchen or household equipment or various items of appliances. Farming equipment which was also quite often misappropriated had bigger value.[49] For the above reasons a considerable group of cases in relation to crimes of art. 43 of the Little Penal Code and art. 44 of the Little Penal Code was qualified as so called examples of a lesser significance. It shall be pointed out that in the analysed cases a preventive measure in the form of temporary detention was applied relatively seldom. The situation seemed similar as far as cases in relation to crimes of art. 43 of the Little Penal Code examined by the Regional Court in Kraków are concerned.[50] It shall be also noted that both discussed types of offences, in principle, were to protect economic substance of the area incorporated into Poland after the World War II.

As a matter of fact these rules did not protect that area from economic damage caused mainly by the Red Army in the first period after the World War II and also later on. At the same time the rules hit average citizens who by taking away quite often small household equipment or farming machines of a small value wanted to improve their quality of life in their place of residence.

[40] A report of an officer of the Milicja Obywatelska, AP GW, ref. no. 66/309/48, k.7.
[41] Ibid.
[42] An indictment in relation to the case of M.W., AP GW, ref. no. 66/309/48, k.16.
[43] A sentence of the Regional Court in Gorzów Wielkopolski of 7th November 1949, AP GW, ref. no. 66/309/48, k. 44.
[44] An official note of an officer of the Milicja Obywatelska, Ap GW, ref. no. 66/309/36, k.5.
[45] An indictment in relation to the case of S.M., G.W., ref. no.66/309/36, k.16.
[46] An indictment in relation to the case of F.H., A.P., GW, ref. no. 66/309/37, k. 19.
[47] Minutes of the court session of 30th August 1948 in the case of F.H., AP. GW. Ref. no. 66/309/37, k.31.
[48] Minutes of the court session of 4th October in the case of F.H., AP. GW, ref.no. 66/309/37. k.36.
[49] Cf. The case of B.R. accused of a crime of art. 43 of the Little Penal Code consisting in misappropriation of a plough, harrow, duster and horse with a cart, AP. GW. Ref.no. 66/309/49.
[50] K. Siemaszko, W trudnym okresie..., p. 319.

Solidarity and the Judiciary in the Polish People's Republic in the Years 1980–1981

Kamil Niewiński *

Abstract

The revolutionary social movement of Solidarity, which was born in the socialist Poland in 1980, was the driving force behind the political transition of 1989/90, which in turn led to the democratisation of social and political life in this country. The early years of Solidarity saw the formulation of a social reform programme that laid foundations for political transformations. The judiciary was a very important sphere of the state functioning that required major reforms. The creation of a fully independent and self-governing judiciary model has become one of the primary purposes of Solidarity. The concepts of reforms in this area, developed by Solidarity in 1980–81, are presented in the article from the perspective of state archival sources and labour union documents. The Polish justice system has been operating until this day on the basis of these concepts; some of the proposed solutions, however, have never been brought to life and may constitute comparative legal material for further discussion about the judiciary system.

Key words: *Solidarity; Polish People's Republic; judiciary; judges; independence of the judiciary; self-government of judges.*

1. Introduction

The decade of the 1980 s in Poland was a time of social revolution under the banner of Solidarity, as a result of which the totalitarian socialist system collapsed and the power of the Polish United Workers' Party (PUWP), exercised on behalf of the Soviet Union, was overthrown. There are many publications both in Polish and foreign literature on the origins and activities of Solidarity since the very formation of the movement until the democratic transition in Poland (years 1980–1989/90). Thirty five years after its founding, this movement remains one of the main areas of historical, sociological or political science research. The decade of Polish struggle for a sovereign and democratic state is still an open subject, because of the amount of unexamined archival documents and the issues that had not been addressed so far. One of them is the sphere of judiciary in the turbulent times of what is known as 'the first Solidarity' (from September 1980 to December 1981), martial law (from December 13, 1981 to July 22, 1983) and the Polish path to democracy in the years 1989/90. This article aims to present the impact of Solidarity on this sphere of state functioning, with particular focus on judicial reform proposals put forth in the years 1980–1981, which later formed the basis for a judiciary reform in Poland in the time of transition. Understanding the essence of Solidarity demands requires a brief outline of the actual and political circumstances in which the judiciary functioned in the Polish People's Republic (PPR).

In the socialist system, the judiciary was neither separate nor independent. The courts were subordinate to the executive and political powers. The judiciary was controlled by the PUWP through their specialised units, i.e. administrative departments of the Central Committee (CC) and voivodeship committees (VC) [1], as well as through the Ministry of Justice and court presidents.

The personnel policy in courts was aimed at recruiting the largest possible number of judges willing to submit to the PUWP guidelines [2]. In the early 1980 s, as many as 53.1% of district court judges (first instance), 66.9% of voivodeship court judges (second instance) and about 80% justices of the Supreme Court [3] were members of the PUWP, as it had not been prohibited by law back then. Judges would often join the party in order to boost their career opportunities, as party affiliation [4] had been an overriding condition for promotion.

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1 Archival documents relating to the structure and scope of work of the Administrative Department of the CC and the administrative departments of VC of the PUWP, Archives of Modern Records in Warsaw (hereunder: AMR), 1354 Polish United Workers' Party – Central Committee (hereunder: 1354 CC PUWP), Administrative Department of the CC PUWP (hereunder: AD), sign. LI/9, LI/37, LI/43 and LI/54.

2 RUDNICKI, Stanisław, *O praworządności i niepraworządności w wymiarze sprawiedliwości*, „Tygodnik Powszechny" 1981, No. 24, p. 5.

3 SZARYCZ, Jan, *Sędziowie i sądy w Polsce w latach 1918–1988*, Judicial Law Research Institute of the Ministry of Justice, Warsaw, 1988, p. 155, 201 i 237; WALCZAK, Ryszard, *Sprawowanie kierowniczej roli partii w sądach i prokuraturze w Polsce Ludowej (studium politologiczne)*, Academy of Social Sciences, Warsaw, 1987, p. 289–290; WALCZAK, Ryszard, *Polityka, sądy, prokuratura*, Youth Publishing Agency, Warsaw, 1990, p. 138.

4 RZEPLIŃSKI, Andrzej, *Sądownictwo w PRL*, Polonia, London, 1990, p. 66–73.

The judicial system of the PPR involved a number of legal mechanisms that undermined the principle of judicial independence [5]. Supreme Court justices were appointed for a five-year term of office, hence they regularly had to go through political verification. Common court judges were appointed for an indefinite term; however, each of them could be removed at any time due to "*the lack of guarantee of proper performance of judge's duties in the PPR*", without any justification or a possible recourse to the law. Officially, judges were appointed and dismissed by the State Council, the chief executive body, upon request of the Minister of Justice. Other personnel decisions, e.g. concerning judge advancements, remunerations or rewards, were the domain of the Minister of Justice and court presidents. These decision usually required prior approval of competent bodies of the PUWP.

Self-government of judges was an illusion. In voivodeship courts (VC), there were only general assemblies of judges, deprived of any influence on professional matters of judges. The role of assemblies was limited to nominating half of the members of VC administrative councils, the latter being consultative bodies of VC presidents. A VC president was a council chairman and appointed the second half of council members. In this way, he held control over that body [6].

The Minister of Justice and court presidents also exercised supervision over courts and judges. Under the aforementioned supervision, they could review records of pending cases, indicate deficiencies in the proceedings and provide guidelines for judges.

That was the factual and legal reality in which the judiciary found itself upon entering 1980 s, a decade that brought about the birth of a revolutionary social movement of Solidarity along with calls for a complete overhaul of the socialist regime. Judges joined this social movement, as they believed it to be an opportunity to move towards genuine judicial independence.

2. Solidarity in judiciary

At the turn of September and October 1980, first trade union organisations of Solidarity were formed in courts. On October 19th, a countrywide section of the Independent Self-Governing Trade Union Solidarity of Justice Workers (ISTU S JW) [7] was established. At the central level, this section was managed by the National Coordinating Commission (NCC) [8], with Barbara Kuklińska, a probation officer from Gdansk, as its president. The NCC Presidium members included: Kazimierz Barczyk, a judge from the District Court (DC) in Krakow, Adam Strzembosz, a judge from VC in Warsaw, Janusz Ślężak, a judge from DC in Gdansk, Bogdana Żuralska, a judge from DC in Poznan, Wojciech Soiński, a judge from DC in Szczecin and Antoni Szymanski, a probation officer from Gdansk [9].

The justice workers' section of Solidarity was open for all employees of the Ministry of Justice and its subordinate units, including the courts, i.e. judges, notaries, administrative staff, bailiffs and probation officers. Solidarity was most popular among the courts' administrative staff. According to the data of the Administrative Department of the CC PUWP, from a total of 21,296 employees of the Ministry of Justice and its organisational units (except for prison service), as many as 10,166 people (47.7% of justice workers) were members of Solidarity. Among members of the union there were 978 judges and assessors, which made up 26% of the total employment in DCs, VCs and Regional Courts of Labour and Social Insurance (RCLSI) [10]. Branches of the ISTU Solidarity were also created in the Ministry of Justice and the Supreme Court [11].

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[5] At that time, in force were: the Regulation of the President of the Republic of February 6, 1928 Law on Common Courts (Journal of Laws of 1964 No. 6, item 40 with amendments) – radically amended after 1945 by the socialist authorities and the Act of February 15, 1962 on the Supreme Court (Journal of Laws No. 11, item 54 with amendments).

[6] RZEPLIŃSKI, 1990, p. 77–85; WŁODYKA, Stanisław, *Organizacja wymiaru sprawiedliwości w PRL*, National Scientific Publishing, Warsaw, 1963.

[7] In accordance with § 8 item 1, point 1 of the Charter of Solidarity, union members affiliated on the territorial and professional basis, which meant that the main links of the labor union organization were the factory organizations, bringing together employees of all professions working in a given enterprise. In accordance with § 8 item 1, point 4, at all levels, including at the national level, were able to operate sections of industry associations. OWSIŃSKI, Jan Marek, *Dokumenty Krajowej Komisji Porozumiewawczej i Krajowej Komisji NSZZ „Solidarność" (1980–1981)*, The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (hereunder: INR), Warsaw, 2012, p. 44.

[8] SZYMAŃSKI, Antoni, *Krajowa Komisja Koordynacyjna Pracowników Wymiaru Sprawiedliwości NSZZ „Solidarność"* [in:] *Obywatelskie Centrum Inicjatyw Ustawodawczych Solidarności 1980–1990*, elab. BARCZYK, Kazimierz, GRODZISKI, Stanisław, GRZYBOWSKI, Stanisław, Sejm Publishing House (hereunder: SPH), Warsaw, 2001, p. 556–558.

[9] STANOWSKA, Maria, STRZEMBOSZ, Adam, *Sędziowie warszawscy w czasie próby 1981–1988*, INR, Warsaw, 2005, p. 44.

[10] Data presented by the Administrative Department of CC PUWP came from February 25, 1981 and they are confirmed by general information provided by the authorities of „Solidarity". See: Information of the Administrative Department of the CC PUWP from march 2nd, 1981 on the situation in the labor union movement in the Ministry of Justice and its organizational units, AMR, 1354 CC PUWP, AD, sign. LI/22, p. 1–8; *Problemów jest mnóstwo*, „Gazeta Prawnicza" (hereunder: GP) 1981, No. 9, p. 4; *„Solidarność" pracowników wymiaru sprawiedliwości*, „Tygodnik Solidarność" (hereunder: TS) 1981, No. 10, p. 10; KAUBA, Krzysztof, *„Solidarność" w resorcie sprawiedliwości*, TS 1981, No. 24, p. 14. Other data in this area were presented by the Ministry of Justice in the report from March 1982 submitted to the Politburo of the CC PUWP (PB). The Ministry indicated that to the „Solidarity" belonged a total of 7.249 members of the judicial staff, including 838 judges. These data were related to the period after the introduction of martial law, when union activity were suspended, and the Ministry of Justice, on the instructions of the CC PUWP, has taken actions directed against members of the „Solidarity" in the judiciary. See: Assessment of socio-political situation in the judiciary, AMR, 1354 CC PUWP, PB, sign. V/173 (mcf 2999), p. 26; WALCZAK, 1987, p. 289–290; SZARYCZ, 1988, p. 176.

[11] STANOWSKA, STRZEMBOSZ, 2005, p. 45–47; RUDNICKI, Stanisław, *NSZZ „Solidarność" w Sądzie Najwyższym – refleksje z perspektywy lat* [in:] *Ius et lex. Księga jubileuszowa ku czci prof. Adama Strzembosza*, ed. by DĘBIŃSKI, Antoni, GRZEŚKOWIAK, Alicja, WIAK, Krzysztof, Catholic University of Lublin, Lublin, 2002, p. 293–300; and [in:] BARCZYK, GRODZISKI, GRZYBOWSKI, 2001, p. 547–550.

The mere fact of judges' affiliation to trade unions might have raised reasonable doubts. The Ministry of Justice pointed to the fact that judges' membership in the huge social and labour movement of Solidarity could make them vulnerable to pressures from the union's leadership and workers' majority, thus posing a threat to the independence of those judges [12].

However, the affiliation of judges shall be justified by the legal and political reality, in which they functioned, as discussed in the introduction. Some judges were aware of the necessity to reform the judiciary, and they were looking for public support for their demands in the Solidarity movement [13]. The NCC of ISTU Solidarity of Justice Workers presented these postulates in a statement issued on October 27th, 1980. Major demands included guarantees for the independence and irremovability of judges. A disciplinary action was to be the only exception to the latter. This required the abolition of regulations about definite term of office of justices of the Supreme Court along with regulations under which political and executive authorities could resort to judge removal on the grounds of the alleged lack of guarantee of proper performance of their duties. Furthermore, the judges of Solidarity demanded the Minister of Justice and court presidents to be deprived of any instruments for interfering with adjudication. Their powers were to be limited to activities in the field of actual courts' administration. There was also a proposal to abolish the judge reward system that was based on sole discretion of court presidents and to introduce uniform base salary rates to be increased only with the length of service. A self-government of judges was to be the guarantor of judicial independence. The Solidarity called for introducing such bodies at the level of voivodeship court districts. Apart from general assemblies of judges in VCs, there was a proposal to establish self-governing executive bodies in the form of colleges of judges, with all their members being appointed by general assemblies. In addition, demands were made to transfer to self--government bodies competencies in the area of: the exclusive right to nominate candidates for the posts of court presidents, setting the broad lines of action for courts in a given voivodeship, decision-making powers concerning personnel as well as professional and socio-wage matters of judges, assessors and trainee judges [14].

These demands set the scene for a discussion on the future of justice in the socialist state. On this basis, the judicial section of Solidarity began talks with the leadership of the Ministry of Justice in order to obtain commitments from the PPR authorities that these demands were going to be met, like it was the case with the accords signed with the striking workers in August 1980. The negotiations commenced in mid-November and were broken by mid-December 1980, because if the demands of Solidarity were to be implemented, the executive and political authorities would have lost their influence on judicature [15].

After these unsuccessful attempts of negotiations, the judges affiliated with Solidarity began to look for public support for their demands. As a result, matters of socialist justice have been incorporated into the action programme of Solidarity by the highest labour union authorities.

3. National Liaison Commission of Solidarity on the reform of the judiciary

Initially, the initiative and attempts to push through demands of a judiciary reform were remaining in the hands of the judges, members of Solidarity. The Solidarity leadership were not uninvolved, however. The negotiations of the judicial section with the Ministry of Justice were attended by representatives of the highest workers' authorities of Solidarity from the National Liaison Commission in Gdansk (Gdansk NLC), namely Andrzej Gwiazda and Andrzej Milczanowski. Following the fiasco of the December talks, the rule of law and judiciary reform were included by the Gdansk NLC in the theses for discussion on directions of Solidarity's further action developed in February 1981 [16]. Chapter 4 of these theses, entitled "Guarantees for the future", subsection 1, discusses rule of law. The authorities of Solidarity considered the following to be of fundamental importance: "*full restoration of the rule of law in the relations between the state powers, society and the citizen. (…)The rule of law means that the laws should be a reflection of the interests and will of the public, and their provisions should be binding for authorities and citizens. No one can stand beyond and above the law. (…) Before the law, everyone should be equal. It should be one and just for everyone, regardless of their social and state position*". Recognizing only independent courts "*as natural guarantors of civil rights and liberties*", Solidarity pointed to the importance of respecting the principle of judges' irremovability, and above all opted for the abolition of definite term of office of Supreme Court justices, as it has been widely criticized. Moreover, the union authorities saw the need to introduce appropriate mechanisms for the selection of lay judges for all types of courts. According to Solidarity, lay judges should be elected in a popular vote, together with councillors of primary and voivodeship level.

In the spring of 1981, in the wake of the Bydgoszcz crisis [17], the Gdansk NLC of Solidarity demanded a renegotiation of

[12] Theses of the Ministry of Justice for discussion on organization and tasks of the labor union movement in the judiciary, AMR, 285 Ministry of Justice (hereunder: MJ), sign. 7/175, pp. 23–25.

[13] Appeal of the NCC of the „Solidarity" of Justice Workers, AMR, 285 MJ, sign. 7/282, p. 30.

[14] Statement by the NCC "Solidarity" Workers of Justice of October 27th 1980, ibidem, p. 10–11.

[15] *NSZZ „Solidarność" Pracowników Wymiaru Sprawiedliwości* – Polish Press Agency release, „Trybuna Ludu" 1980, No. 278, p. 9; *„Solidarność" pracowników wymiaru sprawiedliwości*, TS 1980, No. 10, p. 10; Note of the Deputy Minister of Justice Tadeusz Skóra on the discussions with the "Solidarity" in the Ministry of Justice of December 11–12th, 1980, AMR, 285 MJ, sign. 7/114, p. 27.

[16] „Solidarity" orientations in the current situation in the country – thesis to discuss, published as a supplement in „Tygodnik Solidarność", No. 3, of April 17th, 1981, [in:] AMR, 842 General Prosecution of the PPR (hereunder: PPR GP), sign. 6/341, p. 19–26.

[17] It was an incident of remove by force „Solidarity" members from session of Bydgoszcz Voivodeship Council on March 19th, 1981 by the troops of Militia, which became the cause of worsening socio-political situation in the country. See: OSIŃSKI, Krzysztof, RYBARCZYK, Piotr, *Kryzys bydgoski 1981. Przyczyny, przebieg, konsekwencje*, Monograph, Tom I, INR, Bydgoszcz-Gdansk-Warsaw, 2013.

agreements with the government from August 1980. The rule of law, including a reform of the judiciary, was supposed to be on the agenda. On April 10, Solidarity authorities adopted two documents in this regard, prepared by a team of experts chaired by Zbigniew Bujak, a member of the union leadership and the head of Mazowsze Region Solidarity[18]. These documents were presented to the Minister of Justice Jerzy Bafia on April 25th. They contained an assessment of the rule of law in the PPR and demands for a democratic reform of the judiciary, including proposed amendments of the Law on Common Courts and the Supreme Court Act. In these documents, Solidarity authorities indicated the following: *„Without an independent judiciary, one cannot imagine fully independent judges enjoying wide authority, necessary to secure the legal order in the state. (…)To establish the rule of law in Poland, what must be first and foremost introduced is a full self-government of judges, starting from the district courts to the Supreme Court, which would have a decisive influence on the choice of court presidents and judges posts, and thereby it would release the judges from the influence of administrative factors and other centres of power. A judge should not be threatened by the possibility of transferring him against his will to another court or depriving him of his position through any procedure other than disciplinary. A judge should not hold any social functions outside the court. The rule of law in Poland shall mean an increase in the role of the Supreme Court, whose judges should be appointed for an indefinite time. (…)Once all these conditions are met, the courts will be able to fully play their rightful role of justice guardians"*[19].

The April talks, however, did not bring any binding decisions. According to the Polish Press Agency report, the Minister of Justice only asserted that several issues raised by the Solidarity, including the judicial self-government, would be included in the draft amendment of the Law on Common Courts, which was being prepared by the Ministry[20].

In the concept of the Bujak team, it was important to prepare a social counter-project of the judiciary reform which could be confronted with the Ministry proposals[21]. The legislative work in this area had already been carried out by the judges affiliated with Solidarity as part of activities conducted by the Centre of Civil Legislative Initiatives of Solidarity.

4. Centre of Civil Legislative Initiatives of Solidarity and social projects of judiciary reform

On January 17th, 1981, the First National Forum of Justice Workers was organised in Krakow upon the initiative of judge K. Barczyk, member of the Presidium of the NCC Solidarity JW. The conference was attended by 250 judges from 65 voivodeship and district courts, legal theorists, prosecutors, attorneys and legal advisers who supported the Solidarity movement, and representatives of Solidarity. The main focus of discussion was judges' independence and self-government; the status of criminal and procedural law was also high on the agenda. The Centre of Civil Legislative Initiatives (CCLI)[22] of Solidarity was founded by the Forum, to be an institution within which the most prominent representatives of the legal community, divided into thematic teams, would work together to develop a series of draft laws to reform the entire system of socialist law. The drafts were to be the subject of legislative initiatives and a civic alternative to the government's reform proposals[23].

Within the CCLI framework, two teams of judges who were members of Solidarity were established and developed social draft amendments to the Law on Common Courts and the Supreme Court Act.

The reform of the judiciary proposed in these drafts focused on the appointment of judicial self-government bodies at the voivodeship level and in the Supreme Court. These self-government bodies were to be general assemblies of judges and colleges of judges appointed by assemblies. These bodies should have decision-making powers as regards the personnel, wages and social matters of judges. The most important thing was to give self-government bodies an exclusive right to nominate candidates for vacant posts of judges. The role of the Minister of Justice in this field was to be limited to publishing a vacancy notice in the Official Journal and then presenting the Council of State with one of the proposals pre-approved by a self-government body.

A similar appointment procedure was to be applied to the posts of presidents of Common Courts and the Supreme Court. The General Assembly of Judges of the competent court would choose candidates for presidents from among persons nominated by a group of judges, members of the Assembly, and the college of judges. The Minister of Justice would then appoint a court president from among the candidates who have received more than 50% support of the General Assembly. There was an unresolved dispute whether the Minister of Justice should have the right to nominate candidates for the posts of court presidents, to be later approved by assemblies of judges. An alternative scenario was put forward, in which the court president was to be elected by the General Assembly from among the candidates presented only by the judges' community. The Minister of Justice would then have the right to veto a President-elect. Fol-

[18] *Krajowa Komisja Porozumiewawcza NSZZ „Solidarność" – posiedzenie w dniach 9–10 kwietnia 1981 r.*, elab. TABAKO, Tomasz, „Nowa", Warsaw, 1996, p. 139–144 i 209.

[19] *"List of issues concerning the prosecution of PPR raised by a team of "Solidarity" at a meeting with a government team in April 25th, 1981", as well as document "A preliminary assessment of the rule of law condition in the Polish People's Republic"*, AMR, 842 PPR GP, sign. 6/341, p. 3–9; OWSIŃSKI, 2012, p. 181–185; *Praworządność – stanowisko KKP do rokowań z rządem*, TS 1981, No. 6, p. 7; STRZEMBOSZ, Adam, *„Solidarność" o prawie i praworządności*, GP 1981, No. 15–16, p. 5.

[20] *Pierwsza tura rozmów*, „Głos Pracy" 1981, No. 83, p. 1 i 2; *Rozmowy przedstawicieli rządu z zespołami KKP NSZZ „Solidarność"*, „Życie Warszawy" 1981, No. 97, p. 1 i 4.

[21] *Krajowa Komisja Porozumiewawcza NSZZ „Solidarność" – posiedzenie w dniach 9–10 kwietnia 1981 r.*, elab. TABAKO, Tomasz, „Nowa", Warsaw, 1996, p. 144–145.

[22] Genesis, the activities and results of work of the CCLI lived to see the elaboration in the form of book collection of documents and memories of participants of those events, published by Sejm Publishing House. See: BARCZYK, GRODZISKI, GRZYBOWSKI, 2001.

[23] SZCZĘSNY, Jerzy, *Obywatelskie Inicjatywy Ustawodawcze*, GP 1981, No. 13–14, p. 10.

lowing this veto, the candidate would be re-considered by the General Assembly. Only the appointment of the First President of the Supreme Court would be carried out without the participation of judges' self-government, as it would fall within the exclusive powers of Sejm or the Council of State. What should be also noted is that project promoters postulated introducing the principle of a definite term of office for court presidents. On the other hand, the draft amendment to the Supreme Court Act once more underlined the need to abolish definite term of office for Supreme Court justices.

The authors of projects were not unanimous about abandoning the provision under which a judge could be dismissed on the grounds of the lack of guarantee of proper performance of his duties. In the draft amendment to the Supreme Court Act, this provision was deleted. In turn, the authors of the draft amendment of the Law on Common Courts demanded that the Minister of Justice could only file a request for judge removal upon prior consent of the competent General Assembly of Judges. A similar approach was applied to supervisory powers of the Minister of Justice and court presidents that allowed them to interfere with the pending court proceedings. A proposal was made to grant judges the right to appeal against administrative supervisory guidelines to the College of Judges. Moreover, a demand was made to introduce a provision stipulating that "*the administrative supervision cannot encroach on the area, in which judges are independent under the law, in particular by exerting influence on the content of the judgement or by questioning the judgement outside the instance course*".

The assumptions behind the judiciary reform were also presented to the public by the judges of Solidarity in numerous press articles published mainly in the labour union newspaper "Tygodnik Solidarność" ("Solidarity Weekly")[24].

5. Judiciary reform in the resolutions of the First National Congress of Delegates of Solidarity

The most important event of what is known as the first period of Solidarity (September 1980–December 1981) was the First National Congress of Delegates in the Gdansk Olivia Hall, held on 5–10 September (first part), and continued on September 26–October 7, 1981. The Congress was supposed to determine a programme and guidelines for Solidarity reform efforts.

The discussion at the congress focused on the role of Solidarity in the socialist system, in the sphere of exercising the state power and the influence on the economic and socio-political affairs. Zbigniew Romaszewski presented theses of the judiciary reform programme, developed by Task Team No. 9 of the National Congress[25]. Judge A. Strzembosz, member of authorities of Solidarity judicial section, talked about the judiciary as well, and called for support for the judges' demands[26].

These issues had been addressed at length in points 23 to 26 of the Solidarity programme adopted by the National Congress of Delegates[27]. Thesis 24 of the programme resolution was about judicial independence. Its provisions were based on earlier demands formulated by Solidarity leadership and judges affiliated with the union. It has been proposed to introduce legal guarantees of judicial independence and self-government through limiting the role of courts' administration bodies, the abolition of definite term of office for Supreme Court justices and introducing the principle of judge irremovability (the exception here being a disciplinary procedure) and of judge non-transferability without judge's consent. The resolution included, for the very first time, a demand for self-governmental verification of all serving judges. The goal behind this verification was to remove those judges who broke ethical standards in their judicial practice, in particular those who blindly followed political guidelines of the PPR authorities. The General Assembly of Judges of competent courts would have the power to formulate approvals and any requests for judge removal. In addition, the resolution has also raised the issue of judges' political affiliation with the PUWP. The National Congress called for a ban on judges belonging to any political organisations.

It should be noted that this ban should also cover judges' affiliation to labour unions. However, if the judges' self-governmental demands were to be met, the presence of judges in the structures of labour unions would be redundant.

The demands put forward in the resolution of the First Congress were radical in nature and went far beyond earlier proposals of system changes in the judiciary, as they entered into the sphere of shaping the judicial personnel.

The message of the Solidarity's programme resolution concerning justice was further reinforced by two following resolutions of the Congress, "on basic expectations of the nation" and "on the judges independence". In the first one, the list of seven overarching social demands included the need to ensure the equality of all before the law, the release of prisoners of conscience and defence of those who were victimised for their

[24] DANKOWSKI, Juliusz, *Jakie są gwarancje sędziowskiej niezawisłości*, TS 1981, No. 4, p. 13; WASILKOWSKA Zofia, *Sąd Najwyższy*, TS 1981, No. 7, p. 13; WĄSOWICZ, Marek, *Odnowa w prawie*, TS 1981, No. 8, p. 12; *„Solidarność" pracowników wymiaru sprawiedliwości*, TS 1980, No. 10, p. 10; ŚLĘŻAK, Janusz, *Dlaczego polskie sądownictwo powinno być samorządne?*, TS 1981, No. 11, p. 12–13; KAUBA, Krzysztof, *„Solidarność" w resorcie sprawiedliwości*, TS 1981, No. 24, p. 14; STRZEMBOSZ, Adam, *O samorządne sądownictwo w samorządnej Rzeczypospolitej*, TS 1981, No. 33, p. 13; STRZELECKA, Jolanta, *W sprawie gwarancji dla niezawisłości sędziowskiej*, TS 1981, No. 35, p. 11; RUDNICKI, Stanisław, *O praworządności i niepraworządności w wymiarze sprawiedliwości*, TP 1981, No. 24, p. 5; WASILKOWSKA, Zofia, *O potrzebie i kierunkach zmian przepisów o Sądzie Najwyższym*, „Nowe Prawo" 1981, No. 4, p. 61–62; STRZEMBOSZ, Adam, *„Solidarność" o prawie i praworządności*, GP 1981, No. 15–16, p. 5; ŻBIKOWSKA, Magdalena, *List do redakcji*, „Prawo i Życie" 1981, No. 8, p. 19; ŁABĘDŹ, Krzysztof, *Koncepcje polityczne w prasie NSZZ „Solidarność" w latach 1980–1981*, Adam Marszałek, Torun 2004, p. 93–95, 148–155.

[25] *IX. Prawa obywatelskie i praworządność*, TS 1981, No. 26, p. 5.

[26] *Diariusz zjazdowy*, TS 1981, No. 28, p. 11–12; *I Krajowy Zjazd Delegatów NSZZ „Solidarność" – stenogramy*, vol. 2, part 2, elab. MAJCHRZAK, Grzegorz, OWSIŃSKI, Jan Marek, INR, Warsaw 2011, p. 81–82 i 158–159.

[27] *Program NSZZ „Solidarność" uchwalony przez I Krajowy Zjazd Delegatów*, TS 1981, No. 29, p. 7–8; *I Krajowy Zjazd Delegatów NSZZ „Solidarność" – stenogramy*, vol. 1, elab. MAJCHRZAK, Grzegorz, OWSIŃSKI, Jan Marek, INR, Warsaw 2011, p. 1003–1006.

publishing, labour union and political activity[28]. The second resolution emphasized the importance of judicial independence. The First National Congress of Delegates of Solidarity expressed their conviction that the Republic could not be repaired if independence of the judiciary was not guaranteed. Solidarity decided to: „1. request all union organizations to popularise widely those Union programme theses which concern the guarantees of independence of judges and necessary changes to obtain judiciary that is fully self-governing *and independent of any political powers and state administration; 2. put an obligation on Union authorities (…) to develop materials that would present for the whole society the history of the judiciary in the post-war period along with its positive and negative role in the struggle for human rights and respect for the rights of the whole society; 3. oblige the National Committee to undertake a particular activity in negotiating amendments to the laws, contained in the Union programme and securing the independence of the judiciary; 4. oblige all members of the Union to support these activities, if necessary by way of a protest campaign"*[29].

6. Conclusion

Resolutions of the First National Congress gave prominence to judicial independence in Solidarity's demands. They set out a specific action plan aimed at raising public awareness of political problems involved in the judiciary in the Polish People's Republic and promoting legislation changes that would secure full judicial independence and self-government. Should state and political powers further oppose the implementation of these demands, the Congress of Solidarity committed union members to reach for the ultimate means of social compulsion in the form of a strike action. Less than two months after the First National Congress of Solidarity, on December 13th, 1981, the PPR authorities decided to smother the social reform movement by imposing martial law throughout the country. Paramilitary activities have proven to be effective only for a short period of time. The martial law has failed to suppress the social renewal movement, and impeded the process of changes only for a while. These changes, as it has turned out, resulted in a transformation of the socio-political system in Poland in the late 1980 s and early 1990 s. Consequently, pluralistic political life was restored and democratisation of state structures became a fact. With that in place, political and legal changes postulated by Solidarity in 1980–81 could be successfully introduced to secure both independence of the judiciary and self-government of judges.

[28] Ibidem, p. 1050–1051; *Deklaracja I Krajowego Zjazdu*, TS 1981, No. 25, p. 1.

[29] *Uchwała w sprawie niezawisłości sądownictwa*, TS 1981, No. 30, p. 10; *I Krajowy Zjazd Delegatów NSZZ „Solidarność" – stenogramy*, vol. 2, part. 2, elab. MAJCHRZAK, Grzegorz, OWSIŃSKI, Jan Marek, INR, Warsaw, 2011, p. 927–928.

Attempts to Unify and Codify Private Law during the Period of the Inter-war Czechoslovak Republic

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Abstract

On the basis of the received law, Act no. 11/1918 Coll. the First Czechoslovak Republic incorporated two legal systems – the Austrian and the Hungarian. The most important task of the state administration was the fastest possible unification of the two received legal systems which established, de facto, a new Czechoslovak law. The unification (realized by means of codification) in the field of private law had a particular importance, where, on the one hand, there was applied the ABGB, and, on the other hand, in Slovakia and Carpathian Ruthenia there was applied the customary law, being constantly improved by the judicial practice, and decisions of the Curia and partial legislation were also applicable. The purpose of the present study is to briefly and, if possible, the most concisely determine the main lines and the main issues of unification and codification of the private law in the inter-war Czechoslovak Republic while taking into account the formal diversity of the received laws (ABGB versus legal customs and decisions of the Curia, i.e. generally binding rulings of the Royal Hungarian Curia (curia regis)).

Key words: *unification; codification; the first Czechoslovak Republic; received law; ABGB; general private law; Slovakia; drafts of the Czechoslovak Civil Code; a legal custom.*

Introduction

The end of World War II and the established Versailles system intervened significantly in the geopolitical division of Europe. As a result of the arrangement of the post-war change of environment, the formation of new states, as the so-called successor states, or annexing new territory to the original national territory brought, inter alia, the issue of creation and consolidation of emerging or existing laws, and often consecutively, the issue or necessity to subsequently unify the received or *"inherited"* laws[1]. These states included also the Czechoslovak Republic as one of the successor states of the Austro-Hungarian Empire. The present paper aspires to give a brief overview of the unification problem of the first Czechoslovak Republic with special emphasis on unifying efforts within the field of the private (civil) law.

1. The unification problem of the received legislation and its solution

The basis of the legislation applicable in the Czechoslovak state became the Act on the establishment of an independent state of Czechoslovakia no. 11/1918 Coll. – the so-called received norm[2], which was publicly declared on the day of the creation of Czechoslovakia, the 28th October of 1918 and published in the Official Collection of Acts and Provisions of the state of Czechoslovakia on November 6th, 1918. We may note that the received norm fulfilled a dual function, it primarily was *„the act that declared and established the Czechoslovak state sovereignty"*[3] and, secondly, it was the law under which there occurred a *„public authoritarian reception of law"*[4] to ensure the *"legal continuity in the material sense"*. On account of the occurred reception of law there was created a situation of legal dualism (transition-

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1 For more details see Vaverka, F.: Unification issue in legislations of the states in the territory of the post-war Central Europe (Unifikačný problém v právnych poriadkoch štátov poválečnej Strednej Európy. (Predbežný úvodný referát pre unifikačný kongres právnický v Bratislave v dňoch 26.–28. IX. 1937)). In: Právny obzor, 20, 1937, p. 337–365. In this article the author presents his interpretation of the unifying solution to problems in various European countries, namely France, Italy, Austria, Poland, Yugoslavia, Romania and Czechoslovakia.

2 Weyr, F.: The Succession of Czechoslovak state and the Reception Act Nos. 11/1918. („Sukcesořství československého státu a recepční zákon č. 11 z r. 1918".) In: Časopis pro právní a státní vědu 21, 1938, p. 2. See also VOJÁČEK, L. – KOLÁRIK, J. – GÁBRIŠ, T.: Czechoslovak legal history". 2nd edition. („Československé právne dějiny. (1918–1992). 2. prepracované vydanie"). Bratislava: Eurokódex, s. r. o., 2013, p. 55–56 a VOJÁČEK, L. – SCHELLE, K.: Legal history on the territory of Slovakia („Právni dějiny na území Slovenska"). Ostrava: KEY Publishing, s. r. o., 2007, p. 211.

3 Beňa, J.: The development of Slovak legal order. („ Vývoj slovenského právneho poriadku".) Banská Bystrica, 2001, p. 19.

4 Hexner, E.: Notes to the Reception Norms. („Poznámky k recepčným predpisom"). In: Hospodárstvo a právo, 3, 1935–1936, 4, p. 36.

ally, a state of legal trialism). It is understandable that the inconsistency and particularism of the legal standards applicable to different parts of the national territory caused considerable difficulties, particularly, in the case of a specific application of rights by courts or by other state authorities.

Given the urgency of the unifying process, the Ministry for the unification of legislation and the administrative organization was founded in 1919 under the Act no. 431/1919 Coll. (the abbreviated form: Ministry of unification). The Ministry of unification was established as a temporary body which activities should be completed by fulfilling the purpose for which it was established. The act did not contain a precise definition of competencies of the Ministry (this question was addressed only by the Government Decree no. 501/1921 Coll.)[5]. Drafts of acts, which realization did not belong to the scope of the Ministry of unification, would have to be submitted to the Ministry for consideration, if they would modify conditions also in the territory of Slovakia and Carpathian Ruthenia. The scope of this central body could be implemented in practice only to a very limited extent, which is particularly true in the area of private law, where unification and codification works were carried out by the Ministry of Justice. Therefore, the Ministry of unification was basically just a certain type of an "*auxiliary*" authority in the unifying process and it actually fulfilled the function of a "*consultation centre*". Equally interesting is the fact that it resembled a kind of a central authority for *"the law in force in Slovakia and Carpathian Ruthenia*", or, rather, for the *"received Hungarian law*". Its main mission would be to ensure the unification of the laws in force in the Czech lands and Slovakia, while in practice its activities showed "*adaptation*" efforts of the received Hungarian law in force in Slovakia to the Austrian law in force in Bohemia and Moravia. One of the main problems in carrying out the works of unifying was a lack of transparency and accessibility of the received laws. The continued duplication of legislation, accompanied by a poor knowledge of the authentic text of the law, endangered the legal certainty for citizens and caused *"confusion"* in a tangle of existing legal standards.

In September of 1937 there took place in Bratislava a unification congress of lawyers[6], which in its general resolution stressed that *"the acceleration of the unifying works requires an urgent interest of the State and that we must give priority to this State necessity over the other less serious interests… Successful operation of unifying works requires a proper organization and a continuity together with the greatest possible simplification of the preparatory activities. When unifying, may we always carefully consider the value of legislation in force in one and in the other area of the state and the provision better and better satisfying the needs of the epoch must be taken as the basis for a unified legal regulation"*[7].

The unifying efforts, lasting twenty years, thus, did not produced the results expected in the first years of the existence of the common Czechoslovak state. An interesting paradox of the human history is that a part of them was used in reconstructing process of the legal system during the so-called legal biennium (1948–1950) and after 1989. The key sectors of the private and public law were not unified by the adopted common Codes, but only by partial acts. When comparing the sectors of public and private law, we can state that the unifying works were more successful in the area of public law[8].

2. Unification efforts and attempts to codify the private (civil) law

The above outlined problems, which in Czechoslovak legal order were caused by the legal dualism and a different character of the received legislations, both in content as well as formally, clearly manifested particularly in the area of private law. While in the Czech lands the basic legislation of the Private Law was taken from the Austrian (and thus, from then on, the Czechoslovak) General Civil Code (ABGB), in Slovakia and Carpathian Ruthenia the matter of private law was largely governed by the customary law being constantly improved by the judicial practice and by partial legislation. Changes made during the existence of 1st and 2nd Czechoslovak Republic are reflected in particular in the area of private law in force in Slovakia and Carpathian Ruthenia, in judicial structure it is the

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[5] The competences of the Ministry of unification did not cover in particular:
- cases, when certain legal conditions were governed only by standards of one received legislation (Austrian or Hungarian),
- cases, when there was no unification of the legislations, but there occurred their reform,
- acts and regulations governing legal relationships arising after October 28th, 1918,
- regulations issued to execute the harmonized acts.

For more detail see Tománek, F.: Problem of the unification in the Czechoslovak Republic ("Problém unifikácie v republike Československej"). In: Hospodárstvo a právo, 3, 1935–1936, 2–3, p. 24.

[6] A total of 7 resolutions were the result of the nationwide unification congress: General Resolution, Resolution of the Department for Private Law, Resolution of the Department for Civil Procedure, Resolution of the Department for Criminal Law, Resolution of Department for Public Law, Resolution of the Department for Financial Law and Resolution of the Department for Agricultural Law. See the texts of the individual resolutions in Fundárek, J.: Unification congress of lawyers in Bratislava from 26th to 28th September 1937. („Unifikačný kongres právnikov v Bratislave 26.–28./IX. 1937"). In: Právny obzor, 20, 1937, 15–16, p. 649–655.

[7] Fundárek, J.: Unification congress of lawyers in Bratislava from 26th to 28th September 1937. („Unifikačný kongres právnikov v Bratislave 26.–28./IX. 1937"), p. 649.

[8] In the field of public law perhaps the most significant progress was made in the field of administrative law, particularly in the organization of public administration. The unification of administration in Czechoslovakia was planned to take place on the basis of Act no. 126/1920 Coll. on the establishment of county and district offices in the Republic of Czechoslovakia (the County Act), and after its unsuccessful implementation there was finally adopted the Act no. 125/1927 Coll. on the organization of political administration (Act on the provincial administration). See also Vavríková, A.: The public budget and the degree of self-administration of the territorial units during the first Czechoslovak Republic. („Verejný rozpočet a miera samosprávy územných celkov v období prvej Československej republiky.") In: Acta Facultatis Iuridicae Universitatis Comenianae, 21, 2002, p. 275 a nasl.

establishment of the Supreme Court of the Czechoslovak Republic[9] (which, unlike the Hungarian Royal Curia, did not have the law-making power). This situation is eloquently expressed by Štefan Luby's[10] statement: "*the customary law was, de facto, petrified in 1918, deprived of the possibility for further evolution via law-making case law*", but until the entry into force of the Constitution of Czechoslovakia on 29th February of 1920, it had the possibility of its own autonomous changes. However, the customary law would subsequently "fossilize" in Slovakia at the level it had in March 6th, 1920 (the date of the entry into force of the Constitutional Charter of the Czechoslovak Republic). In view of the above mentioned circumstances, the private law in force in Slovakia required also its own codification, in addition to the unification with the law in force in the Czech lands.

As we have already mentioned above, the state of fragmentation and heterogeneity of the legislation in force in the unitary Czechoslovak state was not a satisfactory condition. *"This situation only facilitated opportunities that were rapidly seized by the judicial practice, the problem consisted in the fact that the judicial practice incorporated the principles and rules applicable in the Czech Lands proceeding from the Austrian law into the system of customary law in force in Slovakia."*[11] Enforcement of the received, originally Austrian, law instead of the customary norms and curial decisions should be expected, given the fact that in Slovakia there worked the Czech lawyers and judges and they mostly did not know sufficiently the norms of customary law and at the same time neither they were so accessible for them. In the case when they were unable to find the relevant standard, they applied norms of the received Austrian law which were often completely unknown for the parties to the dispute. This practice was often adopted either in the decisions of the Supreme Court of the Czechoslovak Republic[12]. This was the so-called *"dry (easy) way"* of expanding the validity of the former Austrian Civil Code in Slovakia, which consisted in the fact that in Slovakia *"the adjudication was made according to the ABGB."*[13] Applying the received, originally Austrian, law on legal circumstances governed by the received, originally Hungarian, customary law was justified by the earlier validity of the Austrian law in this territory at the time of Bach's absolutism (and therefore it is not a law that is unknown for Slovakia), and other reason was that this law would come into force in Slovakia in the form of the revised, received Austrian Civil Code. *"Therefore, the atmosphere of legal life in Slovakia is somehow full of confidence that the legislation of civil law is lex futura to this part of the republic… and also of the practice and… the Slovak jurisprudence must respect this new legal development and to not distance itself unnecessarily (where it is possible) from the provisions of the Civil Code in force in the historic lands…"*[14] These procedures for implementing the received Austrian law on the territory of Slovakia have a wider basis (deeper meaning), which lies in the very essence of the established Czechoslovak state as a unitary and centralized state. Objections and demands to preserve the specificities of national, originally Hungarian, law were advocated by the Slovak legal community, but they were respected to a minimal extent[15].

Opinions on the process of unification or reunification of private (civil) law to consolidate the rule of law diverged from its beginnings. On the Slovak side, the issue of how to unify the Private Law was addressed specifically during the first two congresses of the Slovak lawyers between 1919 and 1920 in which there also appeared significant inconsistency of opinions. At the second congress of the Slovak lawyers there was finally adopted by a majority of the plenary the concept of a moderate revision of the Austrian Civil Code, the validity of which would be extended to the entire territory of the Republic after the performed revision. The following congresses of the Slovak lawyers then dealt with specific issues of the partially prepared texts of the sub-commissions[16]. Due to the chosen concept of a slight revision of the provisions of the ABGB the explanatory memoranda for the drafts of the Civil Code of 1931 and 1937 consistently indicated that *"it is not perhaps necessary to extensively justify why there was elected as a basis for preparatory works the Civil Code of 1811… the point is to make a new code approximate as closely as possible to the legal circumstances hitherto, which can happen only if it is based on law that in one part of the country is valid since the beginning… and secondly, a certain part of the Civil Code coincides with the original law, some part was established as customary law, and there are some issues about which we always knew that they will be governed by a special legislative Act introduced in Slovakia and Carpathian Ruthenia"*[17].

Despite the fact that in 1919 the Ministry of unification was established, the unifying process of the Civil Laws was per-

[9] See Act No. 5/1918 Coll. The amended Act No. 216/1919 Coll. on the Supreme Court.

[10] Luby, Š.: The Dynamics and the Statics of the Private Law. („Dynamika a statika súkromného práva"). In: Všehrd, 16, 1934, p. 350.

[11] Luby, Š.: The Unification Efforts in Czechoslovak Private Law y. 1918–1948. („Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948"). In: Právny obzor, 50, 1967, p. 573.

[12] The Supreme Court of the Czechoslovak Republic in its decision Rv I. 163/23 (Vážný, F.: The decision of the Supreme Court of the Czechoslovak Republic in civil matters. (Rozhodnutí Nejvyššího soudu Československé republiky ve věcech občanských.) Praha, 1924. p. 2805) held that *"in Slovakia there apply the obligational-legal provisions of the Austrian Civil Code in the same extent that the customary law "* which was contrary to the applicable legal situation. See also Luby, Š.: The Unification Efforts in Czechoslovak Private Law y. 1918–1948. („Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948"), p. 574.

[13] Schelleová, I. – Schelle, K.: Civil Codes 1811–1950–1964. („Civilní kodexy 1811–1950–1964"). Brno, s.a., p. 25.

[14] Horák, J.: Some questions about sources of civil law on the territory of Slovakia and Carpatian Ukraine. („Některé otázky ohledně pramenů občanského práva v praxi na Slovensku a Podkarpatské Rusi). In: Právny obzor, 8, 1925, p. 17.

[15] Horák, J.: Some questions about sources of civil law on the territory of Slovakia and Carpatian Ukraine. („Některé otázky ohledně pramenů občanského práva v praxi na Slovensku a Podkarpatské Rusi). p. 17.

[16] See more in: Luby, Š.: The Unification Efforts in Czechoslovak Private Law y. 1918–1948. („Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948"), p. 579.

[17] See the Act establishing the General Civil Code. The draft of Super-revision Commission. Part II. The explanatory report. p. 4–5 and Government Bill establishing the Civil Code. Praha, 1937, p. 236.

formed by the Ministry of Justice. In 1920 5 sub-commissions[18] were entitled for the revision of provisions of the ABGB, which in three years prepared drafts for individual sub-sections of the Civil Code. Subsequently, the individual partial drafts were published by the press and submitted for discussion and commenting of the public and professionals. Partial drafts of the individual parts of the Civil Code prepared by the subcommittees were simultaneously submitted to the Slovak Commission for the field of civil law[19] and to the Slovak experts. The Slovak legal community in this preparatory stage of revision of the Austrian Civil Code no longer had a say in the fundamental conceptual issues of the ongoing *"unification"* process. They reflected only the purpose issues of the proposed legislation with regard to the law in force in Slovakia[20]. The draft of the Civil Code, elaborated by each subcommittee and assessed by the Slovak Commission and the congress of Slovak lawyers in 1926 became the subject of super-revision realized by the newly established Super-revision Commission[21]. The result of the super-revising works was published in 1931, it was *the Act establishing the General Civil Code*[22]. With regard to its content, the entire draft of the Civil Code did not substantially different from the Austrian Civil Code as amended, although the interventions in the systematics of ABGB occurred[23].

The draft of the Super-revision Commission was subsequently subjected to a written inter-ministerial consultation exercise. Given that the written form of the inter-ministerial commenting process appeared to be very prolonged exercise, in 1934 it was replaced by a verbal consultation of the draft of the Civil Code. Oral consultation exercise proved to be more effective, and as early as in the autumn of 1935 the Ministry of Justice established a Super-revision Commission[24], which was responsible for the final editorial works of the Code. The result of the work of the Super-revision Commission (which met for a total of 30 sessions) was published in 1937 under the title *The government bill establishing the Civil Code*[25]. The government bill of the Civil Code already omitted the adjective "general" (as opposed to the draft of 1931), since according to the Explanatory Memorandum, this attribute is no longer necessary *"to express the idea that the new Code includes the legislation applicable for all and for the whole area of Czechoslovakia"*[26].

The government bill proposing the Civil Code was based on the draft of 1931, and the Commission had returned to the original scheme of the Austrian General Civil Code of the 1811[27]. The changes affected mainly the first part of the draft, in which there was no longer included the family law, and, on the other hand, there were added provisions of private international law. Despite the omission of the provisions of the family law and certain other provisions, the number of provisions (sections) in the government draft increased from the original 1353 (draft from 1931) to 1369 sections (which was related to the technical-legislative distribution of matter breaking it down into separate one-paragraph provisions).

Omission of the legislation on the family law in the draft of the Czechoslovak Civil Code was not received with enthusiasm by the legal community.[28] As reported by Karel Schrotz *"This has caused general disappointment and very grim and harsh criticism."*[29] This is evidenced also by the Resolution of the Department for Private Law during the Unification Congress of Lawyers in Bratislava (September 1937) according to which *"the congress recommends that every effort be made to achieve that the government bill include also the unified family law, without it, the new Code would remain incomplete."*[30] The explanatory memorandum

[18] The chairmen of the sub-commissions in charge of revising the provisions of the ABGB were *"professors Dr. Kafka* (responsible for family law), *Dr. Krčmář* (responsible for introductory provisions, provisions on the persons, general part of the law of obligations and a part of inheritance law), *Dr. Stieber* (right in rem), *Dr. Svoboda* (inheritance law) and *Dr. Weiss* (law of obligations)." Representatives proceeding from the community of the Slovak lawyers were missing completely. See more the Act establishing the General Civil Code. Draft of the Super-revision Commission. Part II. The explanatory report. p. 5–6.

[19] Records from meetings of the Slovak Commission for the field of civil law in Bratislava were published by F. Rouček. See Rouček, F.: Revision of the civil law. Records from meetings of the Slovak Commission. I.–II. section. ("Revise občanského zákona. Záznamy z porad Slovenské komise. I.–II. část.") Bratislava, 1923–1924.

[20] Luby, Š.: The Unification Efforts in Czechoslovak Private Law y. 1918–1948. („Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948"), p. 573.

[21] The members of the Super-revision Commission were *„Dr. Krčmář, Dr. Weiss, Dr. Kafka and Dr. Svoboda"*. Additionally, at the request of the Slovak Commission for the field of the civil law in Bratislava there were appointed as members of the commission *„Dr. Záturecký and Dr. Katona."* However, as the explanatory report states about the proposal of the super-revision commission *„when it became obvious, that Dr. Záturecký and Dr. Katona would have problems to take part, whether regularly, or occasionally, in the meetings of the commission, the organisation of the super-revision commission was changed in such a way that… the actual representatives of the Ministry of unification Schrotz and professor Rouček appointed as members of the commission replacing Dr. Záturecký and Dr. Katona."* See more in the Act establishing the General Civil Code. Draft of the Super-revision Commission. Part II. Explanatory report, p. 9 (Zákon, kterým se vydává všeobecný zákoník občanský. Návrh superrevisní komise. Díl II. Důvodová správa, s. 9).

[22] The full text of the draft of the Super-revision Commission with the explanatory report was published under the title The Act establishing the General Civil Code. Draft of the Super-revision Commission. Part I. Text of the Act. Part II. The explanatory report. Praha, 1931.

[23] Draft of the Super-revision Commission was divided into four parts, while the Austrian Civil Code was divided only into three parts. The newly created fourth part of the draft of the Civil Code of 1931 contained provisions on private international law.

[24] *"Dr. Krčmář"* was appointed as a chairman of the Super-revision Commission and its other members were *"Dr. Rouček, Dr. Svoboda, Dr. Weiss, Dr. Schrotz, Dr. Srb and Dr. Veselý"*. *"Dr. Sedláček and Dr. Swoboda"* were appointed as new members of the Commission.

[25] The full text of the draft with the explanatory report was published under the title The government bill establishing the Civil Code. Praha, 1937.

[26] The government bill establishing the Civil Code. The explanatory report p. 244.

[27] The Government Bill of the Civil Code of 1937 was equally divided into 3 parts, in the same way as the ABGB.

[28] Mosný, P. – Hubenák, L.: History of state and law in Slovakia („Dejiny štátu a práva na Slovensku"). Košice: Aprilla, s. r. o., 2008, p 241.

[29] Schrotz, K.: Unification of private law. („Sjednocení práva soukromého"). In: Právny obtor, 20, 1937, p. 662.

[30] See more in Fundárek, J.: Unification congress of lawyers in Bratislava from 26th to 28th September 1937. („Unifikačný kongres právnikov v Bratislave 26.–28./IX. 1937"), p. 649.

to the government bill justified the omission of the legislation on the family law as follows: *"When preparing the Civil Code, the new legislation on the whole set of family law was subject to serious and careful consideration in all aspects, but in the current circumstances the whole addressed materia does not seem to be prepared enough and it was considered appropriate not to postpone its unification only because other parts of the civil law had already been properly prepared."*[31] However, as explanatory report stated later on the reasons which led to the omission of the unification of the family law, the omission did not affected, among other provisions[32], to the provisions on matrimonial property that *"by their nature can be properly classified in law of obligations and therefore the government bill includes them there. "*[33]

Karel Schrotz[34], the head of the Ministry of unification tried to describe the general nature of the government draft of the Civil Code via the following statement: *"The essential feature of the whole draft is the principle of unification, so it is not reformative, therefore, as a result it may not content reforms, but just necessary retouching* (of the Austrian Civil Code – AN) *"*.

Parliamentary discussion on the government draft of the Civil Code was prevented by the political events of 1938–1939. As reported by Ilona Schelleová and Karel Schelle[35]: *"further codification works in the field of civil law were definitely buried due to this fact."*

Unification was partially successful in the following areas:

- within the Family Law (Act no. 320/1919 Coll. as amended, amending the provisions of civil law on marriage contract ceremony, separation and marital obstacles, Act no. 391/1922 Coll., as amended, amending certain provisions on guardianship and custody, Act no. 56/1928 Coll. on the adoption, Act no. 4/1931 Coll. on the protection of individuals entitled to require nutrition, education or sustenance),
- within the law of obligations (Act no. 244/1922 Coll., as amended, which generally governs the legal relations between employers and employees in Slovakia and Carpathian Ruthenia[36], Act no. 145/1934 Coll., as amended, on insurance contract) and
- within the copyright law (Act no. 106/1923 Coll., as amended, on the publishing contract, Act no. 218/1926 Coll., as amended, on the copyright (on the originator's rights to a literary, artistic and photographic work)).

In the area of commercial law there were unified the regulations on limited liability companies (Act no. 271/1920 Coll., as amended, which extended the appliance of the Act of 6th March, 1906, n. 58 on limited liability companies for Slovakia and Carpathian Ruthenia and they changed the Sections 115 and 116 of this Act), then regulations on unfair competition (Act no. 111/1927 Coll., as amended, on unfair competition), regulations on bills of exchange (Act no. 1 / 1928 Coll., as amended, the Exchange Act) and the artisanal law (Act no. 259/1924 Coll., as amended, the Artisanal Act for the territory of Slovakia and Carpathian Ruthenia).

The efforts to unify the civil procedural law ended similarly with failure. The Ministry of Unification in 1931 published a *Draft Act on Jurisdiction and the Civil Procedure of the Court*, which was also based on the Austrian rules of procedure, and only marginally accounted for the Hungarian procedural law. The adoption of a common Code of Civil Procedure, as in the case of the Civil Code, did not finally occur. The unification was successful in the case of non-contentious proceedings (Act no. 100/1931 Coll., as amended, on main provisions of non-contentious legal proceedings) as well as in the case of bankruptcy law (Act no. 64/1931 Coll., as amended, enacting Insolvency, Liquidation and Transaction aside Statutes).

* * *

Based on the brief outline of the development of unifying works it is clear that the unification of norms of civil law and the adoption of uniform codes of civil substantive law and procedural law did not took place during the existence of the first Czechoslovak Republic. Due to the chosen approach consisting only in a slight revision of the provisions of ABGB with just a little regard to the Slovak law, it is questionable whether all these efforts can be called as unification efforts. As one of the most significant contemporary Slovak civilians and Senate President of the Supreme Court of Czechoslovakia Adolf Záturecký stated: *"The uniformity of law in the country is certainly an important factor in terms of the creation and consolidation of the idea among its citizens that they are members of a politically unified nation, but – in terms of ius privatum, quod ad singulorum utilitatem pertinet – only on condition that the law does not conflict with the needs of life."*[37] Another important Slovak civilian Štefan Luby[38] said about the unification of civil law the following words: *"It was not a proper unification at all, as the Slovak law was not really considered and it did not influence the content of the new Code* (the Civil Code – Note. Aut.), *neither its form. Indeed, the result of over twenty years of work was essentially an extension of the Austrian Civil Code for the territory of Slovakia and Carpathian Ruthenia and it was rather a removal of the valid private law and there would eventually remain preserved*

[31] The government bill establishing the Civil Code. The explanatory report p. 242.
[32] The regulations governing the obligations of children in the parent custody, and the commitments of their custodians that had been shifted to the general part of the law of obligations, became part of the government bill of the Civil Code.
[33] The government bill establishing the Civil Code. The explanatory report p. 243.
[34] Schrotz, K.: Unification of private law. („Sjednocení práva soukromého"), p. 664.
[35] Schelleová, I.– Schelle, K.: Civil Codes 1811–1950–1964. („Civilní kodexy 1811–1950–1964"), p. 26.
[36] The field of labour law and social security law experienced a special development. For more details see: Mosný, P. et al.: Legal historical reality of social doctrine in 20th century. 2. rozšírené vydanie. ("Právnohistorická realita sociálnej doktríny 20. storočia. 2nd edition"). Kraków: Spolok Slovákov v Poľsku – Towarzystwo Słowaków w Polsce, 2014.
[37] Záturecký, A.: Duplicity within the legislation in the Czechoslovak Republic. In: Bratislava, Časopis Učené Společnosti Šafaříkovy, 4, 1930, p. 66.
[38] Luby, Š.: The Unification Efforts in Czechoslovak Private Law y. 1918–1948. („Unifikačné snahy v oblasti československého súkromného práva v rokoch 1918–1948"), p. 585.

some specific institutions, like branch succession or co-acquisition." The main causes of failure in unifying the private law may include also the excessive enforcement of the "time-honoured" ABGB without intending to take over some of the more progressive and modern provisions of customary law, and this was generally associated with implementation of state centralization efforts.

Conclusion

There is no doubt that the consolidation of legal situation, and the following necessary unification of the received legislations in civil law, which was complicated by the indispensable codification, were really complex problems relating to the legal development of the first Czechoslovak Republic. Many qualified professionals working in various positions did not manage during the twenty-year existence of Czechoslovakia to establish a uniform Civil Code or uniform Code of Civil Procedure, or a Commercial Code. As reported by Ilona Schelleová and Karel Schelle[39], *"in the first decade of the First Republic therefore in the field of civil law the unification was rather just discussed, the results were insignificant. Works on the revision of Civil Law intensified only in the beginning of the thirties."* The drafts, that were developed and submitted for public discussion, were subjected to the criticism and the dissatisfaction was echoed both in Slovakia and the Czech Lands among professionals as well as among laymen. In the article we have tried to elaborate some basic causes for this situation, among which we can include not just international political situation, but also the internal political disagreement reflecting different traditions and socio-legal and cultural background of both nations. Unification and codification efforts in the area of private law culminated in Czechoslovakia in the 50 s of the 20th century[40], but in a different political and social situation in terms of the slowly being established socialism.

[39] Schelleová, I. – Schelle, K.: Civil Codes 1811–1950–1964. („Civilní kodexy 1811–1950–1964"), p. 25.

[40] Among the major codifications in the field of private law, which were prepared and adopted within the legal biennium (1948–1950), there belonged: Act no. 141/1950 Coll. the Civil Code; Act no. 142/1950 Coll. The Civil Procedure Code and the Act on the Family Law no. 265/1949 Coll. The Commercial Law no longer had its justification and so it was replaced by the so-called Economic Law (the reappraisal of the Commercial Law occurred only after 1989 by the adoption of the Commercial Code no. 513/1991 Coll.).

Selected Aspects of the Creation and Development of the Rules of International Law for the Prosecution of War Criminals

Ján Štefanica *

Abstract

The purpose of this contribution is to present the progressive development of international legal standards of prosecution of war crimes and those who committed them within the first half of the twentieth century. In this period also international law had to respond inevitably to the two global conflicts marked by the crimes against humanity and war aggression. We focus on the dominant questions of the legal regulations of warfare, war crimes in international treaties. Emphasis was put on concrete examples from legal history that contributed to advancing the issue in international forum. Essential role was played by proficient lawyers whose names are indelibly imprinted in legal history.

Key words: *prosecution of war criminals; war crimes; military conflict; The Lieber Code; Hague Conference; The Moscow Declaration; The Charter of the International Military Tribunal.*

Introduction

Before World War II the issue of warfare and war crimes was not developed enough in terms of international law. In the history of law and philosophy, however, some aspects of military conflict and its context were dealt with long time ago. The issue of just war and its traditions [1] has its roots already in antiquity. The question of war was dealt with both French Constitution of 1791 and in terms of national scope Code of Francis Lieber which was adopted by the US government during the civil war (1861–1865). It is also considered to be the beginning of the subject matter defining elements of war crimes.[2] At the end of the nineteenth century, governments of European countries dealt with the issue of establishment of international arbitration which would solve mutual contentious issues in the way that these disputes could not escalate into war conflicts. The Hague Conference, held in 1899 at the initiative of the Russian Tsar Nicholas II., culminated in signing of four conventions on the peaceful resolution of international disputes, and four conventions on the law of war. Nevertheless, there were not yet defined crimes in those conventions, but only unacceptable behavior of the State.

Legal situation after the World War I

At the Peace Conference in Versailles, it was the first time when a state was declared guilty of unleashing war and thus becoming the subject of responsibility for the conflict. Allies included the establishment of an international court in the content of Treaty of Versailles According to the articles 227 to 230, the German Government recognized the right of the Allies to hand over the accused to military tribunal under the Act of violation of the law and equity law.[3] The German government also agreed to extradite their accused either to one or all members of the Allied Entente. Subsequently, the Entente powers drew up a list of prosecuted persons containing about 900 names mostly of German nationality. In international criminal proceedings the important representatives of the German Reich should be tried.[4] These representatives through their actions grossly violated "the principles of international morality and the sacred authority of international agreements"[5]. The Allies, however, could not agree on the method of prosecution of political and military leaders of the German Reich. United Kingdom and the United States took a stand that German leaders bore the moral responsibility for the war and its aftermath, but refused to deal

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1 For more on the war and its traditions see: KONIAR, Ivan, *Tradícia spravodlivej vojny*, Verbum – Ružomberok, 2011.

2 The Code was a collection of „Instructions for Command, the US military on the battlefields". It was published on 04. 24. 1863 in Decree of the President A. Lincoln no. 100 and contained an application of laws during wartime in the occupied territories. It included responsibilities both occupied and the occupying party that they had to adhere to, to avoid war and other crimes. It strongly influenced the subsequent development of the law of armed conflict. See also: Mráz, S.: Vojnové zločiny (1. part) in Medzinárodné vzťahy 2/2004, II, p. 24. For more on the Lieber Code see: SCHINDLER, D. and TOMAN, J., *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, 1988, p. 3–23.

3 See the text of The Treaty of Versailles between Germany and the Allied Powers: http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html (09. 11. 2015).

4 The German Emperor Wilhelm II., Bethmann Hollweg Reich Chancellor, Grand Admiral Tirpitz, Admiral Scheer, Field Marshal Hindenburg and General Ludendorff.

5 Article 227 of the Treaty, Versailles treaty between the Allied powers and Germany. See: http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html (09. 11. 2015).

with the question of their legal responsibilities. This problem was eventually resolved by the victorious powers who decided that the German court should investigate and punish those involved in the outbreak of the war and warfare. However, subsequent prosecution was carried out by German side only superficially and inconsistently. In 1920, the Dutch government granted the former German Emperor asylum and refused to extradite him to the Allies. Therefore, the trial was never initiated against him. Despite the proclaimed cooperation, the Weimar government constantly raised protests against prosecution. This way it managed to delay the extradition of criminals and even reduce the number of names on the list to forty. Finally, it was decided that out of 45 exponents only 12 were to be prosecuted. In spite of the difficulties, the legal proceedings actually took place in the period of time from May 23 to July 16, 1921 before the Reich Court in Leipzig. In six cases, however, it ended up issuing acquittals. Of the all prosecuted, four were condemned to several months prison sentences and two condemned received unconditional four – year prison sentences. Neither of them, however, actually served their sentences.[6] From the beginning, the victorious powers blamed Germany for unleashing the war. However, they failed to reach agreement in the subsequent preventive measures. France insisted on unequivocal revenge and aimed to weaken the German influence and military power in Europe. Therefore, it put more emphasis on the division of German Reich. Contrary to France, the United Kingdom saw the position of Germany as a relatively economically strong counterweight to French dominance in Europe. It was enough to them that German was deprived of its colonies. And because the United States had expected that the old European empires would shatter,[7] it was in their interest to maintain reasonably strong Germany not only in relation to France but especially the United Kingdom. It resulted in a compromise, and none of the extreme scenarios was put into practice. Germany itself had neither been destroyed nor reconciled. Treaty of Versailles, however, weakened the German economy, leaving it vulnerable during the Great Depression in the thirties of the last century[8] and then contributed to the onset of Nazism and Adolf Hitler's seizure of power. The Treaty of Sevres, the peace treaty between the Otoman Empire and Allies signed on 10 August 1920, envisage the criminal responsibility of people who in Turkey during the war organized the extermination of the Armenians. On the basis of a convectional Article 230, the League of Nations should have established a tribunal whose authority would be recognized by the Turkish government.[9] The peace treaty was not ratified, and it was annulled by the Treaty of Lausanne of July 24, 1923, containing a clause on amnesty for all offences committed in the period from 1914 until the 1923.

Codification efforts

International lawyers set up their work in various in associations. They also studied projects, established committees as well as organized the conferences. Attention needs to be focused on the activities of four associations: International legal association, the Inter-Parliamentary Union, the International Association of Criminal Law and the International Bureau for the Unification of Criminal Law. Their work was built on the idea of a Romanian lawyer Vespasian V. Pella, who emphasized that a war aggression was a crime and it was necessary to establish an international criminal court in order to criminally persecute it.[10] In the works of other prominent lawyers, a doctrine was emerging gradually and in 1925 a report on the collective criminality of states and future criminal law was submitted to the Inter-Parliamentary Union. In this report, the state crime warfare was analyzed there for the first time and the war was considered a manifestation of human depravity. Against this wanted to V. Pella to build an international criminal jurisdiction. Legal associations were working on criminal code of nations and in 1927 the International Association of Criminal Law mandated him to prepare a draft of statutes regarding the permanent court of international justice. The proposal was presented and submitted to the General Secretariat of the League of Nations in 1928. Subsequently, on August 27, 1928, it gave him the international importance in the sense of signing of Briand – Kellogg Pact in Paris. Although this pact rejected war as a means of solving international disputes, in reality it was only a moral appeal and it did not contain any sanctions.[11] In 1931 in Brussels, and two years later in Copenhagen, lawyer Raphael Lemkin submitted a report on the prosecution of terrorism by international jurisdiction. In his study he dealt with the massacre of Armenians in the Ottoman Empire in 1915 and in 1943 he coined the term "genocide". He participate in the work of unification of criminal law that have been undertaken since 1927 in Warsaw and at the 5th Conference on the unification of criminal law in 1934 in Madrid. Specify the nature of elements of two new crimes and suggested that were embodied

[6] See: SCHABAS, W., *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press, 2000, p. 19–20.

[7] United States never signed the Treaty of Versailles with Germany. Elections in 1918 were won by the Republican Party and it then twice blocked the ratification of the Treaty in the Senate, partly because of the preference for isolationism (Not recognizing the League of Nations), partly because high reparations against Germany. In 1921 they signed a special so-called Treaty of Berlin with Germany, which confirmed the payment of reparations and other provisions of the Treaty of Versailles, but missed all the passages of the League of Nations.

[8] Article 231 of the Treaty attributes responsibility for the loss and suffering of the Allied powers during the war only to Germany. The article then provided the basis for war reparations. The Commission representing the Entente States in January 1921 quantified reparations to 269 billion marks, which most economists considered excessive and were reduced to 132 billion marks. See: Versailles Peace Treaty between the Allied powers and Germany dated 06. 28. 1919 http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html (09. 11. 2015).

[9] See: The peace treaty concluded with Turkey in Sčvres. http://www.armenian-genocide.org/Affirmation.236/current_category.49/affirmation_detail.html on 08. 10. 1920 (10. 11. 2015).

[10] PELLA, V., *La Guerre-Crime et les Criminels de guerre*, Edité par Baconničre – Paru 1964, p. 129–144.

[11] PELLA, V., *La Guerre-Crime et les Criminels de guerre*, Edité par Baconničre – Paru 1964, p. 157–163.

in the internal criminal law of 37 participating States.[12] At the end of the Second World War might R. Lemkin only conclude that the adoption of its proposal for the Madrid Conference would give the courts the legal framework for the prosecution of crimes committed during World War II Axis powers and their perpetrators would be impossible to find refuge in neutral countries? When Yugoslav king Alexander I. got killed in attack along with French Foreign Minister Louis Barthou, the French government suggested to the Council of the League of Nations preparation of the International Convention for the prevention and prosecution of terrorism and established the International Criminal Court. The Committee charged with editorial staff of the Convention drafted the text adopted 16 November 1937 in Geneva. Convention was related only to acts of terrorism, but the Court had jurisdiction to punish crimes and offenses that threaten international relations. The provisions, however, never came into force. World War II began without clear rules and standards enabling the international community to prosecute war crimes.

Development during World War II

World War II played a decisive role in considering the violation of rules of war as criminal. At the beginning of the war, the Allies began to deal with the issue of responsibility for the war and came to the conclusion that offensive war must be regarded as a war crime and war criminals and those who helped them must be prosecuted. At first, Moscow, Paris and London protested against the proposal of the United States on international process in which exponents of the Nazi regime were supposed to be accused and at the same time given the right to defence.[13] Exiled governments based in London (including Czechoslovak) constantly pointed out the injustice and atrocities committed in their countries.[14] Particularly in the early stages of the war was the approach of the exiled governments legitimate because some diplomats at the British Foreign Office took a reserved approach to the reports on the German (as well as Soviet) war crimes in the occupied territories. Regarding the issues of possible punishment, the diplomats were very reluctant to establish any official rules of war crimes.In this regard, a number of memoranda were handed over to the superpowers and so already in the second half of 1940, governments of France, Czechoslovakia and Poland together with the United Kingdom issued a joint protest against the Nazi crimes in Poland and Czechoslovakia. In October 1941 President Franklin Roosevelt denounced „the execution of a large number of innocent hostages"[15] in the territories occupied by Adolf Hitler. Winston Churchill also joined the initiative of US President. For Czechoslovak diplomacy, the activity of the Polish government in exile was very significant in the first phase of the war. Therefore, the two together, in the second half of 1941, pushed for adoption of the Declaration, which would be "a warning that war criminals will be punished"[16]. But the British Ministry of Foreign Affairs requested the postponement of its adoption, mainly due to the problematic definition of states against which it was supposed to be directed, particularly because of the Soviet war crimes committed on the territory of Poland. In October 1941 and January 1942, the Soviet foreign minister V. Molotov handed over a diplomatic note to the allied western powers in which he first spoke of "systematic and deliberate violation of international law and brutal acts of violence against the Russian prisoners of war, pillage, destruction and atrocities against the civilian population"[17] On 13 January 1942, led by UK Foreign Minister R. A. Eden the third allied conference with participation of nine European allied countries was held at London's St. James Palace.[18] Referring to The Hague treaty that prohibits countries fighting in the occupied territories "from committing violent acts against civilians, despising applicable local laws and committing destruction of national institutions"[19] nine governments adopted a Declaration known as the "St. James Declaration". They rejected all acts of violence perpetrated in the occupied territories and their main goal was to punish all the major war criminals.[20] The representatives of the USA, the USSR, Britain, China and their dominions participated in the negotiations only as observers. Thus when in the spring of 1942 there was a further escalation of war crimes in the occupied territories, the signatories handed over the text of declaration, along with other examples of Nazi crimes in the form of verbal notes and short joint memorandum.

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[12] The crime of barbarity, it was the acts of oppression and destruction, directed against individuals as members of national, racial or religious group. Felony vandalism, respectively deliberate destruction of artistic and cultural works that present special creations of these groups and make up their cultural heritage. Raphael Lemkin is also regarded as the creator of the term genocide. See: SCHAB, W., *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press, 2000, p. 24–30.

[13] MIČIANIK, P., *Vojnové zločiny slovenských vojakov 194 –1944.* Published on Druhá svetová, http://www.druhasvetova.sk/OLD/view.php?cisloclanku=2009020003 (10. 10. 2015).

[14] The gradual formation of the government in exile in 1940: May 5 Norwegian government in exile (London, King Hakon VII.), On May 14 the Netherlands government in exile (London, Queen Vilhelmína), May 25th government in exile of Belgium (Limoges, Vichy, London from October 22, Earl Pierlot), 21st June Polish government in exile (London, General Sikorski), July 9 Czechoslovak government in exile (London, Sramek officially recognized 21st July), November 13th government in exile Luxembourg (Montreal, Grand Duchess Charlotte).

[15] HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 113.

[16] KUKLÍK, J., *Mýty a realita takzvaných Benešových dekretů*, Praha, 2002, p. 196.

[17] HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 113–114.

[18] Belgium, France, Greece, Yugoslavia, Luxembourg, Norway, Poland and Czechoslovakia.

[19] In paragraph 4 of the Declaration states: "The undersigned representatives declare… are determined to endeavor in a spirit of international solidarity so that: these culprits and responsible people, no matter what their nationalities are, were track down, brought to Justice and tried, the judgments rendered and executed." Ibid, p. 114.

[20] These were the governments of Australia, Belgium, Czechoslovakia, China, France, India, South Union, Yugoslavia, Canada, Luxembourg, Netherlands, Norway, New Zealand, Poland, Greece, USA and Great Britain.

It was the Czechoslovak government in exile, which after executions and extermination of Lidice as reprisal for the assassination of R. Heydrich, called UK in the verbal note to join the St. James Declaration. Subsequently, a resolution was adopted on acceleration of preparations for publication of the Czechoslovak retribution decree. Moscow Declaration signed by the foreign secretaries in November 1943 contributed to the punishment of the World War II war criminals.[21] It contained the following main points: war criminals who committed their acts in certain countries will be extradite to these countries in order to be tried and punished according to their laws, war criminals whose crimes have no particular geographical location because they were committed in several countries will be punished by a joint decision of the Allied governments. The conclusion of the Moscow Declaration was: "Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."[22]

From 15 to 18 December 1943, Kharkov trial was conducted. Its importance lies in the fact that it was carrying out the commitments of the Moscow Declaration. It was also the first condemnation and punishment of war criminals in the country in which they committed the crimes. The process was conducted against M. Bulan as a domestic traitor and three German soldiers captured at Stalingrad. The indictment accused them of using specially modified vehicles for torture of civilians. All were sentenced to death for mass murder and torture of residents of Kharkov and its environs.

At a conference in Tehran in December 1943 the punishment of war criminals was also discussed. J. V. Stalin proposed eminent sentences for German soldiers and officers responsible for crimes against the indigenous population on the eastern front. British Prime Minister W. Churchill, however, categorically rejected those proposals when he expressed this view: "The British Parliament and public will never tolerate mass executions. Even if in war passion they allowed them to begin they would turn violently against those responsible after the first butchery had taken place."[23] However, neither was there any written law rules on criminal liability on the basis of which could be the acts of German soldiers against Soviet civilians prosecuted nor were there any definition of actus reus of these crimes. J.V. Stalin 's requirement, thus, only stemmed from the necessity for punishing the culprits. W. Churchill, however, at that time tried to prevent the USSR from gaining the influence on Central Europe and tried to push his plan to weaken the USSR influence, in which he counted with the support of F. Roosevelt.[24]

However, he had to abandon his plan because he did not get any support. At the Yalta conference in February 1945 the Allied leaders again discussed war criminals. W. Churchill mentioned the Moscow Declaration which the Allies could not agree on. Americans reflect on the facts of the new terms of international law, such as conspiracy or war of aggression. Soviet leaders continued to insist on the death penalties for most of responsible for their war crimes. The actual implementation of the Moscow Declaration remained an open question.

Statute of the International Military Tribunal

On October 7, 1942 in London 17 governments attended and announced the establishment of the United Nations Commission for War Crimes. Its main role was to collect evidence and testimonies of witnesses and compile lists of war criminals of the Axis countries.[25] In reality, it was established in October 20, 1943 and the Foreign Office was entrusted with its running. It called on the governments for the appointment of their representatives and for paying comparative costs. Based on the resolution of the Czechoslovak government-in-exile of 24th September 1943, Bohuslav Ečer was appointed as its representative.Member of the Technical Assistance Committee of Experts was a lawyer of the Ministry of Foreign Affairs Zdeněk Procházka.[26]

United Nations Commission continued in the activities of the organization London International Assembly (LIA), which set up the special commission to address war issues.[27] Within UNWCC there were established three subcommittees: the first was in charge of collecting evidence and compiling a list of criminals, the other dealt with the legal issues of extradition and the establishment of an International Criminal Court, the third one worked on defining the categories of war crimes. The Commission issued a resolution calling on the Allied states to submit a list of German civilian and military officials responsible for the administration of occupied countries. They planned to include the extradition of these people in the terms of truce with Germany. The Commission defined the conditions for the extradition of war criminals.[28] Both resolutions were approved by the Czechoslovak government. UNWCC recommended that joint military tribunals were formed to try war criminals. In August 1944 the Commission proposed an agreement on mutual extradition of persons indicted for war crimes. This conven-

[21] USA (Cordell Hull, Under-Secretary), Great Britain (Anthony Eden) and the Soviet Union (Vyacheslav Molotov).Hull, Eden and Molotov were the authors of the Moscow Declaration; officially, this document is signed F. Roosevelt, W. Churchill and J. V. Stalin.

[22] The text of the Moscow Declaration cited by Keesingovho contemporary history archives in Essen, 1945 Section 70 G in HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 654–655.

[23] HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 120.

[24] HOREMUŽ, M., *Súčasná bezpečnostná politika Ruskej federácie a jej vybrané dimenzie*, Verbum – Ružomberok, 2013, p. 41–45.

[25] Its official name sounded United Nations War Crimes Commission (UNWCC) led her Cecil Hurst with US Representative Herbert Pell.

[26] KUKLÍK, J., *Mýty a realita takzvaných Benešových dekretů*, Praha, 2002, p. 197–198.

[27] Bohuslav Ečer was also a member of this organization. He promoted that SS, SA, NSDAP and Gestapo were criminal organizations, he pointed to the voluntary input into them, starting from the irrelevance of the subsequent obligation to follow the regulations commanders. Adoption of this proposal was one of his greatest achievements.

[28] EČER, B., *Norimberský soud*, Praha, 1946, p. 23–47.

tion on extradition was accepted by all the allied governments. In the committee of the Commission in question there were also five representatives of the Czechoslovak government.[29] Although the Allies could not agree until the end of war on how to punish the major war criminals, the following options were taken into account: the Court will consist of members of neutral states[30], the war criminals will be condemned by German court[31], German criminals will be judged by the leaders of the Allied Powers. The allied judges, however, were aware of the fact that if they wanted to sue the German criminals for war crimes, they had to disregard any doubt about their guilt.[32] On 26 June 1945 they brought together representatives of the four victorious powers in London to reach a joint decision.[33] Secret stenogram of preparatory meetings in London published by Robert Jackson about four years later, points out onto to the serious differences of opinions. These concerned the possible objections of defence against unleashing and management of offensive wars, committing war crimes committed by the allied countries, sentencing many innocent Germans who did not commit any criminal offences. Moreover, there were known cases in liberated territories, where a wave of reprisals arouse against persons suspected of collaborating with the enemy during the occupation.[34] Despite many differences, the Allies agreed that the courts would retrieve only the offences that tried German war criminals. The statutes of the tribunal required the court not to deal with other cases. Allies made it clear that they did not intend to discuss with their opponents on the correctness of their decisions.[35] According to then-existing international law the persons responsible for unleashing the war were not automatically personally liable for their crimes. This weakness of international law was admitted also by R. Jackson, when he said: "I admit that our international law in this regard is the weak support. We must simply state that they bear personal responsibility."[36] This was the period which led to the creation of international criminal law and to the exclusion of prosecution of such acts from exclusive national sovereignty.

The Charter of the International Military Tribunal

On August 8, 1945, the Agreement for the prosecution and punishment of the major war criminals was signed in London and the Charter of the International Military Tribunal was annexed to it.[37] All four powers entered into this agreement and in accordance with Article 5, 19 governments of the United Nations[38] expressed their adherence to the Agreement and the Charter. The Charter, which became the legal basis for the Nuremberg Trials regulated the rights and obligations of all parties and established facts and principles that judges should adhere to. Article 3 of the Agreement states that: each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.[39] This article bound the allies of the victorious powers to extradite all war criminals who at that time resided in their territory to the International Military Tribunal This Agreement came into force on the day of signature and should remain in force for the period of one year and "shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it"[40]. On the basis of the London Charter, the Court of Justice for the trial and punishment of the major war criminals of the European Axis was established. The Tribunal was entitled to try and punish persons who have committed crimes in its interest, either as individuals or members of organizations. The Charter contains 30 articles, which can be divided into several

[29] The list of persons suspected and accused of committing war crimes in 1948 included the 36,529 names; the Czechoslovak government approved the names of 1,543 Germans, Nazi collaborators and 14 Hungarians. The lists should be as exhaustive as possible and should include a description of the individual cases, the names of the offenders, their victims and witness together with a written statement.

[30] Telford Taylor, one of the American prosecutor at Nuremberg, to say: „These proposals were rejected as unrealistic due to the fact that the numbers of neutral countries were so low that this solution has proved impossible." HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 124.

[31] However, the fact that after the First World War, the processes in Leipzig ended either in acquittals or light sentences of imprisonment played an important role in this.

[32] No judging took place in case of for example allied officers for their possible crimes against the civilian population, which could include the bombing of Hiroshima and Nagasaki. The important fact that played the important role in this was that the winners were the USA and the USSR, who dictate the conditions of vanquished nations.

[33] United States was represented by Chief Judge Robert Jackson and his ten assistants, for the United Kingdom participated Attorney General David Maxwell – Fyfe, Lord Chancellor Jowitt and eleven assistants, for France participated mentor Luers and Professor of International Law Robert Falco with two assistants and finally for the Soviet Union General Jola Nikičenko, vice president of the Supreme Court in Moscow and his two assistants.

[34] In the first weeks after the liberation of Paris, in France there were executed more than 11,000 suspected of collaborating with the enemy.

[35] „Of what we want to avoid, is a debate on whether the conduct is a violation of international law or not.We will simply proclaim what is international law, so that further discussion on whether the international law or not, will be useless." HEYDECKER J., LEEB J., *Norimberský proces*, Praha, 2007, p. 127.

[36] Ibid, p. 128.

[37] Full title of the Agreement provided: Agreement by the United States, the interim government of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics for the trial and punishment of the major war criminals of the European Axis signed in London on 08. 08. 1945, Full text on: http://avalon.law.yale.edu/imt/imtconst.asp (10. 04. 2015).

[38] Czechoslovakia, Poland, Yugoslavia, the Netherlands, Belgium, Ethiopia, Australia, Honduras, Norway, Greece, Denmark, Panama, Luxembourg, Haiti, New Zealand, India, Paraguay, Uruguay and Venezuela. Of the countries at war with Germany lacked only Canada and Union of South Africa.

[39] GORSHENIN, K., P., *Norimberský proces. 1. diel.*, Praha, 1953, p. 42.

[40] Ibid, p. 42.

parts. The first part contains various provisions regarding the establishment of the tribunal for the trial of war criminals. Article 1 states: "In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis."[41] In the second part, there were reported various crimes for which the perpetrators should bear personal responsibility. There were crimes against peace[42], war crimes[43] and crimes against humanity[44]. Crimes against peace were aggression against Austria and Czechoslovakia and also the war against Poland. Tribunal, taking these facts into account, declared unleashing and waging war as the worst war crime, which has made clear its position on the accountability of German officials on this issue. Article 9 of the Charter states that: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."[45] And the article 11 emphasizes that: "Any person convicted by the Tribunal may be charged before a national, military or occupation court with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization."[46] The tribunal sentences could be reduced by the Control Council for Germany, but it could not increase the severity. Article 29 of the Charter says: "If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof for such action as they may consider proper, having regard to the interests of justice"[47].

International tribunals after World War II

At the Nuremberg trial against the main war criminals, the International Military Tribunal handed down its verdicts in the trials of 22 Nazi leaders – eleven were given the death penalty, three were given life imprisonment and four were given imprisonment ranging from 10 to 20 years. The court acquitted the three defendants. In addition to individuals, the groups and organizations were also indicted. This was particularly the Government of the Reich, SS troops, the state secret police assault troops NSDAP, the General Staff and the top command of the German Wehrmacht. SS, SD, Gestapo and Political leaders were declared as criminal organizations.US military tribunals in Nuremberg and Dachau sentenced a total of 1,941 Nazi criminals and handed down 324 death sentences. British military tribunal and British courts sentenced 1,085 people, including 249 sentenced to death. In the French zone, 2107 were convicted and 104 received death sentences. The International Military Tribunal in Nuremberg punished in western areas in total 5,025 Nazis and 806 people were sentenced to death; only 486 of them were executed.[48]

However, there are some legal problematic moments still being discussed. The main sentence of the Nuremberg Tribunal mentions twelve wars of aggression although the term war of aggression was not defined until 1974. Nevertheless, in most cases mentioned in the indictment actually it was a war of aggression. The most discussed question was whether the law, declared ex post facto, can be the basis for assessment of those acts. German defense attorneys invoked the general principle of nullum crimen sine lege, nulla poena sine lege. However, this objection was rejected by chairman of the tribunal. In fact, it was directed against the jurisdiction of the Court and therefore it could not be met. Many judges and lawyers dealt with this problem. The discrepancy occurred in the relevance of the arguments that explained how the Nuremberg Tribunal judged the Nazis for crimes against peace, if by that time was not such an offense defined in international law. Most of the accused committed crimes for which, according to relevant national laws, they were supposed to receive death sentences. International law at that time lacked the constituent elements of such crimes as defined by the Statute of the International Criminal Tribunal; however, these crimes should have been punished at the international level. Nazi criminals were the first to be penalized in this way, but the law should have been also used against the others who might have committed something like that. There were also cases where it is unclear to what extent the Nuremberg principles were followed. Individual responsibility was one of the discussed problems. According to the principles of the statute, the official position of defendants cannot justify impunity or extenuating circumstances. Judgment extended this

[41] Statute of the International Military Tribunal: www.courttv.com/archive/casefiles/nuremberg/law.html (03. 09. 2015).

[42] The delict crimes against peace were understood as threading, preparation, initiation war of aggression, taking war of aggression or war violating international treaties, agreements, guarantees and participation in them.

[43] Under war crimes it is understood breach of the laws and customs of war.Specifically, it could be to murder, ill-treatment, deportation of civilians from the occupied territory, or slave labor.

[44] Crimes against humanity were murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations before the war or during the war, and at the same time persecution for various reasons, whether political, racial or religious.

[45] Statute of the International Military Tribunal. http://www.courttv.com/archive/ casefiles / Nuremberg / law.html (09. 03. 2015).

[46] The International Military Tribunal declared criminal organizations following institutions: Head of Staff Nationalsozialistische Deutsche Arbeiterpartei (NSDAP), Schutzstaffel (SS), Gestapo, Sicherheitsdienst (SD).Statute of the International Military Tribunal. http://www.courttv.com/archive/ casefiles / Nuremberg / law.html (09. 03. 2015).

[47] Statute of the International Military Tribunal. http://www.courttv.com/archive/ casefiles / Nuremberg / law.html (09. 03. 2015).

[48] BORÁK, M., *Spravedlnost podle dekretu. Retribuční soudnictví v ČSR a Mimořádný lidový soud v Ostravě (1945–1948)*, Ostrava, 1998, p. 98.

principle that no one can achieve impunity just because they acted on the basis of national sovereignty when the state approved acts which were beyond international law limits. Following the orders was until then mostly perceived as a reason for impunity. However, the status did not recognize this principle and established that "following the orders" can be considered only as a mitigating circumstance. However, this was contrary not only to German but in 1944 and the Allied military codices. A number of issues and uncertainties arose about the crimes against humanity. Another and perhaps even more serious problem of double morality came up.[49] The war crimes trials did not end only by punishing top officials of Nazi Germany. Between years 1946–1949 other processes took place. In France, Holland UK, Australia, Poland, Norway, Canada, Greece and China around 1200 other processes were held. The surprising finding is that quite a number of death sentences were handed down and carried out in Bulgaria, which was not directly occupied Germany. It was probably caused by a strong anti-communist orientation of the Bulgarian government, which even before the arrival of the Red Army did not surrender and even ordered the persecution of communists and antifascists. According to some opinions, this attitude of the Imperial Government was afterwards punished by death of war Bulgarian officials through retribution of Bulgarian authorities.[50]

Intention to punish war crimes and leading Japanese representatives was presented by the Allies in Potsdam Declaration. It contained Statute of the International Tribunal for the Far East as well as assurance that the Allies did not intend to enslave Japan, but merely to enforce justice by punishing war criminals. On 19 January, 1946 the Supreme Commander for the Allied Powers in Japan, General MacArthur ratified the Tokyo Charter. It contained a new definition of crimes against peace, war crimes and crimes against humanity and establishment of the Court organisation. Tribunal was composed of eleven judges who did not have substitutes. There was one prosecutor and his ten representatives. Actus reus of the crimes against humanity was formulated slightly differently compared to the Nuremberg trials. Tokyo concept of crime did not apply only to civilians, but each person. Thanks to this formulation the murder of military personnel in unlawful war could be affected. The process itself lasted from 3 May 1946 to end of November 1948. There were 28 accused Japanese – soldiers, diplomats, politicians and one civilian. The defendants were accused of 30 crimes against peace. First of them was allegation that they participated in the conspiracy in order to take control over East Asia and later the world. Additional charges of crimes against peace were waging war against China, the US, UK, Netherlands, France and USSR. The allegations also referred to the commands, approvals or authorization of atrocities against the civilian population and included also neglect of responsibilities to ensure compliance with the laws of war and prevent violations. The Tokyo tribunal could hold the court hearing only against those individuals or members of organizations who were accused either of crimes against peace, war crimes or crimes against humanity. In addition, the definition of a crime against humanity, stated in Article 5 c) of the Statute, differed slightly from the definition specified in article 6 c) of the Nuremberg Charter. While in the former text it was stated that these crimes were "murder, extermination, enslavement, deportation, and other inhumane acts committed against the civilian population", the Tokyo statute omitted the words "against the civilian population", thus extending the content of the relevant class of crime.[51] The main purpose of the extension was to allow punishment of a large-scale slaughter of military personnel in unlawful war. While at Nuremberg the organizations were tried, in Tokyo no such measures were taken to bring to justice the alleged criminal organization. All the defendants stated that they are innocent. According to final judgement all accused were found guilty of mentioned crimes. Seven of them were sentenced to death; others were sentenced to imprisonment from seven years to life.[52]

War crimes trials after World War II have become an extremely important factor in the development of modern international law and in formation of international criminal justice. The principles in international documents were later confirmed in the UN General Assembly Resolutions of 11 December 1946 and 27 November, 1947.This led to the creation of the basic pillars of the post-war international legal documents aimed at averting of wars and condemnation of war crimes, as well as the recognition of the principle that war crimes and crimes against humanity are not covered by any periods of prescription.

Conclusion

Despite constant war conflicts in the history of human society, the issue of the rules of international law for the punishment of war crimes and their perpetrators was dealt with quite late. The Geneva Conventions from 1906 already considered criminal penalties for violations of established rules; however, the idea to bring the perpetrators responsible for crimes against humanity to justice has actually started to develop during the First World War. After the WW II the attempt to create an international tribunal that would punish the perpetrators and the international community decided to take measures to prevent the repetition of the horrors of war. Thanks to a legal analysis of V. Philip, R. Lemkin and other prominent legal experts the doctrine of collective criminality of states and international criminal law was established. It was the World War II though, that played a decisive role in the issue of punishing perpetrators of war crimes. In 1945 the agreement for the prosecution of war criminals was signed, to which the Charter of the International Military Tribunal was annexed. The principles confirmed in them and later in the UN General Assembly resolutions created a basic pillar of the post-war international documents aimed at averting of unleashing of war and condemnation of war crimes.

[49] See: SCHABAS, W., *Genocide in International Law: The Crimes of Crimes*, Cambridge University Press, 2000, p. 608 and also GORSHENIN, K., P., *Norimberský proces. 1. diel.*, Praha, 1953, p. 42.
[50] AMORT, Č., *Dějiny Bulharska*, Praha, 1980, p. 602–603.
[51] ROLING, B. V. A., CASSESE, A., *Tokijský proces*, Praha, 1995, p. 184.
[52] Ibid, p. 84–121.

Magna Carta: Disentangling History from Myth in Russia

Dmitry Poldnikov *

Abstract

This article commemorates the 800th anniversary of the Great Charter (Magna Carta) by reviewing the its study in Russia during the late imperial, soviet and contemporary periods. First, it gives an overview of the key publications and their topics arranged chronologically, second, it examines the interpretative paradigms, third, it presents the results of interpreting Magna Carta as a historic(al) document and as a myth in legal history. It is shown that the distinction between the historians' and the lawyers' interpretation of Magna Carta has not been clearly drawn in the past, and even today it is contingent upon the dominant ideology embraced by the researchers.

Key words: *Magna Carta; Russian legal science; liberal interpretation; Marxist interpretation; reception of liberal values; human rights; rule of law; constitutionalism.*

The 800th anniversary of the Great Charter, or Magna Carta, which English barons and knights used to force King John to confirm their privileges in 1215, prompted many English scholars to revisit it. With an attempt to reevaluate it. Yet, as Lord Sumption recently stated, it is hardly possible to say anything new about Magna Carta, 'unless you say something mad'[1]. This remark was obviously addressed to English historiography. Scholars have established a long tradition of examining the Great Charter from different perspectives. Since the late 19th century one has been able to clearly distinguish between the lawyer's view and the historian's view of this document.

Prominent lawyers and judges began to forge their vision (the myth) of Magna Carta as the first document of the British constitution starting at least from judge Edward Coke in the 1620 s. This line was continued with the liberal 'Whig' interpretation of British history. And, as Lord Bingham's book shows, they continue to cite it as a foundation stone of the rule of law[2].

Legal historians successfully challenged this vision, following the footsteps of Edward Jenks, Frederic Maitland, William McKechnie who at the turn of the 19th century revealed the original limited meaning of the Charter in 1215. It was no more than an attempt of the barons to put some formal constraints on the king's arbitrary rule. The evidence now only grows, as one can learn from James Holt[3], Ralph Turner[4] and, again, Jonathan Sumption[5].

Distinguishing the historical document from its later interpretation(s) works well for the British historiography. It works for the USA where Magna Carta has been cited in both meanings since the American revolution. Yet will this distinction be relevant for interpreting the Great Charter outside the common law world? The question is justified because today this document arguably enjoys greater prestige outside the UK, especially in the US[6] and in the countries of the former Soviet block.

In this article I intend to show that my home country has a solid historiography on Magna Carta but the distinction between the myth and the historical document was not always clearly drawn throughout three major periods: 1) the late Russian Empire (late 19th and early 20th centuries); 2) Soviet Russia (1917–1991); 3) contemporary Russia (since 1991). In order to demonstrate the variations in the interpretation of the Charter, this article, first, gives an overview of the key publications and their topics arranged chronologically, second, it examines the interpretative paradigms, third, it presents the results of interpreting Magna Carta as a historic(al) document and as a myth in legal history in Russian historiography.

I. Russian bibliography on Magna Carta

1) The late Russian Empire.

It was the liberal professors of legal and social history (Maksim Kovalevsky, Paul Vinogradoff, Dmitry Petrushevsky) and

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1 Sumption J., *Magna Carta then and now. Address to the Friends of the British Library*, 2015. URL: https://www.supremecourt.uk/docs/speech-150309.pdf.

2 Bingham T. H., *Rule of Law*, New York, 2010.

3 Holt J. C., *The Northerners: a Study in the Reign of King John*, Oxford, 1992.

4 Turner R. V., *Magna Carta through the ages*, New York, 2003.

5 Sumption J., Op.cit.

6 Turner R., Op.cit.

public law (Aleksander Gradovsky, Boris Chicherin, Fedor Kokoshkin, Pavel Novgorodtsev) who broke new ground and initiated the academic study of Magna Carta in the late Russian Empire. They regarded it as the cornerstone of the rule of law in England and hoped that its study would help to moderate the Tsarist autocracy following the Great Reforms of Alexander II and even more so after the first Russian revolution of 1905. Those great intellectuals introduced the 'Whig' interpretation of Magna Carta in Russia.

2) Soviet Russia (1917–1991)

In Soviet Russia lawyers' interest in Magna Carta was greatly diminished as all liberal concepts were outlawed. Pre--revolutionary liberal interpretations of Magna Carta were either surrounded by a wall of silence or censored in accordance with the Marxist paradigm. It was historians of social and political life in medieval England (Eugenia Gutnova, Valentina Shtokmar, Mikhail Barg, Klara Savelo) who continued to investigate Magna Carta as a historical document. Petrushevsky's publications linked the pre-1917 discourse with the early Soviet historical knowledge, but he was openly criticised for idealising the Charter. A handful of Soviet lawyers (Fedor Dmitrichev, Nikolai Kolesnitsky, Mikhail Strakhov, Zinovy Chernilovsky) paid their attention to Magna Carta as but one piece of evidence in the development of feudal states throughout Europe. Only towards the end of the period did lawyers start to recognise significance of this document [7].

3) Contemporary Russia (1991–)

The revival of the liberal tradition in Russia after 1991 paved the way for embracing of legal and political principles (equal protection of the law, guarantees against arbitrary government, due process of law etc.) associated with Magna Carta in the Anglo-American literature. This is why the Great Charter experienced a big come-back in the literature on human rights (Vladik Nersesjants, Elena Lukasheva), constitutionalism (Valery Zorkin, Boris Strashun, Gennady Muromtsev), legal theory (Vitaly Oksamytny, Timofey Radko), and naturally, legal history (Nina Krasheninnikova, Vladimir Tomsinov, Sergey Khatunov).

As the following shows, the interpretations of Magna Carta are far from unanimous and coherent, given the methodological variety in legal science then and now.

II. The interpretation(s) of Magna Carta through a century and a half

The Russian bibliography on Magna Carta suggests its diverging interpretations. This variety is largely due to the *historical context* and changes of the *research paradigms* (1). And it affects substantially the vision of Magna Carta as a historic document (2) and a lawyers' myth (3).

1) Context and Paradigm of Interpreting Magna Carta

1) The Russian Empire

There were as good as no references to Magna Carta in Russian literature before the second half of the 19th century. The study of Magna Carta was precluded by a sense of the genuine peculiarity of Russian laws. As Russian Tribonian, count Mikhail Speransky put it, all Russian laws and public order were 'genuinely original': 'We did not borrow anything from foreign laws… The differences between Russian legal order and that of other European country are insurmountable.' [8]

All that changed following the Great Reforms of Alexander II (in the 1860 s) as the Tsarist government gave the go-ahead for investigations into foreign legal experience. England became one of the natural objects of research. And a moderate anglomania transformed into academic studies of Britain in the second half of the 19 century [9]. Among the confirmed 'anglomaniacs' of that period there were many prominent liberal professors who sympathised with the British constitutional monarchy. To name but few: Maksim Kovalevsky, Paul Vinogradoff, Aleksander Gradovsky in St. Petersburg, Boris Chicherin in Moscow, Dmitry Kachenovsky in Kharkov.

Professors of legal history (Kovalevsky, Vinogradoff) began to study Magna Carta as a source of information on social history. Their vis-à-vis at chairs for public law initiated comparative studies in foreign constitutional history and legal teachings. They were especially interested in the origins of state and public order in the Middle Ages as represented by Magna Carta.

The goals and interpretation strategies of all Russian scholars were comparable with those of their English contemporaries. Lawyers were attracted by the constitutional significance of the Great Charter and understood it as a banner of the constitutionalism (especially during and shortly after the revolution of 1905). Historians paid attention to the historical document [10].

2) Soviet Russia

The Bolshevik revolution of 1917 changed the context and the paradigm of academic research in constitutional history. The new government did away with academic liberties and enforced the monopoly of the Marxist paradigm in social sciences and humanities. It implied that economic development (pre-) determined legal institutions (economic 'structure' mattered more that legal 'superstructure'). All foreign history was to be studied through the progressive social struggle of the oppressing (rich) and the oppressed (poor) classes. All events were evaluated in terms of 'progressive' and 'reactionary'.

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[7] Esajan Z. S., *Magna Carta and its place in the history of English common law [Velikaja hartija vol'nostej i ee mesto v istorii anglijskogo prava]*. Law thesis. Yerevan, 1986. (in Russian).

[8] Speransky M. M., *A note 'On the Laws of Russia and their difference from the Laws of Russia' read to Nicolas I on 10 March 1826 [Zapiska 'O zakonah rimskih i razlichii ih ot zakonov rossijskih' chitana Nikolaju I]*, in Tomsinov. V.A., *Legal education in the first third of the 19th century [Juridicheskoe obrazovanie v pervoj treti XIX v.]*, Moscow, 2011, p. 190–191. (in Russian).

[9] Ajzenshtat M.P., *'Anglomania' of Maksim Kovalevsky ['Anglomanija' Maksima Kovalevskogo]*, in: Mir Klio, Moscow, 2007. (in Russian).

[10] Petrushevsky D.M., *Magna Carta and the constitutional struggle in English society in the second half of the 13th century* [*Velikaja hartija vol'nostej i konstitucionnaja bor'ba v Anglijskom obshhestve vo vtor.pol. XIII v.*], Moscow, 1915. (in Russian).

Thus, in the studies involving medieval England and Magna Carta, the focus was bound to shift to the origins of feudal order, the organisation of manor and public administration in the interests of the oppressing class. In this paradigm legal documents were no more than the balance of powers established through social conflicts. Lawyers (legal historians) lost much of their interest in Magna Carta together with such themes as constitutional order, the rule of law, human rights in a 'bourgeoise state'. References to Magna Carta were limited to the context of a feudal state in England and in Western Europe as part of academic course on foreign legal history or in comparative studies of state models in Europe.

3) Contemporary Russia

Democratisation of the political life in Russia after 1991 opened up new perspectives for academic studies, but it also brought new challenges. The political turn allowed Russian legal historians and theoreticians:

- to evaluate the limitations of the Marxist paradigm (its straightforward reference scale 'progress' vs 'reaction');
- to acknowledge the significance of legal culture for understanding historical documents;
- to discover the complexity of premodern legal orders and the coexistence of different layers;
- and to reconnect with the Western academic agenda.

Yet with liberty comes responsibility. Russian scholars found themselves in a situation of methodological confusion due to the plurality of approaches, the inconsistency in their application, augmented by recourse to uncertain categories, such as 'legal culture', 'legal tradition', and by the path-dependency with the previous historiography.

2) Magna Carta as a Historic(al) Document

1) Back to the beginnings of the Russian historiography on Magna Carta, our scholars began to discover the Charter as an historical document almost simultaneously with the British colleagues. Most legal historians who specialised in English history (Kovalevsky, Vinogradoff, Petrushevsky) travelled to England to contact their counterparts and to familiarise themselves with the primary sources and current publications. By the turn of the 20th century it was firmly established that the original meaning of Magna Carta was more modest than its later interpretation.

These historical investigations culminated in the essays of Dmitry Petrushevsky who revealed the feudal character of this document: 'Magna Carta is a peace treaty between the king and the victorious barons, with support of other groups of English society' [11], the first notable limitation of the king's power. 'Magna Carta is but the first step of English society towards its (political) liberty'.

Theoreticians and philosophers accepted this divide between the original and subsequent meaning of the Charter. Pavel Novgorodtsev in his 'Lectures on the history of the philosophy of law', mentioned the impact of Magna Carta on the political thought of later centuries (as *ultima ratio* of the claims of John Lilburne and levellers in the 17th century) [12]. Clearly, 'the old foundation was chosen to back up completely new ideas.'

2) Soviet historians continued to investigate the historical meaning of Magna Carta at the expense of its later rethinking. In the words of Eugenia Gutnova, this Charter was only a document of its time (thus, historical and not historic) since it reflected and protected the interests of the barons (tenants-in-chief) and to much less an extent the interests of knights, wealthy town-dwellers and peasants. The content of Magna Carta was sorted out into the baronial (= reactionary) and 'progressive' articles:

- for barons: trial by the peers (art. 21, 39), protected the privileges of manorial courts (art. 34), scutage only by consent of the counsel of the tenants-in-chief (art. 12);
- for knights: no extra services beyond customs (art. 15, 16, 27);
- for town dwellers: confirmed privileges (art. 13) and measures and weights (art. 35);
- no article protected the interests of villeins.

Obviously, the author understood 'progress' in terms of setting constrains on royal and feudal arbitrary rule and paving the way to the establishment of the Parliament in the late 13th century. Soviet historians acknowledged a handful 'progressive' articles which protected the interests of the majority of the population, confirming the administrative and judicial institutes introduced by the reforms of King Henry II (art. 18, 19, 20, 32, 40). The so-called 'constitutional articles' of Magna Carta were believed to protect barons only (art. 12, 14, 21, 34, 39, 61), their judicial and manorial privileges.

3) Contemporary legal historians, generally, continue to affirm the feudal nature of King John's charter but they are more cautious in limiting its original significance to the protection of barons. It is true that barons were the ones who stood behind Magna Carta but they succeeded to prevail over the king exactly because of wider social support of knights, town-dwellers and other free men [13].

Investigations into the articles of Magna Carta reflect the variety of existing approaches with recourse to contemporary British and American literature. The Charter is regarded as the historical document generally, and its key-articles are being scrutinised.

Talking about the document as a whole, *Magna Carta is declared a feudal document of its time, the result of the balance of powers* in 1215. Hence it protected mostly the interests of barons and other free men (*liberi homines*) and it aimed at restoring *status quo ante* the revolt against the king. The change in the balance of powers led to its quick subsequent invalidation by King John and Pope Innocent III and its troubled fate in the 13th and 14th centuries.

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[11] Ibidem.

[12] Novgorodtsev P. I., *Lectures on the history of philosophy of law* [*Lekcii po istorii filosofii prava]*, Moscow, 1914. (in Russian).

[13] Krasheninnikova N.A., *Magna Carta of 1215: contemporary interpretation* [Velikaja hartija vol'nostej 1215 g. (sovremennaja interpretacija)], in: Vestnik Moskovskogo universiteta. 3 (2002), p. 86–107, Krasheninnikova N.A., *History of foreign states and laws: selected legal documents. Textbook. [Istorija gosudarstva i prava zarubezhnyh stran: izbrannye pamjatniki prava: uchebnoe posobie]*, Moscow, 2015, p. 226–247. (in Russian).

Most legal historians agree now that one must cautiously distinguish between the so-called 'feudal' and 'constitutional' articles in the Charter to differentiate its original significance and later impact.

Main Feudal Articles:
- trial by a jury of one's peers when imposing fines (art. 20–21, here '*homo liber*' as a baron);
- on mutual obligations between the king and his tenants-in--chief and on the council of peers (art. 12, 37);
- the exclusive right of the barons to control the implementation of Magna Carta by the king (art. 61).

Main 'Constitutional' Articles: art. 17–22, 36, 39, 40, dealing with the interests of the majority of the free men of England, especially:
- on the accessibility of the king's justice (art. 17–19);
- that a fine should correspond to the gravity of a crime (art. 20);
- against the abuses of the royal officials or the king himself when dispensing justice (art. 24, 40);
- on the lawful judgement by one's peers (art. 39).

In addition to general assessment of Magna Carta some of its articles were put under scrutiny. For example, art. 34, 39 examined by Nina Krasheninnikova[14]. In her words, art. 39 confirms two judicial procedures: first, 'by the peers' for the barons to protect their tenants against arbitrary judicial persecution by the king, and second, 'by the law of the land' in accordance with the common law in the royal courts. Art. 34 precludes the king from dispossessing his tenants-in-chief through the extended usage of the writ '*Praecipe*' in his court without participation of the peers. Sergey Khatunov paid attention to the role of art. 32 in amending the practice of the arbitrary confiscation of the land of the tenants accused of a felony but not duly convicted[15].

3) Magna Carta as Myth

1) One can argue that the study of Magna Carta in Russia began in the second half of the 19th century exactly because of the mythical halo around it. The liberal professors in the late Russian empire (such as Gradovsky, Chicherin, Kokoshkin) paid their attention to the Great Charter exactly because it became the (first) great milestone of the British constitutionalism. They discussed this document within the discourse of the legal origins of the state (in Britain and in Europe), the protection of individual and social liberties with an obvious intent to foster liberal and constitutional ideas, to limit the tsarist autocracy by law on the model of Great Britain.

So, Aleksander Gradovsky compared Magna Carta with Russian autocratic order and pointed out that it set the legal framework for the English monarchy (= limited the royal arbitrary rule). Boris Chicherin and Fedor Kokoshkin cited Magna Carta as one of the earliest examples of an agreement between the king and his subjects to settle their relations, to put a check on the king in return for the feudal services of his vassals.

These and other liberal professors had no ambition to conduct historical research. Therefore, it was sufficient for them to use secondary literature. First, in Rudolf von Gneist's 'Englische Verfassungsgeschichte', later in English as well[16]. Naturally, they paid attention to the so-called constitutional articles of Magna Carta (such as art. 39) to the prejudice of typically ‚feudal' ones. And they tended to interpret more passages of the Charter as a springboard of the British constitutionalism.

2) During the Soviet period the constitutional myth of Magna Carta began to work against it. The Bolsheviks were openly hostile to all bourgeois liberties, constitutionalism, the rule of law, and were aspiring to rebuild the regime on a new principle — ‚All power to the soviets!'

Soviet historians and lawyers did their best to demystify the original and very limited meaning of Magna Carta. They openly blamed pre-revolutionary Russian and foreign authors for idealising this historical document. In their eyes, the Marxist approach to history proved that there was no reason to distinguish between ‚feudal' and ‚constitutional' articles in the Charter nor to call it a great proof of English exclusiveness. It was clearly stated that the myth of the Great Charter was due to political interests of the later generations, starting from the English revolution (= the English civil war).

There was no place for myths in the true history of state and law in England. Thus, the Charter was mentioned only in passing as one of many historical pieces of evidence of the evolution of a feudal state in Europe. For lawyers the subject did not seem worthy of further investigations.

3) The myth of Magna Carta made its come-back in Russia after 1991. With the revival of democratic and liberal ideals, contemporary Russian legal historiography on the subject seems to be the opposite of the Soviet one. Many respected lawyers cite Magna Carta as the first document of the unwritten British constitution. It is believed to be the first (with few qualifications) written manifestation of the idea of human rights, the beginning of such crucial principles as due process of law, a fair trial by equals and by the law of the land, the rule of law or legal constrains on the government.

Such an interpretation is especially popular with the libertarian scholars, such as Vladik Nersesjants and Elena Lukasheva. The former regarded Magna Carta a sure sign of successive development of the Western countries[17]. The Great Charter is cited from time to time as a proof of the English origins of human rights (according to Timchenko, Kononenko)[18] and

[14] Krasheninnikova N.A., *History of foreign states and laws: selected legal documents.* cit.
[15] Khatunov S.Ju., *Article 32 of Magna Carta and its major provisions [Tridcat' vtoraja stat'ja Velikoj Hartii Vol'nostej i vse osnovnye polozhenija]*, in Rossijskij juridicheskij zhurnal, 4 (2011), p. 232–239. (in Russian).
[16] Gneist R., *Englische Verfassungsgeschichte*, Berlin, 1882.
[17] Nersesjanc V.S., *General theory of law and state [Obshhaja teorija prava i gosudarstva]*, Moscow, 1999. (in Russian).
[18] Kononenko V.P., Timchenko L.D., *Establishing the principle of respect for human rights in international law [Stanovlenie principa uvazhenija prav cheloveka v mezhdunarodnom i nacional'nom prave]*, in Rossijskij juridicheskij zhurnal, 4 (2011), p. 90–99. (in Russian).

constitutionalism (according to Strashun, Muromcev and Baranov)[19].

This myth of Magna Carta became common in textbooks on legal theory and human rights (Oksamytny, Radko)[20]. In 2008 the Ministry of Education of Russia suggested citing the Great Charter during classes on human rights[21].

All in all, a Mystified History?

It would not be an exaggeration to say that Russian lawyers today are more familiar with the myth of Magna Carta than with the real document. This is not a problem, as long as this myth fosters higher legal values in Russian law. After all, hardly any legal system could exist without some inspiring mythology. So the English have their Great Charter which is cited by courts, although, as Lord Sumption acknowledges, mostly rhetorically[22]. The French portray their legal culture as extremely rational and clear, based on the Codes and the universal principles of legality and human rights (Audren and Halpérin)[23].

The problem with Magna Carta in Russia is its increasingly irresponsible usage. Its mythical halo eclipses the historical document even in the professional discourse. In the contemporary legal literature one can easily come across several Magnae Cartae:

- for the whole humanity (the Universal Declaration of Human Rights of 1948)
- for judicial procedure and for judges (the Fundamental Principles adopted by the European Committee on Legal Co-operation of 2010)
- for the knowledge age (the UN Convention on the Rights of the Child of 1989)
- for wild nature (!) (the Convention on International Trade in Endangered Species of 1973)
- and even for medieval Russia (the *Kormchaia kniga* of Novgorod of 1280, or the collection of church and secular law in Northern Russia, mostly translated from Byzantine law)[24].

The excessive usage of Magna Carta indicates reckless myth-building in contemporary legal culture and its pseudo-historical foundations. It also touches upon a bigger problem of transplantability of Western values associated with the Great Charter. The issue was raised by the Chairman of the Constitutional Court of Russia Valery Zorkin. In 2008 he questioned the possibility of effectively transferring a popularised and emasculated version of Western values. 'Can we claim to actually borrow the constitutional values of Magna Carta if their usage is in watered-down words and vague metaphors and not in its deeper essence?'[25] After all, as Samuel Huntington put it in 1996, the spread of pop culture and consumer goods around the world is not equal to the spread of the true Western culture. '*The essence of Western civilization is [the] Magna Carta, not the Magna Mac*. The fact that non-Westerners may bite into the latter has no implications for their accepting the former.'[26]

Recent Russian legal historiography tends towards the mythical document. Ironically, in the Commentary to the Constitution of Russia edited by Valery Zorkin himself, Magna Carta is cited as the first document to 'incarnate the ideas of the rule of law, judicial independence and a fair trial' (art. 22). This claim is confirmed by an unspecified article (in fact, art. 39, in an inaccurate translation!) of the Charter[27].

And yet, the affliction of confusing the mythical and actual Magna Carta in some Russian publications is treatable given a long tradition of accurate studying of this seminal Charter. And it must be done before introducing more historical evidence on this and other great documents of the past.

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[19] Strashun B., *Constitutionalism: idealism, realism and perspectives [Konstitucionalizm: ideal, real'nost' i vozmozhnye perspektivy]*, in Sravnitel'noe konstitucionnoe obozrenie, 5 (2011), p. 43–47., Muromcev G.I., *Constitutionalism: methodological issues [Konstitucionalizm: problemy metodologii]*, in Pravo. Zhurnal Vysshej shkoly jekonomiki, 1 (2014), p. 20–42., Baranov V. F., *The birth and development of English common law in the 12th to 17th centuries [Vozniknovenie i razvitie anglijskogo obshhego prava v XII-XVII v.]* Law thesis. Moscow, 2012. (in Russian).

[20] Oksamytny V.V., *General theory of state and law [Obshhaja teorija gosudarstva i prava]*, Moscow, 2012., Radko T.N., *Theory of state and law: textbook [Teorija gosudarstva i prava: uchebnoe posobie]*, Moskva, 2011. (in Russian).

[21] Letter of the Ministry of Education of Russia dated 7 October 2008 No. AF-320/03 ‚On organising classes on human rights'. (in Russian).

[22] Sumption J., Op.cit.

[23] Audren F., Halpérin J-L., *La culture juridique française. Entre mythes et réalités. XIX-XXe siècles,* Paris, 2013.

[24] Bujnaja J., *Magna Carta of Russia (a report on the Kormchaia kniga of 1280)* URL:http://zakon.ru/Blogs/magna_charta_zemli_russkoj__v_istoricheskom_muzee_otrestavrirovali_novgorodskuyu_kormchuyu/16939 (in Russian).

[25] Zorkin V. D., *The rule of law and the contact of civilisations [Verhovenstvo prava i vstrecha civilizacij]*, in Zhurnal konstitucionnogo pravosudija, 1 (2008), p. 2–9. (in Russian).

[26] Huntington S. P., *The Clash of Civilizations and the Remaking of World Order,* New York, 1996.

[27] Commentaries on the Constitution of the Russian Federation (article-by-article), edited by V.D. Zorkin 2nd ed., Moscow, 2011. (in Russian).

The Funds for the Execution of Obligations (Contract) according to the Albanian Customary Law

Katrin Treska *, *Engjëll Likmeta* **

Abstract

In this paperwork will be laid for discussion the question which constitutes even the fundamental issue of this paperwork: which were the main tools for the execution of obligations according to Albanian customary law? What was the meaning and their role in relation to other norms of civil nature in the Canon? The main sources of Albanian customary law were: Canon of Lek Dukagjin, Canon of Skanderbeg, Canon of Dibra, Canon of Benda, and Canon of Laberia. In this paper will be analyzed those means sanctioned in the Canons applied in Albanian territories and used to ensure the fulfillment of obligations in civil relationships. The Albanian customary law provided that obligations were executed voluntarily and precisely. This meant that, in general, the obligations arising from a contractual relationship, were executed and fulfilled on time, in the manner specified literally in the contract, and in the right quality, even though the main form of concluding a contract at that time was the verbal one. The main tools for the execution of obligations under the Albanian customary law were: the bail (escrow), the earnest, the pledge. In this paper will be taken into analysis the provisions about these tools in the Canon of Lek Dukagjin, Canon of Skanderbeg, Canon of Dibra, Canon of Benda, and in the Canon of Laberia.

Key words: *Customary law; Albanian Canons; Obligations; Pledge, Earnest; Escrow.*

1. Introduction

The main sources of Albanian customary law were: Canon of Lek Dukagjin, Canon of Skanderbeg, Canon of Dibra, Canon of Benda, Canon of Laberia etc. Canons conducted rules contained in some local variants [1]. Since antiquity, in Albania, as in ancient Rome and Athens, in civil obligations relationships, it was important for creditors to make sure that the debtors would fulfill their obligations regularly and in time. Albanian customary law, as Roman law, had many institutions that served to the creditors as a guarantee that the debtor would meet on time and properly his liabilities [2]. Insurance could be real or personal. Mortgages was a real, accessory, mutual, not equal contract, which was created by the submission of any irreplaceable items to the creditor, who was authorized to have its possession, and even to sell it in case the debtor did not fulfill its obligation and to get so from the price the sum equal to the primary obligation [3].

Earnest was used in classical law to evaluate the perfection or excellence of the contract [4]. It was part of those instruments that were used and are in use even today, like real guarantees for the fulfillment of the obligation. In addition to providing real guarantees, there were also used personal guarantees by the debtor to ensure the fulfillment of the obligation. Such personal guarantees were: interest contracts, swearing, through specific promises of debtors as well as via third parties [5]. *Stipulations* were unilateral contracts and *iuris stricti* that consisted in formal promises in response to a formal question [6]. A *stipulation* was a verbal expression that the person who was being questioned, answered the he would do, or he would give what he was asked [7].

2. Canon of Laberia

Types of obligations under Albanian customary law

The Canon of Laberia defined obligations as: a relationship through which a person (the debtor) is obliged to give something, to perform or not to perform a specific action for the benefit of another person (the creditor) and it has the right to require something, and the right to take or not a certain

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1 ELEZI, Ismet, *Criminal customary law of the Albanians*, the publishing house "November 8", Tirana, 1983, p. 32.
2 MANDRO, Arta, *Roman Law*, third edition, Tirana, 2006, p. 408.
3 MANDRO, Arta, *Roman Law*, third edition, Tirana, 2006, p. 360.
4 MANDRO, Arta, *Roman Law*, third edition, Tirana, 2006, p. 375.
5 MANDRO, Arta, *Roman Law*, third edition, Tirana, 2006, p. 409.
6 BORKOWSKI, Andrew, & DU PLESSIS, Paul, *Roman Law*, UET Press, Tirana, 2010, p. 384.
7 BORKOWSKI, Andrew, & DU PLESSIS, Paul, *Roman Law*, UET Press, Tirana, 2010, p. 385.

action[8]. Under this Canon, the main sources of the incurrence of liabilities were[9]:

- contracts;
- damage causing;
- unjust enrichment.

The contract was that kind of a civil nature Canon agreement which aimed at birth, creation, modification or termination of the Canon obligations of a civil nature. As a general rule, the contract was concluded between two or more parties. The main form of concluding a contract was the verbal one[10]. It meant concluding an agreement based on the word of honor and allegiance (trust) which was a leading institute in the Albanian customary law. A contract could be concluded in this form only by male adults, and mostly only by the heads of the household- *paterfamilgliasi*[11]. The main types of obligations under the Canon of Laberia were obligations to the community, family obligations, mutual obligations, obligations arising from impermissible actions[12].

The Obligations to the communion – community included: obligations deriving from being a member of a particular society. Thus, according to the Canon, for every member of the community were predicted the below mentioned obligations such as: participation in the organized fighters' groups to combat the enemy, participation in the community assemblies and meetings and the implementation of decisions taken by them, providing assistance in case of natural disasters, family or social activities, as well as providing a real and concrete assistance in joint work of the community such as: construction of water lines, mill and construction of various roads[13]. The Family obligations were not explicitly defined, but it is understandable that in this group of obligations were included obligations towards the family and obligations to its members.

I think that such kind of obligations did include in particular the obligation to take care of children and of the elderly people of the family, or pregnant women. Mutual obligations were defined in different verbal and written contracts but they were not clearly defined in the provisions of the Canon. Whereas, with obligations arising from impermissible actions were understood the obligations that were arisen as a result of damage caused to health or property.

The obligations' insurance tools

As a general rule, in the Canon of Laberia it was provided that obligations were executed voluntarily and precisely. This meant that, in general, the obligations arising from the contractual relationship, were executed and fulfilled on time, in the manner specified literally in the contract, and in the right quality. Otherwise, it was the organ of the Council of Elders[14], which acted for the resolution of the actual case, referring to the Canon norms. If we refer to the contemporary legal terminology, we can say that the decision of the Council of Elders constituted an executive title, which meant that it was obligatory to be implemented by the parties in a civil dispute.

The Canon of Laberia used to know two main forms of obligation execution[15]:

- Execution in nature;
- Execution in cash.

The most prevalent form of the obligation's fulfillment was execution in nature. It was accomplished through the granting of cattle (be these petty or thick), the granting of agricultural products such as cereals (e.g. wheat, corn), milk and its derivatives, meat and its derivatives, as well as poultry wildfowl. As a form of execution of the obligation served also pets that were used as working tools such as: horse, donkey, mule, etc.

But naturally, in this paperwork will be laid for discussion the question which constitutes even the fundamental issue of this paperwork: which were the main tools for the execution of obligations? What was the meaning and their role in relation to other norms of civil nature in the Canon? The main tools for the execution of obligations under the Canon of Laberia were three. They were:

- The bail/(escrow);
- The earnest;
- The pledge.

The bail was a personal key instrument for fulfillment of the obligation in the Canon of Laberia. According to the Canon, we would be faced with this institute of Albanian customary law, if a person – the guarantor would undertake the fulfillment of an obligation that a person had (the debt-receiver) – the debtor, against a third person named creditor – (the debt-giver), in case the debtor failed to fulfill. The failure of the obligation's fulfillment could be complete or partial. The bail's object was different. Thus, subject of bail could be: the guns, the watch (clock), the means of production and tools, pets, and any other item that was owned by the family. Although, the Canon used to legitimate as subjects of the bail the male family members, this institute was limited to its object. Thus, they could serve as guarantors only for certain items such as watches and guns. Meanwhile, for other items it was always required the consent of the household head – *paterfamilglias.* It should be emphasized that the Canon of Laberia did not recognize as subject of the

[8] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 449, p. 163.
[9] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 450, p. 163.
[10] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 480, p. 168.
[11] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 481/3, p. 168.
[12] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 451–454, p. 163–164.
[13] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 451, p. 163.
[14] The committee consisted of representatives from constituent tribes` men of the village or province, who distinguished character and high moral integrity. This body was not a permanent body and hereditary. For more information see: ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 61, p. 54.
[15] ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 457, p. 164.

bail children and women[16]. The Canon sanctioned the fact that "the debtor who pays the obligation to the creditor, was obliged to announce the guarantor in order for the obligation to be considered fulfilled"[17]. Also, the Canon of Laberia used to recognize as a case of bail termination even the obligation fulfillment by the guarantor, when the civil liability was not fulfilled on time and according to the deadline set by the debtor. The unwritten Canon law recognized even the right of the guarantor's heritage. Thus, the Canon of Laberia sanctioned that: "[…] when the guarantor dies, his inheritors have to respond to the commitment"[18].

The Earnest was another tool for ensuring the execution of the obligation. Canon of Laberia stated that: "[…] the earnest was the percentage of the value of goods that was given by the buyer of the product – to the other party, the owner of the goods, before the purchase, to the account of the amount to be paid under the contract, ensuring thus its execution"[19]. The earnest was accomplished in two forms: with or without witnesses. By granting the earnest, the product object of the contract, was considered sold. Goods were considered sold to the person who had given the earnest, considering the good customs in the country. Furthermore, the Canon sanctioned that: "[…] even if others do decuple the value of the good, it was already sold […]"[20]. In this case, the transaction, the purchase contract was considered executed.

The Canon of Laberia also used to regulate even the cases of loss and denial of the earnest institute, as a coercive tool for the fulfillment and execution of the obligation. In case the buyer did not want to buy the product,– for which the earnest was given, the contract was considered unexecuted because of the buyer, and in such terms the buyer lost the earnest given. While, when the contract was not executed because of the seller, the latter was obliged to turn back to the buyer who had left the earnest, a double value of the given deposit. Such repressive measures were not unintentionally provided from Canon norms. These measures served to regulate trade activities. The earnest was given back in return in case the producer could not ensure the product. Canon of Laberia sanctioned that the earnest was not returned when the object of earnest was a real estate, a land. Canon of Laberia provided resolving the case in a certain solemn procedure. Thus, the body of the Council of Elders was the competent body to solve the dispute in case of earnest denial. However, in such a case, it was not offered a full protection of the given deposit amount through the earnest[21].

The pledge was another real instrument to ensure the contract fulfillment. It was considered as a guarantee for the given loan that would be returned on time and in the defined amount. Canon of Laberia defined the meaning of the pledge as well. According to Professor Elezi and norms of the Canon, the pledge was a contract by which the debtor or a third person gave the creditor a valuable item in order to ensure the execution of the obligation. The object of the pledge contract could be different. E.g. livestock, animals and working tools, household furnishings, firearms, clocks (watches), land, pastures, meadows, agricultural and livestock products etc. In any case, according to Canon norms, object of the pledge contract could be the movable as well as immovable property. The value of the pledged item had to be at least equal in each case with the debit value. The pledge contract was subject of a special form of formality. This particular procedure served as a guarantee to ensure the return of the pledged object after the fulfillment and execution of the obligation. Canon of Laberia sanctioned that: "[…] for immovable property, the object was left as a pledge in the presence of two or more witnesses"[22].

Canon of Laberia provided that except the creditor, the pledge could be left also to the elders. In such a case, the elders served as a guarantee for the execution of the obligation. The pledge was left for a fixed period of time under a deadline. Canon of Laberia sanctioned that: "[…] if the pledge cannot be redeemed, the debtor would lose the right to seek it and his property belonged to the creditor"[23]. Also, the Canon sanctioned that: "The deadline for the payment of obligation could be postponed by the agreement of the parties"[24].

Canon of Laberia regulated in detail the case when object of the pledge contract was the immovable property – land. What is to be emphasized is the fact that when the obligation was not executed within the specified time established in the contract, the immovable property, land, was not owned by the creditor, but he could however take just the land's benefits. This meant that the creditor had the right of possession over the earnest pledge, but in any case, until the moment of fulfillment of the obligation by the debtor. I think that such a regulation was provided in order to protect the right of ownership as a fundamental right.

3. Canon of Skanderbeg

Canon of Skanderbeg in its tenth chapter deals with the bail. According to its precepts, bail was the given guarantee to meet the obligations of another person, at a certain time limit. Object of bail could also be the fulfillment of civil obligations of another person. In the purchasing contact, the bail was known as a tool to ensure the contract. Its object was: money, items, products, and the conditions as well[25]. Immovable property could also serve as bail object. Canon of Skanderbeg required in every

16 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 461, p. 165.
17 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 463, p. 165.
18 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 464, p. 166.
19 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 467, p. 166.
20 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 468, p. 166.
21 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 470, p. 166.
22 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 473, p. 167.
23 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 478/1,2, p. 168.
24 ELEZI, Ismet, *Canon of Laberia*, TOENA Editions, Tirana, 2006, articles 478/3, p. 168.
25 ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 2190, p. 145.

case, the person who served as the bailer had to be acceptable to all the parties involved[26]. Like the Canon of Laberia, even this Canon, it was sanctioned that: subject of bail could be only males of the family, not women and children. Adult males of the family (family men) served as escrows only for their personal movable belongings such as weapons, clocks or cattle etc. For other objects than the abovementioned, men of the family had to seek the approval of the family head (*Paterfamilias*). The bail was subject to a certain formal procedure in order to be considered as accomplished. According to the Canon of Skanderbeg, the person who would undertake to cover the debtor's obligation had to declare that: "[…] I am a bailer. In case that this person does not pay to that date, I will pay […][27]". Also, norms of Skanderbeg Canon and those of Laberia Canon provided that bail was inheritable. This meant that in case of death of the debtor or the bailer, the obligation had to be fulfilled and executed by their successors, according to a certain order provided by the Canon.

Fulfillment and execution of the obligation by the escrow was done under a solemn procedure. Thus, the Canon provided that the escrow used to call and pay in the presence of two debtor's friends. Also, the Canon sanctioned that: "[…] he who does not pay his obligation to the bailer was ashamed, was not helped in the future by anybody for any problems, and remained responsible for the debt forever"[28]. As a general rule, the escrow had a honorific role than e real one in fulfilling the debt, because the obligation had always to be fulfilled by the debtor[29].

Another tool of ensuring execution of the contract and fulfillment of the obligation was the pledge. The value of the pledge was worth at least the same value as the object of the obligation contract. If the value of the pledge was greater than the value of the obligation, the difference of the value was returned to the owner. An object was given as a pledge for a specified period of time. Failure to respect the deadline for the obligation fulfillment implied the loss of the object given as pledge by the debtor. However, Canon of Skanderbeg sanctioned that: "the pledged object could not be sold without talking once again with its owner, after the deadline was expired"[30].

The given word (promise) was another tool serving for the execution and fulfillment of obligations. The given word was a specific provision of Skanderbeg Canon compared with Laberia Canon. This institute was provided not only in the Canon of Skanderbeg though. But, in this Canon, the given word was regulated in a specific chapter, in chapter six. Basically, the given word was a kind of promise to fulfill a certain obligation, in the present or in the future. There were two main types of given words: with and without condition. The fulfillment of the conditioned promise depended by the verification of the condition. The implementation of an unconditioned promise depended on moral integrity or personal dignity of the person who made it. Canon of Skanderbeg sanctioned that: "[…] the ox is bound by thong; the man is bound by his word […]"[31]. Also, the Canon provided punishment for the guilty person who did not keep his promise (his word). His punishment was a shame, and implied the loss of honor and family dignity.

Another tool for the execution and fulfillment of the obligation was the earnest. In the Canon of Skanderbeg, unlike that of Laberia, the earnest was not treated in a separated chapter, but as one of the forms of purchase contract. According to the Canon, the form of purchasing contract by earnest happened when the buyer gave to the seller a certain amount of money to secure the purchase of a product or item within a fixed period of time[32]. The earnest was a part of the money that the buyer and the seller had agreed on, to be given to the latter that served to secure the purchase contract. While, as far as damage, loss and denial of the earnest institute is concerned, as a coercive tool for the fulfillment and execution of the obligation, the same rules as in the Canon of Laberia were applied. Canon of Skanderbeg sanctioned that: "[…] the last day for the fulfillment of the obligation through earnest ends with the sunset"[33]. Repentance was not a valuable tool in the purchase contract. This meant that under the Albanian common law of the provinces where Canon of Skanderbeg had influence, the earnest was considered lost if the parties of the purchase happened to repent to fulfill the obligations deriving from it. Thus, the earnest went to the buyer in case the seller was the repentant, and vice versa.

4. Canon of Benda

Canon of Benda knew the earnest, as well as the Canon of Skanderbeg and Canon of Laberia, as a tool to ensure and fulfill the contract. Basically, as in any Canon, even in the Canon of Benda, the earnest aimed getting a certain item. The earnest was the percentage of the value of a certain good desired to be bought. The earnest was given based on the agreement of the parties participating in the contract. The earnest even in the Canon of Skanderbeg had to undergo a kind of certain solemnity. It was made by vowing. The earnest was executed with or without a witness. As a rule, by the given earnest it was considered as delivered the items subject to the purchase contract, and that the contract was considered executed or fulfilled[34].

The bail was a tool provided in the Canon of Benda for ensuring the fulfillment of the obligation. For this instrument were applied the same rules as provided in any Canon.

Pledge was another tool recognized by the Canon of Benda to secure the loan. The value of the thing pledged even in this

[26] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 2190, p. 145.
[27] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 2191, p. 145.
[28] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 2195, p. 145.
[29] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 2201, p. 145.
[30] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 1485, p. 102.
[31] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 1510, p. 105.
[32] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 1540, p. 109.
[33] ILIA, Don Frano, *Canon of Skanderbeg*, Publisher La Rosa, Milot, 1993, article 1546, p. 109.
[34] GOCI, Haxhi, *Canon of the province of Benda,* publishing house OMBRA GVG, Tirana, 2010, article 7, p. 90.

Canon had to be the same or slightly larger than the value of the contract.

The Canon of Benda sanctioned the fact that the pledge was sold when it was not fulfilled the obligation specified in the contract. And in such a case, the body of Elders was charged to collect the debt in favor of the debtor that coincided with the difference between the value of the collateral and that of the contract object[35]. (So, when the value of the pledged item was greater than the value of the contract object, the pledged item was sold and the proceeds that exceeded the value of the debt according to the contract went in favor of the debtor and the creditor used to receive only the value coinciding with the debt).

The Canon of Benda recognized two types of collaterals[36]. They were:

- The valuable pledge;
- The matured pledge.

The valuable pledge was left for some great need, such as: the organization ceremonies of joy or sorrow. Its object could be valuable personal belongings estimated according to that time value, such as e.g.: firearm, clock, personal clothing, etc.

In contrast to valuable pledge, the matured pledge could have as its object a certain item, which, as a rule had not any great value. However, it was considered by the parties that in the depth of its content it had an equal value to the object of the contract, from which the pledge was deriving.

In the Canon of Benda it is interesting the fact that the pledge could be put on the table in order to prove the accuracy of a given or displayed opinion in front of the public opinion[37].

The given word or promise was a coercive tool, which among other things, served for the execution of duties. Thus, the Canon sanctioned the rule that: "[…] promise made and not kept outrages the family honor"[38]. The given word was a particularity of the Canon of Benda in relation to the Canon of Laberia, but a common connection with that of Skanderbeg.

5. Canon of Dibra

Even in the Canon of Dibra the main tools to ensure the fulfillment of the contract were: the earnest, pledge and bail. According to the Canon of Dibra, the meaning of earnest was the same with that expressed in other sources of the Albanian customary law. Interesting was the fact that the earnest was applied only in the field of trade, in commercial relations. Thus, the earnest was used in two cases. Firstly, when it was given for a product or item not yet produced. Secondly, for an item or product which the purchaser did not meet the money, the monetary value[39]. The earnest was given to a movable object/item, and was applied mainly in order contracts. Also, the earnest, as a tool ensuring the obligation was given for the land[40], as an immovable item, which had a huge monetary value. In this case, precisely because of its great value, the Canon of Dibra sanctioned that when the buyer might not have all the money, the buyer could use the earnest. The latter, was regarded as a helpful tool to the successful conclusion of the purchase contract between parties. According to the Canon of Dibra, the earnest was applied in the presence of witnesses. Such a procedure was intended by the Canon as a protective measure, for the parties to adhere to the implementation of the contract[41].

Another tool for duty ensuring was the pledge. Mostly, this ensuring means were applied for the execution of the contract. The Canon of Dibra, as many other Albanian Canons, sources of the Albanian customary law, recognized the right of the borrower to request deferment of the obligation fulfillment, as well as the right of the lender to approve the request of the latest. In any case, Canon sanctioned that: "[…] the deferment depended on the lender"[42]. Besides the pledge with witnesses, and with a deadline, the Canon of Dibra recognized another kind of pledge that was the pledge with no deadline. This kind of tool was applied for the immovable property such as land. In such a case, the pledge as a mean of fulfilling the obligation used to undergo to a certain formality. Thus, according to Canon, the land owner stated to the one who took the money that: "This land is yours to work it and obtain the production until the day that I give you the money"[43]. So, the owner of the immovable property did recognize to the lender one of three property rights, that of the possession, until the moment he met the monetary obligation to the lender. The procedures were very detailed compared with other Canons. Also, the bail (earnest) comes with a different name from all other Canons. It was qualified as "qefil", a term not found in the Albanian customary law.

"Qefili" was the negotiator between the buyer who had not enough money to carry out the purchase of an item and the seller. The purpose and main function of the negotiator (intermediary) was to ensure the execution of the obligation in the sale contracts by the buyer. According to the Canon of Dibra, subject to bail could be anyone. In the Canon there were not definitely and explicitly excluded women or children. Indirectly, the Canon accepted as his subject of bail, mainly male heads of the family, paterfamilias, with high moral integrity and dignity. We say this because the Canon stated that: "Anyone had the right to enter "qefil" […] but is accepted only those who are known for trust and manhood"[44]. Canon provided a fixed term agreement by the parties for the obligation fulfillment by the debtor. In case of expiry of that period, the obligation to

[35] GOCI, Haxhi, *Canon of the province of Benda,* publishing house OMBRA GVG, Tirana, 2010, article 2–5, p. 103.
[36] GOCI, Haxhi, *Canon of the province of Benda,* publishing house OMBRA GVG, Tirana, 2010, article 1–5, p. 105.
[37] GOCI, Haxhi, *Canon of the province of Benda,* publishing house OMBRA GVG, Tirana, 2010, article 4, p. 105.
[38] GOCI, Haxhi, *Canon of the province of Benda,* publishing house OMBRA GVG, Tirana, 2010, article 6, p. 109.
[39] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2164, p. 491.
[40] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2193, p. 500.
[41] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2172, p. 492.
[42] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2246, p. 508.
[43] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article, p. 2247, p. 508.
[44] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2258, p. 509.

fulfill the contract object, used to pass on *qefil* – the guarantor or the intermediary as it was called differently. To the debtor, who did not meet the obligation on the asked time, manner and amount, were not aided anymore by the community. The Canon of Dibra sanctioned that everyone had to be careful towards such debtors. For them, it was worth the customary rule that "you give them with hand […] and you take from them with foot"[45].

6. The Canon of Lek Dukagjini

The Canon of Lek Dukagjini recognized as tools for the execution of the obligations the earnest too, in the fifth book of the Canon of Lek Dukagjini.

As in all Canons addressed above, the earnest had the same definition. Thus, according to the Canon of Lek Dukagjini, earnest was considered the amount of money that was given before the item had been purchased[46]. In this Canon it was not provided a certain solemn procedure for the earnest allocation. The Canon stated that the sale contract was considered executed, if the buyer had given the seller a hundred monetary units as a down payment (earnest). And in this Canon, the institution of repentance for the successful finalization of the parts in the sale contract was not recognized. The Earnest in such a case was considered lost for the party that did not meet its obligations stemming from him by the execution of the contract.

Pledge was included in the sixth book of the Canon of Lek Dukagjini. The giving of pledge, according to the Canon norms, intended a comprehensive fulfillment of the contract. Object of pledge could be any item, the value of which was equal to or greater than the object of the contract required to be executed[47]. The pledge would be considered lost if it was not realized in the time specified on the binding agreement between the parties. In such a case, the seller had the right to benefit the assigned value of the contract by selling the pledged item left by the buyer. As in any Canon of Albanian customary law, the difference in monetary value, between the collateral sale and contract value, the lender returned to the party who had not fulfilled the obligation, to the borrower.

Also, the promise was another form of ensuring the fulfillment and execution of the contract. Object of the contract ensured by promise could be the accomplishment of certain obligations such as: in the field of health, family relations, the means of transport used at the time etc. Usually, object of the contract was money but also certain items, whether movable or immovable. Canon of Lek Dukagjini sanctioned the rule that "speaking, (promise) is at the bottom of the purse"[48]. This meant that the party making a promise was obliged to keep it, if the other party had always fulfilled its requested obligation.

Canon of Lek Dukagjini, in its eighth book, provided the bail as another tool to ensure the execution of the contract. Bail was treated by Canon norms as an institution of honor. This meant that the guarantor was a much respected figure in fulfillment of the obligation. In the role of the guarantor was required to be a person with popularity, high moral integrity as well as dignity and confirmed personality within the community. A particularity of the Canon of Leka, in relation to many other norms of Albanian customary law, was that, the obligation was fulfilled by the guarantor when the debtor died. And not, as accepted in other Canons, fulfilled first by the heirs of the debtor, and in case of no fulfillment by them, it was fulfilled by the guarantor.

As in any Canon norms of the Albanian customary law, even in the Canon of Leka the bail was gratuitous, without reward. The Canon sanctioned that: "[…] as a bail with compensation no one can enter.[49]" Bail was subject to a given procedure. According to the Canon, the guarantor stated that: "[…] I am taking the role of the bailer, but if you do not mind to pay the obligation, you better tell me now to prepare myself for its fulfillment, because I cannot stand personal supreme dishonor."[50]. The debtor had the obligation to previously announce his guarantor to pay the debit to his creditor. When the debtor could not meet the obligation, to the guarantor was recognized the right to inform the community about the failure of accomplishment of the debtor's obligation. The Community where the debtor lived used to compel the debtor to execute the contract to his creditor.

The debtor's no fulfillment of obligations was legitimized when he was in economic difficulty. In such a case, it was the guarantor who met the obligation. In any other case he was forced to fulfill the obligation. If not, he was ordered to pay a fine to the community where he lived in accordingly to the importance and prejudiced object. This in itself constituted a difference between the Canon of Lek Dukagjini with respect to many other customary norms operating in Albanian-speaking territories.

7. Conclusion

A common characteristic of Albanian customary law compared with European law was the existence and uniformity of the means provided to ensure the fulfillment of obligations in civil relationships (for that specific period of time).

The main sources of Albanian customary law were: Canon of Lek Dukagjin, Canon of Skanderbeg, Canon of Dibra, Canon of Benda, and Canon of Laberia. Despite minor differencies, all these canons provided the same tools for the execution of obligations under the Albanian customary law: the bail (escrow), the earnest, and the pledge.

A difference was made by the Canon of Dibra, which recognized the bail (earnest), but with a different name. It was qualified as "qefil", a term not found in the Albanian customary law. "Qefili" was the negotiator between the buyer who had not enough money to carry out the purchase of an item and the

[45] MARTINI, Xhaferr, *Canon of Dibra*, second edition, printing-"EMAL", Tirana, 2007, article 2268, p. 510.
[46] GJEÇOVI, Shtjefën, *Canon of Lek Dukagjini*, publishing house "Convention", printing- "Geer", Tirana, 1999, articles 543, p. 52.
[47] GJEÇOVI, Shtjefën, *Canon of Lek Dukagjini*, publishing house "Convention", printing- "Geer", Tirana, 1999, articles 502, p. 55.
[48] GJEÇOVI, Shtjefën, *Canon of Lek Dukagjini*, publishing house "Convention", printing- "Geer", Tirana, 1999, articles 516, p. 56.
[49] GJEÇOVI, Shtjefën, *Canon of Lek Dukagjini*, publishing house "Convention", printing- "Geer", Tirana, 1999, articles 687, p. 69.
[50] GJEÇOVI, Shtjefën, *Canon of Lek Dukagjini*, publishing house "Convention", printing- "Geer", Tirana, 1999, articles 688, p. 69.

seller. The purpose and main function of the negotiator (intermediary) was to ensure the execution of the obligation in the sale contracts by the buyer.

The Albanian customary law provided that obligations were executed voluntarily and precisely. This meant that, in general, the obligations arising from a contractual relationship, were executed and fulfilled on time, in the manner specified literally in the contract, and in the right quality, even though the main form of concluding a contract at that time was the verbal one.

Albanian customary law provided the Council of Elders, as on organ which acted for the resolution of disputes, referring to the Canon norms. If we refer to the contemporary legal terminology, we can say that the decision of the Council of Elders constituted an executive title, which meant that it was obligatory to be implemented by the parties in a civil dispute.

In conclusion, we can say that customary law had very detailed rules and procedure to ensure fulfillment of the obligations.

Treasure Trove in Roman Law, in Legal History, and in Modern Legal Systems. A Brief Summary*

*Iván Siklósi***

Abstract

In our study, the problems of regulation concerning treasure trove in Roman law and in its subsequent fate have been investigated.

First of all, the Roman law regimes of treasure trove have been analysed with special regard to the famous text from Paul (D. 41, 1, 31, 1) in which the original, classical, influential, but strongly discussed definition of treasure can be found.

After research in the sources and literature of Roman law, the subsequent fate of treasure trove systems needed to be scrutinised. Therefore, the different treasure trove systems in the Medieval, as well as in the modern age, and in some modern legal systems have been closely examined.

As compared to Roman law – especially to classical and Justinian's Roman law – utterly new regimes were created concerning treasure trove. Nevertheless, it is worth mentioning that Justinian's ruling was sometimes equally in force. Not only in the medieval legal sources, but even in the modern age similar regulations compared to the medieval legal constructions can be found, albeit Justinian's treasure trove related rules were also in force.

Justinian's Roman law regime of treasure trove, as well as the famous definition by Paul has survived in many contemporary civil codes. In this respect, the regulations of some modern civil codes were analysed.

Key words: *treasure; treasure trove; pecunia; monile; mobile; naturalis aequitas; droit écrit; droit coutumier; "public law" approach; "public law" elements.*

1. Introduction

Taking into consideration the numerous relevant sources in Roman law and in medieval legal history, treasure trove could be considered as a significant legal problem and, in addition, it bears great importance in modern legal systems as well.

As for the Roman law literature, a number of studies have been published on the one hand related to the general issues (cf., for instance, Pampaloni,[1] Perozzi,[2] Mayer-Maly,[3] Marchi,[4] Knütel[5]) and linked with certain details (see, for example, Schulz,[6] Nörr,[7] Scarcella,[8] Busacca,[9] Klingenberg[10]) of treasure trove on the other hand. The most specialised analysis of treasure trove in Roman law could be found in the great monograph of a Spanish romanist, Alfonso Agudo Ruiz, published in 2005.[11]

During the analysis of treasure trove patterns of Roman law, dogmatically as well as terminologically important questions appear which have not been clarified even today. Merely some examples need to be named here, such as only money or also other movables of any value could be regarded as treasure in classical Roman law? Can or cannot treasure trove be regarded as an autonomous way of acquiring ownership in classical

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1 M. Pampaloni: *Il concetto giuridico del tesoro nel diritto romano e odierno*, in: Per l'VIII centenario della Università di Bologna, Roma 1888, pp. 101 ff.

2 S. Perozzi: *Contro l'istituto giuridico del tesoro*, in: Monitore dei Tribunali, 31, Milano 1890, pp. 705 ff.

3 See, for instance, Th. Mayer-Maly: *Der Schatzfund in Justinians Institutionen*, in: P. Stein – A. D. E. Lewis (ed.): Studies in Justinian's Institutes in Memory of J. A. C. Thomas, London 1983, pp. 109 ff.; Idem: *Thensaurus meus*, in: Studia in honorem Velimirii Pólay septuagenarii, Szeged 1985, pp. 283 ff.; Idem: *Ducente fortuna*, in: R. S. Bagnall – W. V. Harris (ed.): Studies in Roman law in memory of A. Arthur Schiller, Leiden 1986, pp. 141 ff.

4 E. C. S. Marchi: *A 'fanciulla d'Anzio' e o instituto do tesouro*, Index 25 (1997), pp. 365 ff.

5 R. Knütel: *Von schwimmenden Inseln, wandernden Bäumen, flüchtenden Tieren und verborgenen Schätzen*, in: R. Zimmermann – R. Knütel – J. P. Meincke (hrsg.): Rechtsgeschichte und Privatrechtsdogmatik, Heidelberg 1999, pp. 549 ff.

6 F. Schulz: *Fr. 63 D. 41, 1 (Zur Lehre vom Schatzerwerb)*, SZ 35 (1914), pp. 94 ff.

7 D. Nörr: *Ethik von Jurisprudenz in Sachen Schatzfund*, BIDR 75 (1972), pp. 11 ff.

8 A. S. Scarcella: *Una nuova concezione del tesoro alla luce del C.I. 10.15.1*, Atti dell'Accademia Peloritana dei Pericolanti 58 (1989), pp. 188 ff.

9 C. Busacca: *Qualche osservazione sulle innovazioni introdotte dai Divi Fratres nel regime giuridico del tesoro*, in: Studi in onore di Angelo Falzea, IV, Milano 1991, pp. 133 ff.

10 G. Klingenberg: *Der „Angeber" beim Schatzfund*, in: F. Harrer – H. Honsell – P. Mader (hrsg.): Gedächtnisschrift für Theo Mayer-Maly, Wien 2011, pp. 237 ff.

11 A. Agudo Ruiz: *Régimen jurídico del tesoro en Derecho romano*, Madrid 2005.

Roman law? These questions should by all means be discussed. Since the word "treasure" does not exclusively appear in the Roman law sources as a technical term, problem of terminology is equally to be analysed. In addition, there are several additional, but not less important questions are to be studied, such as the different points of view by classical Roman jurists concerning the legal nature of treasure, the problems of treasure trove by a slave or a *filius familias*, and the development of the treasure trove regime in context of imperial constitutions.

After research in the sources and literature of Roman law, the subsequent fate of treasure trove systems needed to be likewise scrutinised. Therefore, the different treasure trove systems in the Medieval, as well as in the modern age, and in some modern legal systems have to be closely examined.

2. Treasure trove in Roman law

As for the Latin word "the[n]saurus" – originating from the Greek noun *thesauros* [12] – first appeared in non-legal writings in Rome. In several works from the time of the Republic, as well as of the Principate, the problem of treasure trove arose (see, for instance, the works by Plautus, Horatius, and Petronius).[13]

In the Roman legal texts the word *thesaurus* appeared only later. Originally, the Roman jurists did not distinguish the proprietor of the land from the owner of the treasure. According to the oldest Roman law tradition, represented even by the *fundatores iuris civilis* (Brutus and Manilius) in preclassical Roman law, treasure – as an *accessio* of the land – belongs to the owner of it (cf. Paul. D. 41, 2, 3, 3).[14]

The detailed rules of the treasure trove were only elaborated by classical Roman jurists. In this regard, the famous text by Paul (D. 41, 1, 31, 1) [15] – in which the original, classical, influential, but strongly discussed definition of treasure could be found – deserves an in-depth analysis. According to Paul, *"thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat"* ("Treasure is an ancient deposit of a valuable movable object, the memory of which is no longer sustained, so that it now has no owner any longer.").

Concerning the term *depositio pecuniae*, we can emphasise that – in the light of other relevant sources (Paul. D. 47, 9, 4, 1; Paul. D. 50, 16, 5 pr.; Herm. D. 50, 16, 222) – not only money, but generally further movables of great value could be regarded as treasure, even in classical Roman law. On the basis of several postclassical sources – which contain the words *monile* and *mobile* in the scope of defining "treasure" – it could theoretically be concluded that only money could be regarded as treasure in classical Roman law, though it seems more likely that the above-mentioned term *depositio pecuniae* referred to each and every movable object of value even in classical Roman law.

As for the expression *iam dominum non habeat* mentioned in Paul's text: since treasure, in principle, has or may as well have an owner, it cannot be regarded as *res nullius*. The other observation by Paulus – *cuius non exstat memoria* – can be considered as a dogmatically more relevant element, because the owner of treasure seems to be in a "memory hole". As a result of practical considerations, treasure can be regarded as an object the ownership of which cannot be actually clarified.

Since treasure is not *res nullius* in a strict (technical) sense, the acquisition of its ownership cannot be regarded as *occupatio* – which is carried out as a result of *apprehensio* – but *inventio*. It is, however, questionable whether classical Roman jurists institutionalized an absolutely autonomous way of acquiring ownership, which is different from *occupatio*. In our opinion, treasure trove could be regarded as an autonomous way of acquiring ownership in Roman law, however, it is probable that this was so merely from Hadrian's time.

The *locus* of treasure trove is not disputed in Roman law literature since classical, postclassical, and even Justinian Roman law focused only the treasures which had been found in an immovable – contrary to the medieval and modern jurisprudence, in which treasure trove in any movable property is also dealt with.

Especially on the basis of texts by the early classical jurists (for instance Labeo), but even by the later classical jurists, it can be observed that the word *thesaurus* was not only used in strict legal (technical) sense but also in a non-technical sense. In these fragments *thesaurus*, of course, has nothing to do with treasure trove as one of the original ways of acquiring ownership (see, for instance, Pomp. D. 10, 4, 15; Ulp. D. 10, 2, 22 pr.; Iav. D. 34, 2, 39, 1; Pap. D. 41, 2, 44 pr.).

Lots of debates have arisen from a *filius familias* (under the authority of his father) or a slave finding treasure in an immovable property – neither of whom was able to acquire ownership for them. In this respect, the texts by Tryphoninus (D. 41, 1, 63) are relevant.[16]

Considering the imperial constitutions related to treasure trove, the most famous and significant regulation was introduced by Hadrian. His constitution can be described as a *media sententia* compared to the different prior opinions by classical jurists. Hadrian's constitution, equally cited in the Institutes of Justinian, is also known from an earlier, though not a legal

[12] See, for instance, W. H. Gross, in: *Der kleine Pauly* (hrsg. von K. Ziegler – W. Sontheimer – H. Gärtner), 5, München 1979, s. v. *thesauros*; H. G. Liddell – R. Scott: *A Greek-English lexicon*, Oxford 1940, s. v. *thésauros*.

[13] See P. Bonfante: *Corso di diritto romano. La proprietà*, II/2, Milano 1968, pp. 132 ff.; Knütel: *op. cit.* p. 574; Agudo Ruiz: *op. cit.* pp. 65 ff.

[14] *„Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thensaurum cepisse, quamvis nesciat in fundo esse…"* Cf., for example, Nörr: *op. cit.* p. 14.

[15] *„Thensaurus est vetus quaedam depositio pecuniae, cuius non exstat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est thensaurus: cuius etiam furtum fit."* Cf., for instance, F. Schulz: *Classical Roman law*, Oxford 1951, p. 362; V. Arangio-Ruiz: *Istituzioni di diritto romano*, Napoli 1960[14], p. 191; Bonfante: *op. cit.* pp. 128 ff.; M. Kaser: *Das römische Privatrecht*, I, München 1971[2], p. 426; Mayer-Maly: *Thensaurus meus* (cit.), pp. 283 ff.; Marchi: *op. cit.* pp. 368 ff.; Knütel: *op. cit.* p. 573; Agudo Ruiz: *op. cit.* p. 31 ff.

[16] Cf. Schulz: *Fr. 63 D. 41, 1…* pp. 94 ff.; Agudo Ruiz: *op. cit.* pp. 92 ff.

source, *Historia Augusta* (*Vita Hadr.* 18, 6).[17] With regards to treasure trove, Hadrian ruled that if anyone made a find on their own property, they might keep it, if on another's land, they should turn half of the treasure over to the owner thereof, if on state premises, they should share the treasure equally with the *fiscus*.

Yet later – on the basis of the text by Callistratus (D. 49, 14, 3, 10) – the *divi fratres*: Marcus Aurelius and Lucius Verus fundamentally modified Hadrian's concept. According to their constitution, every treasure – which had been found in a non--negotiable thing – belonged to the emperor and, in addition, every treasure needed to be reported to the *fiscus* (cf. Call. D. 49, 14, 3, 11 and Call. D. 49, 14, 1 pr.) – which regulatory attitude implies a "public law-approach".[18]

The rather obscure constitution of Alexander Severus – which is often disregarded in Roman law literature – is only mentioned by *Historia Augusta* (*Vita Alex.* 46, 2).[19] According to this constitution, a part of the treasure belonged to the finder, but when the treasure was too precious, a part of it belonged to imperial authorities. Unfortunately, the background and the exact content of these rules are unknown, and as a result we cannot come to any well-founded conclusions on the basis of such an uncertain source.

As for the postclassical Roman law, the imperial constitutions concerning treasure trove are to be mentioned (cf. CTh. 10, 18 and C. 10, 15). In this respect, perhaps the most notable postclassical ruling related to treasure trove was created by the constitution by Leo and Zeno in the year of 474 AD which, on the one hand, reinstated the regime institutionalised by Hadrian and, on the other hand, established noteworthy and substantial new rules related to treasure trove, which often appear even in the modern era.[20]

It is well-known that Hadrian's regulations were implemented by Justinian, according to his Institutes (2, 1, 39).[21] It is worth mentioning that only Hadrian's constitution was cited in Justinian's Institutes, while the above-mentioned constitution by Leo and Zeno was disregarded in this law-book. According to Inst. 2, 1, 39, "if a man found a treasure in their own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in sacred or religious premises. If they found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the land; and upon this principle, if a treasure was found in a land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder. Consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to them, and half to the treasury or the State." This brief text consists of seven cases and – being a legal source – it is more accurate and precise than the above-mentioned text in *Historia Augusta*. Justinian also referred to the *naturalis aequitas* ("natural equity") which had not been mentioned in *Historia Augusta*, but which was referred to nonetheless in the text of Gratianus', Valentinianus', and Theodosius' imperial constitution, published in the year of 380 AD (cf. CTh. 10, 18, 2).

Nevertheless, another solution was in force in the Ostrogothic Kingdom at the same time. It can be assumed on the basis of a brief text by Cassiodorus (*Variae*, 6, 8, 6) that Theodoric the Great gave all treasure the *aerarium*.[22]

3. Treasure trove in the Medieval and in modern age

As compared to Roman law – especially to classical and Justinian's Roman law – utterly new regimes were created concerning treasure trove. Nevertheless, it is worth mentioning that Justinian's ruling was sometimes equally in force. In this respect, the *constitutio (Regalia sunt hec)* of the Holy Roman Emperor, Frederick Barbarossa (1158) could be referred to, in which the solution by Justinian appeared, that is half of the treasure belonged to the finder.[23]

However, the Constitutions of Melfi by Frederick II (*Constitutiones Regni Siciliae*, 3, 35, in the year of 1231) gave the whole treasure to the *fiscus*.[24]

According to the famous law-book of Eike von Repgow, the Mirror of the Saxons (*Sachsenspiegel*, 1, 35), "every treasure hidden in the ground" („al schat under der erde begraven") belongs to the Emperor.[25]

However, according to the *Schwabenspiegel* (347), one fourth of the treasure belongs to the finder.[26]

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[17] *„De thesauris ita cavit, ut, si quis in suo repperisset, ipse potiretur, si quis in alieno, dimidium domino daret, si quis in publico, cum fisco aequabiliter partiretur."* Cf. Bonfante: *op. cit.* p. 131. Knütel: *op. cit.* p. 571.

[18] Cf. Busacca: *op. cit. pp.* 133 ff.; Agudo Ruiz: *op. cit.* pp. 95 ff.; Klingenberg: *op. cit.* pp. 242 f.

[19] *„Thesauros reppertos iis qui reppererant donavit et, si multi essent, addidit his eos quos in suis habebat officiis."* Cf. Bonfante: *op. cit.* p. 135; Busacca: *op. cit.* p. 154; Agudo Ruiz: *op. cit.* pp. 106 f., with summary of the relevant literature.

[20] Cf. Mayer-Maly: *Ducente fortuna* (cit.), p. 142; Agudo Ruiz: *op. cit.* pp. 108 ff.; Klingenberg: *op. cit.* p. 241.

[21] *„Thesauros, quos quis in suo loco invenerit, divus Hadrianus, naturalem aequitatem secutus, ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera sed fortuitu invenerit, dimidium domino soli concessit. Et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis."* Cf., for instance, Mayer-Maly: *Der Schatzfund in Justinians Institutionen* (cit.), pp. 126 ff.; Agudo Ruiz: *op. cit.* p. 85.

[22] *„Depositivae quoque pecuniae, quae longa vetustate competentes dominos amiserunt, inquisitione tua nostris applicantur aerariis, ut qui sua cunctos patimur possidere, aliena nobis debeant libenter offerre."* Cf. Bonfante: *op. cit.* p. 127; Marchi: *op. cit.* p. 369; Knütel: *op. cit.* p. 573[88]; Agudo Ruiz: *op. cit.* p. 37.

[23] „…dimidium thesauri inventi in loco cesaris, non data opera, vel in loco religioso…" Cf. Th. Mayer-Maly: *Der Schatz im Acker*, in Idem: Rechtsgeschichtliche Bibelkunde, Wien – Köln – Weimar 2003, pp. 48 f.

[24] „Scire enim debet unusquisque inventiones regni nostri, quarum dominus non apparuerit, ad fiscum specialiter pertinere." Cf. Mayer-Maly: *Der Schatz im Acker* (cit.), p. 49. Whole context: W. Stürner (hrsg.): *Die Konstitutionen Friedrichs II. für das Königreich Sizilien*, Hannover 1996, p. 402.

[25] „Al schat under der erde begraven diepher den eyn pluch geit horet zu der koninclichen gewalt." Cf. K. Zeumer: *Der begrabene Schatz im Sachsenspiegel I, 35*, Mitteilungen des österreichischen Instituts für Geschichtsforschung 22 (1901), pp. 420 ff.

[26] „…dem vinder sol daz vierteil werden." Cf. Th. Mayer-Maly: *Komponenten der Regelung des Schatzfundes im Schwabenspiegel*, in: D. Medicus – H.-J. Mertens – K. W. Nörr – W. Zöllner (hrsg.): Festschrift für Hermann Lange zum 70. Geburtstag, Stuttgart – Berlin – Köln 1992, pp. 185 ff.

In France, according to the *Établissements de Saint Louis* (I, 94), which summarised the thirteenth-century French customary law, no one but the king got a treasure consisting of gold, while silver treasures belonged to the baron, who had the so-called high justice in their lands (« Nus n'a fortune d'or, se il n'est rois. Celle d'argent est au seignor qui a grant joutise an sa terre. »). Obviously, this rule is closely related to the French law principle "nulle terre sans seigneur".[27] In the same work the definition of treasure could be discovered as well: "Treasure is when it is buried under the ground, and the earth has been disturbed" (« Fortune est don terre est effondrée. »).[28]

On the basis of the research of Coing,[29] it should be pointed out that not only in the medieval legal sources, but even in the modern age similar regulations can be found, albeit Justinian's treasure trove related rules were also in force. In the works by Hugo Grotius,[30] Simon van Leeuwen,[31] and Arnoldus Vinnius[32] again Justinian's regime was introduced. However, the rules stemming from the Medieval – according to which any treasure found should belong to the emperor – were still in force and were termed as a "ius commune et quasi iuris gentium" by Grotius and van Leeuwen, as well. For instance, van Leeuwen pointed out that any concealed treasures which a person may have found upon or in his own ground, belonged to themselves, but if any such treasure was found in the land of another person, one half thereof belonged to the owner of the premises, and the other half to the finder. In many countries, however, the treasure is appropriated by the government. As for Roman-Dutch Law, it can be regarded as uncertain, according to van Leeuwen's opinion.[33]

Concerning the French *droit coutumier* in the 17th century – on the basis of Jean Domat's famous *Les loix civiles dans leur ordre naturel* – we can refer to the rule according to which one third of the treasure belonged to the finder, one third to the landowner, and one third to the baron (« Seigneur haut Justicier »). When the finder was the landowner himself, the half belonged to them, and the other half to the baron.[34]

In the rules concerning treasure trove of the *Codex Maximilianeus Bavaricus Civilis* (1756)[35] and the *Allgemeines Landrecht für die Preußischen Staaten* (1794)[36] – which cannot be considered as civil codes in modern sense – reflects on the one hand Justinian's treasure trove system, and, in addition to all this, the influence of several medieval legal rules, as well.

4. Treasure trove in the modern legal systems

Justinian's Roman law regime of treasure trove, as well as the famous definition by Paul has survived in many contemporary civil codes.

In the modern French rules concerning treasure trove (see art. 716 of French *Code civil*[37]), the subsequent fate of the Roman law tradition could clearly be pointed out. Albeit the French *Code civil* achieved kind of a "symbiosis" between the earlier *droit écrit* and *droit coutumier*, the rules of the article related to treasure trove belong to the rules which prefer the Roman law solution to customary law. Regarding the new social order after the French Revolution, it is obvious that the solution of the earlier French customary law – according to which the one third of the treasure had belonged to the baron – was not allowed to be applied any longer. Since the French *Code civil* had greatly affected many subsequent civil law codifications, the treasure trove system of Roman law has survived in all legal systems inspired by French legal tradition (see, inter alia, the Chilean *Código civil* of 1855,[38] the Louisiana Civil Code of 1870,[39] the

[27] See F. Bourjon: *Le droit commun de la France et la coutume de Paris*, I, Paris 1747, p. 126: „il n'y a nulles terres… qui ne relèvent d'un Seigneur".

[28] Cf. J.-Ph. Lévy – A. Castaldo: *Histoire du droit civil*, Paris 2002, p. 538. Whole context: P. Viollet: *Les Établissements de Saint Louis*, Paris 1883, p. 164; *The Établissements de Saint Louis. Thirteenth-century law texts from Tours, Orléans, and Paris* (translated and with an introduction by F. R. P. Akehurst), Philadelphia 1996, pp. 60 f.

[29] H. Coing: *Europäisches Privatrecht*, I, München 1985, p. 300.

[30] *De iure belli ac pacis*, 2, 8, 7; cf. H. Grotius: *Inleiding tot de hollandsche rechtsgeleerdheid*, Graven-Haghe 1631, p. 18.

[31] S. van Leeuwen: *Het Rooms-Hollands-Regt*, Amsterdam 1708, p. 115.

[32] A. Vinnius: *Institutionum imperialum commentarius*, Amsterdam 1665[4], p. 176.

[33] Van Leeuwen: *op. cit.* p. 115.

[34] J. Domat: *Les loix civiles dans leur ordre naturel*, I, Paris 1745, p. 268.

[35] 2, 3, 4: „Gefundener Schätzenhalber, welche solange Zeit vergraben, eingemaurt, oder sonst verborgen gewest, daß man den Eigenthümer nicht mehr davon weiß, wird das General-Mandat von Anno 1752 hiermit folgendermassen erneuert. Soll man den Schatz in deren Theile theilen, wovon dem Fisco zwey Drittel zugehen, der Überrest aber dem Erfinder, wenn er den Fund auf seinem Eigenthum thut, verbleibt. Falls aber derselbe in fremden geschiehet, so theilt der Erfinder sothanes Drittel mit dem Eigenthümer des Orts, ausser da der Schatz nicht von ungefehr gefunden, sondern ohne des Eigenthümers Wissen und Willen mit Fleiß darauf nachgesucht oder gegraben worden, welchenfalls das ganze Drittel dem Proprietario Loci allein zugehört. Gebraucht man sich aber etwan gar Aberglaubischer Dingen hierunter, so verfallt man dadurch nicht nur in malefizische Straf, sondern der Antheil, welchen man sonst dabey gehabt hätte, gehet verlohren, und kommt dem Fisco zu, jedoch ohne Præjuditz des Eigenthümers, wenn er bey der Sach unschuldig ist."

[36] 1, 9, 86: „Wer zur Nachsuchung von Schätzen vermeintlicher Zaubermittel, durch Geisterbannen, Citiren der Verstorbenen, oder anderer dergleichen Gaukeleyen, es sey aus Betrug oder Aberglauben, sich bedient; der verliert, außer der sonst schon verwirkten Strafe, sein Anrecht auf einen etwa zufälliger Weise wirklich gefundenen Schatz." Cf. Mayer-Maly: *Ducente fortuna* (cit.), p. 144.

[37] „La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds."

[38] Art. 626: „El tesoro encontrado en terreno ajeno se dividirá por partes iguales entre el dueño del terreno y la persona que haya hecho el descubrimiento."

[39] Art. 3420: „One who finds a treasure in a thing that belongs to him or to no one acquires ownership of the treasure. If the treasure is found in a thing belonging to another, half of the treasure belongs to the finder and half belongs to the owner of the thing in which it was found."

Spanish *Código civil* of 1889,[40] and the Québec Civil Code of 1994[41]).

The Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 maintained a solution till 1846, according to which one third of the treasure belonged to the treasury.[42] The Austrian system of treasure trove is now based to a considerable extent on the treasure trove system of Justinian's rules.[43]

Since the German *Bürgerliches Gesetzbuch* of 1900 is a result of the researches of the Pandectist legal scholars, the liberal Hadrian-Justinian regime of treasure trove got into the German Civil Code due to the respect of the Roman law tradition.[44] In this regard Wieacker's opinion seems to be highly relevant: „Insbesondere das Bürgerliche Gesetzbuch von 1896 ist das spätgeborene Kind der Pandektenwissenschaft und der nationaldemokratischen, insoweit vor allem vom Liberalismus angeführten Bewegung seit 1848".[45] Since the BGB – besides the French *Code civil* – had an essential impact on many succeeding civil law codifications (see, inter alia, the Italian *Codice civile* of 1942, the Portuguese *Código civil* of 1966, and the Brazil *Código civil* of 2002), the Roman law regime of treasure trove has survived in these legal systems due to the French and the German legal tradition as well.[46]

The Swiss *Zivilgesetzbuch* of 1907 had a great effect, for example, on the new Italian *Codice civile*, and on many more civil codes. Still, the approach of treasure trove in Swiss law – according to which the treasure belongs to the owner of the property in which a hidden treasure has been found, while the finder has only a claim for an equitable fee[47] – had no influence on any later codifications.

As for the treasure trove system of the Hungarian Civil Code of 1959, a socialist legal approach was institutionalised, according to which the treasure ought to be offered to the state. In contrast to this, the prior Hungarian private law gave one third of the treasure to the finder, one third to the owner of the property in which the hidden treasure had been found, and one third to the Treasury. According to Section 132 of current Hungarian Civil Code, if a person finds a valuable object which has been hidden by unknown persons, or the ownership of which has otherwise been forgotten, he is obliged to offer it to the state. If the state fails to claim the object, it shall become the property of the finder; otherwise the finder shall be entitled to a finder's fee proportionate to the value of the object found. However, if the object found is a relic of great value or historic importance, its ownership may be claimed by the state. In the future the same rules are sustained, with regards to the relevant provisions of the new Hungarian Civil Code (5:64. § [1] – [3]).

English law – which has developed separately compared to continental civil law practices – maintains its old legal tradition[48] concerning the rules of treasure trove as well. According to the old common law and the *Treasure Act* of 1996 – in accordance with the general principles of the English Law of Property as well – the treasure belongs to the Crown or to the franchisee, if there is one.[49]

The leitmotiv of Scottish law – which belongs to the mixed jurisdictions – happens to be the same. According to the principle "quod nullius est, fit domini regis", treasure, as a kind of "bona vacantia", belongs to the Crown.[50]

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[40] Art. 351: „El tesoro oculto pertenece al dueño del terreno en que se hallare. Sin embargo, cuando fuere hecho el descubrimiento en propiedad ajena, o del Estado, y por casualidad, la mitad se aplicará al descubridor." Cf. J. M. Farré Alemán: *Código civil comentado y concordado*, Barcelona 2001, pp. 421 ff.; A. Roma Valdés: *La ley y la realidad en la protección del patrimonio arqueológico español*, International Numismatic Council, Compte rendu 48 (2001), pp. 69 ff. (= http://www.muenzgeschichte.ch/downloads/laws-espana.pdf).

[41] Art. 938: „Le trésor appartient à celui qui le trouve dans son fonds; s'il est découvert dans le fonds d'autrui, il appartient pour moitié au propriétaire du fonds et pour l'autre moitié à celui qui l'a découvert, à moins que l'inventeur n'ait agi pour le compte du propriétaire."

[42] Cf. U. Flossmann: *Österreichische Privatrechtsgeschichte*, Wien 2008[6], p. 175.

[43] Cf. 399.: „Von einem Schatze erhalten die Finder und der Eigentümer des Grundes je die Hälfte." See, for instance, G. Dembski: *Münzfunde und Münzsammlungen – die gesetzlichen Bestimmungen in Österreich*, International Numismatic Council, Compte rendu 48 (2001), pp. 66 ff. (= http://www.muenzgeschichte.ch/downloads/laws-oesterreich.pdf).

[44] 984.: „Wird eine Sache, die so lange verborgen gelegen hat, dass der Eigentümer nicht mehr zu ermitteln ist (Schatz), entdeckt und infolge der Entdeckung in Besitz genommen, so wird das Eigentum zur Hälfte von dem Entdecker, zur Hälfte von dem Eigentümer der Sache erworben, in welcher der Schatz verborgen war." Cf. H. J. Wieling: *Sachenrecht*, Berlin – Heidelberg – New York 2007[5], pp. 160 ff.; M. K. Hermans: *Der Schatzfund. Eine Gegenüberstellung der Rechtsverhältnisse an einem Schatz im deutschen und niederländischen Recht unter Berücksichtigung öffentlich-rechtlicher Sonderbestimmungen*, Münster 2011, pp. 10 ff.

[45] F. Wieacker: *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft*, in: uő: Industriegesellschaft und Privatrechtsordnung, Frankfurt am Main 1953, p. 15.

[46] See *Codice civile*, art. 932; *Código civil port.*, art. 1324; *Código civil bras.*, art. 607.

[47] *Schweizerisches Zivilgesetzbuch*, art. 723.

[48] Cf. H. Bracton: *De legibus et consuetudinibus Angliae* (ed. G. E. Woodbine), New Haven 1922, pp. 338 ff.; W. Blackstone: *Commentaries on the laws of England*, 1, Oxford 1765, pp. 285 f. Regarding the whole problem of treasure trove in English legal history see Ch. R. Beard: *The romance of treasure trove*, London 1933; G. F. Hill: *Treasure trove in law and practice from the earliest time to the present day*, Oxford 1936.

[49] *Treasure Act*, Section 4 (1). See, for example, R. Bland: *The Development and Future of the Treasure Act and Portable Antiquities*, in: S. Thomas – P. Stone (ed.): Metal Detecting and Archaeology, Woodbridge 2008, pp. 63 ff. (= http://www.muenzgeschichte.ch/downloads/Development%20Roger%20Bland.pdf).

[50] Cf. J. Erskine: *An institute of the law of Scotland, in four books, in the order of Sir George Mackenzie's institutions of that law*, I, Edinburgh 1824, p. 224; A. Saville: *The law and practice regarding coin finds. The treasure trove system in Scotland*, International Numismatic Council, Compte rendu 55 (2008), p. 13; A. C. Normand: *Review of treasure trove arrangements in Scotland*, Edinburgh 2003 (= http://www.scotland.gov.uk/Resource/Doc/47063/0023827.pdf), p. 5.

The "treasure trove systems" of the United States[51] are quite heterogeneous. Since Louisiana and Puerto Rico belong to the so-called mixed legal systems, their rules considering treasure trove are based on Roman law. As for the case law of treasure trove, it is very divergent in the Member States of the USA. It is worth mentioning that the principle of equitable division can also be found in the legal literature. As for some treasures of great importance, federal acts ought to be applied (cf., for instance, the *Antiquites Act* of 1906, the *National Historic Preservation Act* of 1966, and the *Archeological Resources Protection Act* of 1979).

5. Conclusions

The original concept by Hadrian related to treasure trove is currently amended with numerous "public law elements"[52] even in those legal systems which are based on the Roman law tradition, since it is obvious that nowadays the treasures of great archeological and cultural importance would not to be exclusively awarded to the finder or, for instance, the landowner. Hadrian's regime is to be evaluated in its own time and context, that is in classical Roman law. The individualist and liberal approach of classical Roman law is also reflected in classical law, as well as Justinian's regime of treasure trove. An exclusively "private law approach" seems to be unsustainable today, as the ruling of treasure trove deserves a complex approach according to which any treasure could be regarded as a national heritage or even a kind of "common heritage of mankind" (of course not in the "technical" sense of modern international law). The regulation of treasure trove has only to serve this fine purpose.

[51] Cf. R. H. HELMHOLZ: *Equitable division and the law of finders*, Fordham Law Review 52 (1983), pp. 313 ff.; J. M. KLEEBERG: *The law and practice regarding coin finds. Treasure trove law in the United States*, International Numismatic Council, Compte rendu 53 (2006), pp. 13 ff. (= http://www.muenzgeschichte.ch/downloads/laws-usa.pdf).

[52] See to the problem of the distinction between private law and public law G. HAMZA: *Reflections on the Classification (divisio) into 'Branches' of Modern Legal Systems and Roman Law Traditions*, in: Fides Humanitas Ius. Studii in onore di Luigi Labruna, IV, Napoli 2007, 2449 – 2476.

Veränderung der Beschaffenheit der „annona militaris“ in der späten Kaiserzeit

(The Meaning Changes of the Annona Militaris in the Later Roman Empire)

Miklós Kelemen *

Abstract

During the period of the late Roman Empire in addition to transforming the government structure of the empire, Diocletian's (284–305) reforms changed the foundations and methods of administration and finance significally. The constitution of the so-called annona-system is to be highlighted with an outstanding importance among the substantial changes. In this system a particular provincial unit supplied and remunerated directly the officials as well as the army stationed at its territory.

During the reorganization, associated with the new system, the annona militaris tax became the main tax of the provincial population. During the Severan era, this type of taxation meant the compulsory delivery of agricultural crops and it was imposed on the population in extraordinary cases. This unofficial tax in-kind assured the maintenance and nutrition of the army. The ad hoc obligation and occasional practice of the compulsory delivery was formalized and organized systematically by Diocletian, his reforms developed it into an imperial-wide administration and funding system.

As an important element of the changes in connection with the reforms, the annona (i.e. a payment in kind issued within the scope of military supplies) became the primary funding source for the army and the administration instead of the stipendium (regular military pay in cash).

It should be pointed out, that during the 2nd and 3rd centuries the annona militaris had not served the logistic needs of the garrison troops stationed in the territories inhabited by the tax payer population yet, but the provision and maintenance of the field armies that had left their military bases for taking part in military operations.

The annona militaris, by its nature still fulfilled the function of the general military supplies. The mobile field forces mobilized for the duration of campaigns continued to receive in addition to the kind benefits also the military supplies i.e. expeditionalis annona.

Due to the nature of the new type of service pay, the payment of the annona was occasionally hampered. There was a possibility of converting in-kind benefits into cash payment (replacing the annonaria species with its cash-equivalent value), especially in case of shortage of goods, spoilage of the produce or even in case of delays in receiving in-kind benefits. Converting in-kind benefits into cash (adaeratio annonae) was possible only in special cases justified by exceptional, i.e. other than administrative organizational conditions. Executing it generally and systematically was prohibited.

It's scientifically known that the disfunctions caused by the conversion of the annona into cash benefits could only be solved by the generalization and institutionalization of cash payments. Due to the economic differences between the western and the eastern part of the empire and the fall of the Western Roman Empire, there was a possibility of transforming the annona into cash payment primarily in the Eastern Roman Empire, that was economically and governmentally stabilized by the reforms of the Byzantine emperor Anastasius (491–518).

Key words: *annona; annona militaris; annona expeditionalis; annona adaerata; annona-system; Diocletian; taxation in the later Roman Empire; Later Roman Empire; history of public administration.*

1. Änderungen in der Verwaltungsfinanzierung und ihre Neudefinierung

Für die Veränderungen des 3. und 4. Jahrhunderts, die grundlegende Umwälzungen in der Geschichte des Römischen Reichs gebracht haben, gilt die allgemeine Feststellung von Ausbüttel bezüglich der Neuerungen der römischen Verwaltungsgeschichte mit besonderem Nachdruck: „Den verschiedenen administrativen Änderungen lag niemals irgendein staatspolitisches Konzept zugrunde, vielmehr reagierten die Kaiser auf Erfordernisse und Probleme, die sich im Laufe der Zeit ergaben“.[1] Die wichtigste – in der Fachliteratur regelmäßig betonte – Besonderheit der römischen Verwaltungsorganisation war es, dass sie effiziente und praktische Lösungen in der Gestaltung von

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[1] F. M. Ausbüttel: *Die Verwaltung des Römischen Kaiserreiches. Von der Herrschaft des Augustus bis zum Niedergang des Weströmischen Reiches*, Darmstadt 1998, 194. Zu einer ähnlichen Schlussfolgerung gelangt Schmidt-Hofner in der Einführung seines Buches über die Herrschaft von Valentinian I. („Der römische Kaiser regierte nicht, er reagierte“) und auch in der Zusammenfassung des Werkes: „Der Großteil der Regierungstätigkeit hatte demnach affirmativen und reagierenden Charakter.“ S. Schmidt-Hofner: *Reagieren und Gestalten: der Regierungsstil des spätrömischen Kaisers am Beispiel der Gesetzgebung Valentinians I.*, München 2008, 11 und 337.

Institutionen immer nur als Reaktion auf entstandene Situationen und Probleme ausarbeitete.[2]

Die Reform der spätrömischen Staatsorganisation unter der Herrschaft von Kaiser Diokletian (284–305) gestaltete das Regierungssystem des Römischen Reiches um, und sie veränderte erheblich die Grundlagen der Verwaltungsfinanzierung samt ihrer Methoden und Formen. Von den Änderungen ist die Aufstellung des sog. „verhältnismäßigen örtlichen Versorgungssystems" mit besonderem Nachdruck hervorzuheben. Im Rahmen der neuen Struktur versorgte und besoldete die gegebene Verwaltungseinheit das auf ihrem Gebiet stationierte Militär wie auch das Beamtentum unmittelbar, deshalb wurde die Abgabenpflicht der Bevölkerung auf dem Gebiet einer gegebenen Verwaltungseinheit gemäß den Bedürfnissen und der Stärke des örtlich zu versorgenden Militärs und der Bürokratie festgelegt.

Im Laufe der Umorganisierung im neuen System wurde die sog. *annona militaris* zur wichtigsten Steuerart der Bevölkerung einer Provinz. Die genannte Steuerart bedeutete zur Zeit von Severus noch eine Naturalabgabe zur Verpflegung und Versorgung des Heeres, und sie wurde zur Deckung der gegebenenfalls entstandenen Bedürfnisse außerordentlich erhoben. Die gelegentliche Pflicht zur außerordentlichen Naturalabgabe und die Praxis der fallweisen Beitreibung wurden durch die Reformen von Kaiser Diokletian zu einem Verwaltungsfinanzierungssystem auf Reichsebene entwickelt (System der *annona-munera).*

Das dritte Element der mit den Reformen verbundenen Veränderungen war die Umgestaltung der den Mitgliedern des Heeres und der Ziviladministration zustehenden ordentlichen Bezüge, des in den frühen Kaiserzeiten bar ausgezahlten Solds, des *stipendium*s, in ein Gehalt in Naturalien, die in Form der sog. *annona* ausgeteilt wurde. Dadurch wurde die zur Verpflegung des Heeres gehörende und in Naturalien ausgegebene *annona militaris* zur wichtigsten Form der Heerfinanzierung, und sie wurde auch Personen der Verwaltung als ordentliche Bezüge ausgeteilt.

Komplexität und Nuanciertheit des spätrömischen Steuersystems und der Verwaltungsfinanzierungspraxis werden bereits in den frühesten Arbeiten über dieses Thema betont.[3] Die Knappheit an Quellen und die daraus resultierende Schwierigkeit der Aufstellung von Theorien werden auch in der neueren Fachliteratur festgestellt, und diese Besonderheit kennzeichnet insbesondere das sich gegenseitig ergänzende System von „Bodensteuer" *(iugatio)* und „Kopfsteuer" *(capitatio),* das ein bestimmender Faktor des neuen Systems war.[4] Várady charakterisiert die gegen Mitte des letzten Jahrhunderts entstandenen Werke über das System *capitatio-iugatio* schlichtweg wie folgt: Es sind Arbeiten, die „die Unerklärbarkeit der Grundlagen offen oder schweigend hinnehmen."[5]

Befasst man sich mit der Fachliteratur dieses Themas, kann man eine weitere Besonderheit beobachten: Die Untersuchung der spätrömischen öffentlichen Lasten fokussiert vor Allem auf die Abgabenpflichten der Agrarbevölkerung, weil die sog. *annona*, die zur Finanzierung der Reichsbürokratie, sowie der Versorgung und Bezahlung des Militärs diente, einen besonderen Stellenwert besaß. In der Wissenschaft ist es allgemein bekannt, dass die *annona,* die im Mittelpunkt der „Staatsfinanzierungsreform" unter Diokletian stand, von der ländlichen Bevölkerung produziert und als Steuer an die Staatsinstitutionen abgeführt wurde. Dabei ist nicht zu übersehen, dass in der spätrömischen Staatsfinanzierung neben den „Agrarsteuern", welche die Einnahmen bedeuteten, auch die „bürgerlichen öffentlichen Pflichten" *(civilia munera)* eine wichtige Rolle spielten, weil sie die Beitreibung deren ermöglichten. Mit den Worten von Kolb ausgedrückt bildeten sie sogar die „zweite Säule der römischen Steuerwirtschaft".[6] Im Hinblick auf die obigen Ausführungen scheint es wohl begründet, die spätrömische Praxis des Umgangs mit öffentlichen Geldern als ein System von Steuern und öffentlichen Pflichten (*annona–munera*-System) auszulegen.

Mit Rücksicht auf die Komplexität des spätrömischen Umgangs mit öffentlichen Geldern und der Verwaltungsfinanzierung besteht hier nicht die Möglichkeit, das verhältnismäßige örtliche Versorgungssystem und die *annona* eingehend zu behandeln. Hier sollen die allgemeinen Kennzeichen der wirtschaftlichen Tätigkeit der öffentlichen Hand zur Zeit von Diokletian an nur tangential beleuchtet werden, während begriffliche und inhaltliche Fragen der als neue Form der Verwaltungsfinanzierung und -entlohnung institutionalisierten *annona militaris* überwiegend mit Hilfe von Textquellen des römischen Rechts,

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[2] R. MacMullen: *Roman government's response to crisis AD 235–337*, New Haven – London 1976, 11; Gy. Németh (hrsg.): *Római történelem* [Römische Geschichte], Budapest 2007, 723. Ein Repräsentant der Fachliteratur benutzt im Zusammenhang mit dieser eigenartigen „Zufälligkeit" den Ausdruck „Regieren ohne Regierung" *(Government without Bureaucracy)*, und weist darauf hin, dass im Verwaltungssystem der frühen Kaiserzeit die Verwaltungsaufgaben nicht mit Hilfe einer berufsmäßig funktionierenden Bürokratie gelöst wurden, sondern kostengünstig mit Hilfe von mit Oberbeamten persönlich verbundenen Menschen, von Soldaten, sowie von Privatpersonen (vor allem städtischen Oberbeamten), die zur Wahrnehmung von Verwaltungsaufgaben verpflichtet waren. P. Garnsey – R. Saller: *The Roman Empire (Economy, Society and Culture)*, University of California Press 1987, 20.

[3] H. Bott: *Die Grundzüge der diokletianischen Steuerverfassung*, Darmstadt 1928, 23; A. Piganiol: *La capitation de Dioclétien*, Revue historique 176 (1935), 1–13; A. Déléage: *La capitation dus Bas-Empire*, Mâcon 1945, 254–261; A. H. M. Jones: *Census, Records of the Later Roman Empire*, Journal of the Roman Studies 43 (1953), 49–64; J. Karayannopulos: *Das Finanzwesen des frühbyzantinischen Staates*, München 1958, 29; L. Várady: *Contributions to the Late Roman Military Economy and Agrarian Taxation*, Acta Archaeologica 14 (1962), 403–438.

[4] W. Goffart: *Caput and colonate: towards a history of late Roman taxation*, Toronto 1974, 110; H. Dazert: *Ergänzungsabgaben und außerordentliche Lasten im römischen Reich im 4. und 5. Jahrhundert nach Christus*, Freiburg 1985, 2; U. Hildesheim: *Personalaspekte der frühbyzantinischen Steuerordnung. Die Personalveranlagung und ihre Einbindung in das System der capitatio-iugatio*, Pfaffenweiler 1988, 177; R. Duncan-Jones: *Structure and scale in the Roman economy*, Cambridge 1990, 119–121. Auf ähnliche Probleme der Untersuchung der auf die spätrömische Zeit folgenden, vom 7. Jh. zählenden byzantinischen Finanzverwaltung macht Brandes aufmerksam. W. Brandes: *Finanzverwaltung in Krisenzeiten: Untersuchungen zur byzantinischen Administration im 6.–9. Jahrhundert*, Frankfurt am Main 2002, 8–18.

[5] Várady L.: *Későrómai hadügyek és társadalmi alapjaik – A Római Birodalom utolsó évszázada (376–476)* [Spätrömisches Heerwesen und seine gesellschaftlichen Grundlagen – Das letzte Jahrhundert des Römischen Reichs], Budapest 1961, 313.

[6] A. Kolb: *Transport und Nachrichtentransfer im Römischen Reich*, Berlin 2000, 167.

vor allem aber von Ausschnitten aus kaiserlichen Verordnungen detailliert unter die Lupe genommen werden.

2. Bedeutungsgehalt und Auslegung der „annona militaris" bis zur späten Kaiserzeit

Die ordentlichen Bezüge der im Heer dienenden Soldaten – und der aus dem bewaffneten Personenbestand ausgewählten und zu Beamtenarbeiten beorderten Gruppen[7] – der frühen Kaiserzeit bestand aus dem in Geld ausbezahlten Sold, dem *stipendium*,[8] und aus dem *donativum,* das als Belohnung funktionierte, einen außerordentlichen Charakter hatte und ebenfalls in Geld verteilt wurde.[9] Das *stipendium* konnte – in engem Zusammenhang mit seiner ersten Bedeutung – das (bezahlte) Dienstjahr des Soldaten bedeuten, wie auch einen viermonatigen Abschnitt des Dienstjahres mit abschließender Soldzahlung.[10]

Die von den regelmäßigen Bezügen des Militärs und des Beamtenstandes sowohl theoretisch als auch praktisch verschiedene *annona militaris* funktionierte als eine nicht im Bereich der Entlohnung, sondern im Bereich der Verpflegung und der Versorgung des Heeres eingeführte Institution. Ihre besondere Bedeutung kam das erste Mal in der Zeit von Severus zum Vorschein, als die Versorgung des Heeres nicht durch Beschaffungen gegen Bezahlung, sondern durch öffentliche Pflichtabgaben gelöst wurde, die gemäß kaiserlicher Steuervorschrift *(indictio)* beigetrieben wurden. Es ist nachdrücklich darauf hinzuweisen, dass die *annona militaris* im Laufe der 2–3. Jahrhunderte noch nicht zur Befriedigung der Bedürfnisse des auf dem Gebiet der Steuerzahler „ständig" stationierten Militärs diente, sondern zur Verpflegung und Versorgung der an einem Feldzug *(expeditio)* beteiligten, *expeditionalis* genannten Streitkräfte.[11]

Was die Bestimmung der *annona militaris* betrifft, war sie ein in Natura gezahlter und auch in Naturalien verteilter Bezug, sie funktionierte aber bis zum Ende des 3. Jahrhunderts sicherlich nicht als ein in Natura gezahlter Sold, aber auch nicht als Naturalergänzung oder Soldzuschlag zum *stipendium* oder zum *donativum.*[12] Die dem Militär gewährten Leistungen, die anfangs als eine Institution der Logistik funktionierten, wurden durch die Staats- und Steuerreformen von Diokletian zur ordentlichen Form der regelmäßigen Entlohnung des Heeres und der staatlichen Administration. Sie beinhaltete den eigentlichen Naturalsold *(annona)* und auch den Zuschlag für das Futter *(capitum).* Parallel zur Umgestaltung der Bestimmung der *annona militaris* wurde die zur severinischen Zeit noch als außerordentlich geltende Naturalabgabe, die *annona militaris,* zur „Hauptsteuer" der Bevölkerung, und die *indictio,* die kaiserliche Verordnung über die Abführung, wurde zur vorrangigen Form der staatlichen Steuerveranlagung.[13]

Im Mittelpunkt des in der späten Kaiserzeit institutionalisierten neuen „verhältnismäßigen örtlichen Verpflegungssystems" stand das Ziel, dass Versorgung, Entlohnung und Befriedigung sonstiger Bedürfnisse des auf dem betreffenden Gebiet stationierten Militärs und der Bürokratie von der örtlichen Bevölkerung – durch Leistung der ihnen vorgeschriebenen öffentlichen Abgaben – bestritten werden sollten. Die Bestandslisten der Militäreinheiten *(quadrimenstrui breves)* wurden von den Kommandanten regelmäßig an die Präfekturen geschickt, wo die Angelegenheiten der *annona militaris* auf höchster Ebene behandelt, und dabei die Höhe der den Einheiten zustehenden Soldbeträge gemäß den Bestandslisten festgelegt wurde. Im Hinblick auf die Korruptionsmöglichkeiten bei nicht wahrheitsgetreuen Datenlieferungen schreibt eine diesbezügliche kaiserliche Verordnung (C. 1, 42, 1) nachdrücklich vor, dass die hohen Beamten und ihre Ämter die genannten Bestandstabellen „ohne Verzug, wahrheitsgemäß und genau" *(„sine cunctatione vere et diligenter")* zu übersenden haben. Eine andere *constitutio* (C. 1, 42, 2) stellt der Glaubwürdigkeit halber die Formerfordernis, dass neben dem Kommandanten *(tribunus)* auch die Offiziere der Einheit (*domesticus*, *actuarius*, *optio*, *numerarius* und *subadiuva*) die genannten Listen zu unterzeichnen haben, um dadurch den Inhalt der Listen und ihre Wahrheitstreue zu beglaubigen.

Die für die Bevölkerung vorgeschriebene Naturalsteuerpflicht beinhaltete außer dem Entrichten *(illatio)* auch die „Einlieferung" *(translatio)* der Steuern. Der Transport erfolgte in erster Linie in die „Naturalsteuerlager" *(horrea)*, in die „Hauptsammelstellen" *(condita)* oder in die Verwaltungszentralen *(stationes),* es kam jedoch vor, dass die Steuerpflichtigen die Natu-

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[7] Die Verwaltungsbehörden durften zur Wahrnehmung ihrer Amtsaufgaben auch den Personalbestand des Heeres, genauer gesagt der Legionen in Anspruch nehmen. Das Vorwärtskommen eines Unteroffiziers *(beneficiarius)* konnte auf diese Weise auch die Möglichkeit einer amtlichen Tätigkeit und einer Karriere enthalten. Zur Geschichte der *beneficiarii* zur Zeit des Prinzipats siehe insbesondere J. Ott: *Die Beneficiarier, Untersuchungen zu ihrer Stellung innerhalb der Rangordnung des Römischen Heeres und zu ihrer Funktion*, Stuttgart 1995, 82–151.

[8] A. K. Goldsworthy: *The Complete Roman Army*, London 2003, 94; G. Wesch-Klein: *Soziale Aspekte des römischen Heerwesens in der Kaiserzeit*, Stuttgart 1998, 45–60. P. Southern – K. R. Dixon: *The Late Roman Army*, London 2000, 76–81.

[9] Es ist hier zu bemerken, dass im Vergütungssystem der frühen Kaiserzeit auch andere Zahlungsformen bekannt waren. Staatliche Amtsgehilfen *(apparitores)*, die nach dem Muster der republikanischen *magistratus* in Anspruch genommen werden konnten, erhielten für ihre Dienste eine Vergütung *(aes apparitorum, merces)* aus der Staatskasse *(aerarium Saturni)* (genauer gesagt: aus der Kasse des Senats), und Sklaven, die neben ihren Herren öffentliche Aufgaben wahrnahmen, erhielten ein jährliches Dienstgehalt (*cibaria*, *cibaria annua).* A. H. M. Jones: *The Roman Civil Service (Clerical and Sub-Clerical Grades)*, Journal of Roman Studies 39 (1949), 38–55.

[10] A. Berger: *Encyclopedic Dictionary of Roman Law*, Philadelphia 1991 (repr.), 715. H. G. Heumann – E. Seckel: *Handlexikon zu den Quellen des römischen Rechts*, Jena 1914[9], 555.

[11] Bott: *a. a. O.* S. 15; H. Dazert: *Ergänzungsabgaben und außerordentliche Lasten im römischen Reich im 4. und 5. Jahrhundert nach Christus*, Freiburg 1985, 3; F. Mitthof: *Annona militaris: die Heeresversorgung im spätantiken Ägypten: ein Beitrag zur Verwaltungs- und Heeresgeschichte des Römischen Reiches im 3. bis 6. Jh. n. Chr.*, Firenze 2001, 80.

[12] Várady: *Későrómai hadügyek* [Spätrömisches Heerwesen] (a. a. O.), 87. Mitthof: *a. a. O.* S. 80.

[13] A. H. M Jones: *Census, Records of the Later Roman Empire*, Journal of Roman Studies 43 (1953), 49–64; Karayannopulos: *a. a. O.* S. 96; Heumann – Seckel: *a. a. O.* S. 33.

ralabgaben unmittelbar zur Station der Truppen zu transportieren hatten.[14]

Es ist zu bemerken, dass die Entlohnung in Form der *annona militaris* nicht nur beim Heer und bei der Ziviladministration im engeren Sinne zur Anwendung kam. Um den Nachwuchs des Heeres zu sichern, kann in der Militärverwaltung die Praxis angetroffen werden, dass die Söhne von Soldaten – da sie den Militärdienst ihres Vaters zwingend erbten – ins Bestandsregister der Truppe *(matricula)* aufgenommen wurden. Im Sinne der Bestimmung der CTh. 6, 24, 2 (364) wurden minderjährige Söhne und Familienangehörige der privilegierten Gruppe der *domestici („domesticorum filios vel propinquos parvos vel impuberes")* nicht nur ins Soldatenregister der Truppe aufgenommen, sondern ihnen stand auch ein „Soldzuschlag" *(„annonarum subsidium")* in einer gewissen Höhe zu.

Eine besondere Gruppe der zum Staatsdienst verpflichteten Menschen stellten die Arbeiter *(fabricenses)* der Waffenfabriken *(fabricae)* dar. Laut Verordnung von Arcadius und Honorius (CTh. 10, 22, 4 [398]) mussten die als Waffenschmiede aufgenommenen Personen nach dem Muster der Rekruten beim Heer *(„ad imitationem tironum")* mit einem Stempel am Arm versehen werden. Die *constitutio* verwendet im Zusammenhang mit der Aufnahme von *fabricenses* in den Truppenbestand auch den Ausdruck „Fahneneid" *(sacramentum militiae).* Eine *Novelle* von Justinian, die *Nov. Ius.* LXXXV. (539) berichtet, dass ein Teil der Waffenschmiede in den städtischen Waffenschmieden diene *(„in publicis armificatoriis deputati sunt")*, andere werden zu Reparaturen zu den Truppen beordert und dort in den ordentlichen Bestand aufgenommen *(„qui in numeris constituti sunt armifactores, quos etiam deputatos appellant")*. Diese Letztgenannten erhalten den ordentlichen Sold, die *annona („de fisco annonas accipiunt")*.

Um den Begriff der *annona* vollumfassend zu behandeln, ist ein weiterer Typ davon zu erwähnen. Ein Sold in Naturalien konnte nicht nur an Soldaten des inneren Militärbestands gezahlt werden, sondern auch an die den Grenzen entlang lebenden (und diese bedrohenden) benachbarten und neu angesiedelten Stämme. Die *annona foederatica* war die an das Militär der mit dem Reich vertraglich *(foedus)* verbündeten Völker gezahlte Verpflegung, und sie spielte die Rolle eines Tributs.

3. Die „annona militaris" als Vergütung und Verpflegung („annona expeditionalis")

Die *annona* – als eine regelmäßige Naturalzuwendung an Stelle des in Bar gezahlten Solds – erfüllte in Folge ihrer Beschaffenheit nicht nur die Funktion der Vergütung, sondern auch die der Verpflegung. Wie auch Karayannopulos darauf hinweist, funktionierte die Vergütung des neuen Typs als „Sold und Verpflegung der Soldaten und Beamten".[15] Die Verpflegung im herkömmlichen Sinne verschmolz dadurch in der Institution der *annona,* die in erster Linie als Gehalt verteilt wurde. Das geht aus der Verordnung aus dem Jahre 364 (CTh. 7, 4, 12) eindeutig hervor:

> *In provinciis statione militum adfici possidentes Ursicini comitis suggestione cognovimus, a quibus superstatutorum grave atque inusitatum quoddam nomen Cenaticorum fuerit introductum. Quod magnifica auctoritas tua missis competentibus litteris in omnibus provinciis iubebit aboleri, ut milites recordentur commoda sua, quae in annonarum perceptione adipiscuntur, extrinsecus detrimentis provincialium non esse cumulanda.*

Laut Verordnungstext können weder die Soldaten noch ihre Vorgesetzten „mit dem Rechtstitel Verpflegungskosten" *(„nomen Cenaticorum")* keinerlei Ansprüche gegenüber den Steuerpflichtigen geltend machen. In der Begründung der *constitutio* ist ausgeführt, dass die Soldaten bei Übernahme der *annona („in annonarum perceptione")* auch die Bezüge erhalten, die ihnen unter diesem Titel (verstehe: Verpflegung) zusteht. Laut Quellentext wurde diese „belastende und außergewöhnliche" *(„grave atque inusitatum")* Pflicht der in der Umgebung des Standorts der Soldaten lebenden Bevölkerung der Provinz außerordentlich vorgeschrieben.

Dabei ist aber darauf hinzuweisen, dass die Verbindung der Soldzahlung mit der Verpflegung – in der Institution der *annona militaris* – sich nur auf das Heer bezog, das zur Provinz gehörte und dort stationiert war. Bezüglich der in einem Feldzug eingesetzten „mobilen Truppen" gab es außer dem Sold in Naturalien weiterhin die Operationsverpflegung, die sog. *expeditionalis annona*. Die Verpflegung der im Rahmen einer militärischen Aktion *(expeditio)* in der Provinz befindlichen Truppen oblag – gemäß dem Grundsatz des verhältnismäßigen örtlichen Versorgungssystems – nicht der örtlichen Bevölkerung, deshalb galten für die mit der *expeditionalis annona* institutionalisierte Militärverpflegung spezielle Regeln. Die diesbezügliche Regelung befindet sich in der 359 (?) erlassenen *constitutio* (CTh. 7, 4, 5).

> *Expeditionalem annonam ex horreis milites viginti dierum debent suscipere, ut eam transvehant propriis in expeditione necessitatibus profuturam.*

Wie darauf oben – bei Auslegung der C. 12, 37, 3 – bereits hingewiesen, standen den Soldaten für ihre Verpflegung keine besonderen Bezüge zu, da diese (teilweise oder ganz) im Naturalsold *(annona)* enthalten waren.[16] Im Sinne der angeführten Verordnung konnten aber die Soldaten während eines Feldzugs *(„expeditionis tempore")*, wenn sie ihren „bezahlungsmäßigen" Standort verlassen mussten, außer ihrem Gehalt besondere Verpflegungsbezüge erhalten, die in Portionen jeweils für 20 Tage in den Provinzlagern *(„ex horreis")* gefasst und zur Deckung des Eigenbedarfs *(„propriis…necessitatibus")* mitgenommen werden konnten. Das war die sog. *expeditionalis annona*.

Zur Nuancierung des Begriffs *expeditionalis annona* dient der Text von CTh. 7, 4, 4 (358?) mit einem weiteren Beitrag:

> *Cum in expeditione milites degant, biduo expeditionalem annonam, tertio die panem consequantur ac vinum.*

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[14] Der belastende Charakter der Verpflichtung zur *translatio* kann sogar in mehreren Verordnungen angetroffen werden. Laut Wortgebrauch der CTh. 11, 1, 22 (386) konnte vorkommen, dass „das Transportieren mehr Schäden anrichtete, als die Abgabepflicht selbst" *(„plus haberet dispendii translatio quam devotionis illatio")*. Um die genannte Last zu erleichtern, wurde angeordnet, dass ein Transport nur „entsprechend den Straßenverhältnissen und dem Standort des Bedarfs" *(„omnis itineris ac necessitatis habita ratione")* gefordert werden konnte. [CTh. 11, 1, 21 (385)].

[15] Karayannopulos: *a. a. O.* S. 95.

[16] C. 12, 37, 3 (364).

Gemäß unserer Auslegung sind *expeditionalis annona* und die für die Zeit eines Feldzugs *(„expeditionis tempore")* zustehende Verpflegung auseinanderzuhalten, weil diese – laut Text der *constitutio* – an den dritten Tagen keine *expeditionalis annona*, sondern eine andere Verpflegung (Wein und Weißbrot) ist. Aus einer 361 erlassenen neueren Verordnung (CTh. 7, 4, 6) – die Zusammensetzung und Tagesration der den Soldaten zustehenden Verpflegung für die Zeit eines Feldzugs (*expeditionis tempore*) festlegt – kann gefolgert werden, dass die *expeditionalis annona* eine im Rahmen der *annona* während eines Feldzugs *(expeditionis tempore)* ausgeteilte Verpflegungsration aus Lebensmitteln minderer Qualität darstellt.[17]

4. Die in Geld umgetauschte „annona militaris" („annona adaerata")

Aus der Beschaffenheit des Solds oder der Bezüge des neuen Typs folgte, dass die Auszahlung der *annona militaris* gelegentlich auf Hindernisse stoßen konnte. Da der Kreis der als *annona* zu verteilenden Produkte *(annonaria species)* genau festgelegt[18] und als Prinzip festgehalten wurde, dass der Naturalsold ausschließlich in Form der genannten Produkte auszugeben ist,[19] konnte dazu kommen, dass die benötigten Produkte nicht zur Verfügung standen. Die Möglichkeit, die Bezüge in Geld umzutauschen – genauer gesagt die *annonaria species* durch Geld zu ersetzen –, bestand in erster Linie bei Produktmangel, aber in dieser Form konnte auch der Gegenwert für nicht rechtzeitig gefasste oder verdorbene Produkte verlangt werden.

Eine Ausgabe in Geld konnte auch durch logistische Umstände gerechtfertigt sein, wie z. B. bei Transportschwierigkeiten. Ein Beispiel dafür liefert die 389 erlassene *constitutio* (CTh. 8, 4, 17), die vorschreibt, den Militärs den Sold in beiden Formen auszubezahlen:

> *Cum ante placuisset, ut a primipilaribus secundum dispositionem divi gratiani species horreis erogandae comitatensibus militibus ex more deferrentur, limitaneis vero pretia darentur, nunc placuit, ut aurum ad officium illustris per illyricum praefecturae cum certa taxatione, id est pro octogenis libris laridae carnis, pro octogenis etiam libris olei et pro duodenis modiis salis singuli solidi perferantur.*

Eine Besonderheit der Verordnung besteht darin, dass sie die Ausgabe des Solds in Geld für Soldaten des niedrigeren Rangs *(limitaneus)* – unter Angabe des offiziellen Preises *(taxatio)* – ermöglicht, während sie für angesehenere Truppen *(comitatensis)* weiterhin eine Bezahlung in Produkten vorsieht. Der Umtausch der *annona (adaeratio annonae)* ist in diesem Zusammenhang kaum als ein Vorrecht oder Belohnung aufzufassen, im Text gibt es keine Hinweise darauf. Auf Grund der bisherigen Ausführungen kann gefolgert werden, dass die *annona* in Naturalien nicht immer eine ungünstigere Form der Vergütung bedeutete.

Dabei ist es selbstverständlich, dass die Fassung der *annonaris* Produkte in Geld – z. B. bei Warenmangel, wenn der Marktpreis der Produkte hochschnellte – konnte „sich lohnen", *horribile dictu*, sogar Korruption ermöglichen. Eine der Gründe solcher Missbräuche lag im Vorrecht der Offiziere, die Fassung der *annona* aufzuschieben und Güter nachträglich zu fassen. Vorgesetzte, die über genügend Vorräte verfügten, konnten sich leisten, die Produkte in einer späteren, „lohnenderen" Zeit zu fassen.

Die genannten Möglichkeiten eines Missbrauchs und die Gegenschritte der Regierung sind in der Verordnung von Kaiser Konstantin (CTh. 7, 4, 1) aus dem Jahre 325 zusammengefasst:

> *Tribunos sive praepositos, qui milites nostros curant, annonas per dies singulos scriptionis indicio sibi debitas in horreis derelinquere non oportet, ut procuratores seu susceptores vel praepositi pagorum et horreorum eam comparent: hinc enim fit, ut a provincialibus non annonas, sed pecunias postulent memorati ipsis etiam speciebus remanentibus vitiatis adque corruptis. constituimus igitur derelictae annonae fisco compendium vindicari, subscribendario et optione gladio feriendis, quoniam fieri non potest, ut vel provinciales iterata collatione graventur vel militibus corruptae species dividantur detrectantibus memoratis ad diem sumere annonas suae congruas dignitati. in qua culpa si quis fuerit adprehensus, nec personae merito nec honoris fastigio defendendus est.*

Gemäß Zeugnis der Verordnung, in der eine große Anzahl von Korruptionsmöglichkeiten und ihren Subjekten genannt ist, fassen die Militärkommandanten *(„tribunos sive praepositos")* die ihnen zustehenden *annona,* also die *annonaris* Produkte nicht in dem dafür vorgesehenen Zeitpunkt, sie hinterlassen diese (bösgläubig) im Provinzlager, und lassen die zuständigen Beamten (im arglistigen Zusammenspiel mit ihnen) diese in Geld umtauschen. Parallel zur Fassung in Geld fordern sie von der Bevölkerung der Provinz – statt Produkte – Geld für die zurückgebliebenen und verdorbenen Produkte *(„a provincialibus non annonas, sed pecunias postulent memorati ipsis etiam speciebus remanentibus vitiatis adque corruptis")*.

Zur Vermeidung ähnlicher Missbräuche wird durch die neue Verordnung eingeführt, dass (unbegründet und unberechtigt) nicht abgenommene *annona*-Produkte für den Fiskus beschlagnahmt werden sollen *(„derelictae annonae fisco compendium vindicari")*, wobei eine nachträgliche Fassung (oder Umtausch in Geld) nicht mehr möglich ist. Den am Missbrauch beteiligten Beamten (*subscribendarius*, *optio*) wird die schwerste Strafe *(„gladio feriendis")* angedroht, sollten sie die Bevölkerung der Provinz mit erneutem Beitreiben belasten *(„provinciales iterata collatione graventur")* oder unter den Soldaten verdorbene Produkte verteilen *(„militibus corruptae species dividantur")*. Den am Missbrauch beteiligten Offizieren wird eine zeitlich „hinausgezögerte" Fassung verboten und betont, dass sie die ihnen nach dem Rang zustehende *annona („annonas suae congruas dignitati")* am dafür bestimmten Tag zu fassen haben. Eine besondere Strafe wird

[17] Mitthof war der Meinung, dass die *annona expeditionalis* nicht wie Requirierungen beigetrieben werden konnte, und sie wurde auf die Hauptsteuern des betroffenen Gebiets angerechnet. Mitthof: *a. a. O.* S. 51.

[18] Gemäß der kaiserlichen Verordnung CTh. 8, 4, 17 (389) über die Zusammensetzung der Bezüge in Naturalien entsprach ein *solidus* dem Wert von 26,5 kg Speck oder Schweinefleisch, 26,5 kg Öl und 105 l Salz. Im Sinne der *Nov. Val.* 13, 4 (445) durften für einen *solidus* 350 l Weizen, 88 kg Rindfleisch und 109 l Wein ausgegeben werden. Die Tauschwerte konnten in den einzelnen Reichsprovinzen in Abhängigkeit von der zur Verfügung stehenden Menge der einzelnen Produkte oder von der Ernte im gegebenen Jahr variieren.

[19] CTh. 7, 4, 21 (396).

ihnen nicht angedroht, nur – etwas weitschweifig – deklariert, dass bei Begehung derartiger Ordnungswidrigkeiten (genauer: schuldhafter Handlungen) weder Verdienste der betreffenden Person noch die Höhe ihres Ranges Befreiung oder Schutz gewähren *(„nec personae merito nec honoris fastigio defendendus est")*.

Eine Ausgabe des Naturalsolds in Geld *(annona adaerata)* war nur in außerordentlichen, durch außerhalb der Verwaltung liegende Umstände gerechtfertigten Fällen möglich, allgemein und systematisch davon Gebrauch zu machen war verboten. Die Begründung der Verordnung CTh. 7, 4, 19 (393, 388–392), in deren Text das Verbot ausgesprochen ist, bringt den Zweck des Verbots eindeutig zum Ausdruck: „Vom Umtausch zum Marktpreis oder zum Preis der Staatskasse soll kein Nutzen gezogen werden können." *(„nec transvectioni publicae nec arcae possunt aliquod deferre compendium")*

Die in der zweiten Hälfte des 4. Jahrhunderts erlassenen kaiserlichen Verordnungen lassen jedoch darauf schließen, dass die Frage der verzögerten Fassung und der darin steckenden Möglichkeit eines Missbrauchs auch später nicht zufriedenstellend gelöst werden konnte. Einem derartigen Problem stehen wir beim Studieren der CTh. 7, 4, 18 (393) gegenüber. Laut Verordnungstext „soll derjenige, der es wagt, sich dem erlassenen Gesetz gegenüberzustellen, weder das, was er in Geld wollte fassen noch das, was er seinerzeit in Produkten nicht akzeptierte, nehmen dürfen" *(„si contra legem datam venire temptavrit, nec illud, quod in pretio expetit, permittatur exigere nec illud, quod suo tempore accipere in speciebus neglexerit, consequatur")*.

Eine weitere (vermeintlich gute) Methode zur Verhinderung der Spekulationen war neben dem Verbot der verzögerten Fassung die Feststellung eines beim Umtausch zwingend anzuwendenden „amtlichen Preises". Die zentrale Feststellung der Umtauschpreise (*taxatio*) und deren Beträge variierten je nach Provinz. In zwei kaiserlichen Verordnungen, die eine *taxatio* enthalten und gleichermaßen im Jahre 409 erlassen wurden, steht vorgeschrieben, dass die Beitreibung der Steuern (*exactio*) unter genauer Angabe der Produktpreise zu verkünden sei.[20] Dieser Preis soll an die örtlichen Verhältnisse und an die Verhältnisse der betroffenen Truppe angepasst werden.[21]

Der bereits erwähnten privilegierten Gruppe des Heeres, den Stabsoffizieren stand weiterhin die Möglichkeit offen, die in Geld umgetauschte *annona* zum Marktpreis zu fassen. Gemäß Regelung der diesbezüglichen kaiserlichen Verordnung CTh. 7, 4, 32 (412) konnten diejenigen, die von dieser Möglichkeit Gebrauch machen wollten, ihre Bezüge „statt Feilschen" *(„iuxta nundinationem")* in Geld übernehmen, und zwar in einem dem Marktpreis angepassten Betrag *(„foro rerum venalium contientur")*. Auf Grund der Quellen kann bei der in Geld umgetauschten *annona adaerata* unterschieden werden zwischen einer Auszahlung nach Umtausch zum Preis der Staatskasse *(aeraria annona)* und nach dem – als außerordentlich geltenden – Umtausch zum Marktpreis *(annonaria in pretiis)*.

Das Umtauschrecht der Stabsoffiziere zum Marktpreis bot eine weitere Spekulationsmöglichkeit. Sie wird in der unten analysierten, im Jahre 424 erlassenen kaiserlichen Verordnung (CTh. 7, 4, 36) eingehend dargestellt:

> *Si quando tribuni sive comites vel praepositi numerorum per provincias annonas voluerint, hoc est quas pro dignitate sua consequuntur, in aere percipere, non aliis eas pretiis, nisi quae in foro rerum venalium habeantur, adaerandas esse cognoscant. Si alias annonas, quae non suae dignitatis erunt, sed alio modo, dum tamen licito, suis commodis adquisitas in auro sibi dari duces sive tribuni voluerint, illis pretiis contenti sint, quae in forma aerariarum annonarum sollemni observatione praebentur.*

Im Sinne des – in mehrerer Hinsicht lehrreichen – Verordnungstextes können *tribuni*, *comites* oder *praepositi* der Provinzialtruppen die ihnen gemäß ihrem Rang *(„pro dignitate sua")* zustehende *annona* zum Marktpreis fassen. Die ihnen darüber hinaus, nicht nach dem Rang (also nicht ihnen!) zustehende *(„quae non suae dignitatis erunt") annona,* die sie bisher durch „Feilschen" umgetauscht haben, dürfe ihnen nur zum amtlichen Preis, der für die *annona* der Staatskasse für jeden Soldaten gilt und gemäß der förmlichen Ordnung festgelegt wurde *(„in forma aerariarum annonarum universis militibus"),* ausgegeben werden. Die *constitutio* macht es eindeutig, dass die Stabsoffiziere nicht nur ihre eigenen Bezüge, umgetauscht zum ihnen zur Verfügung stehenden höheren Marktpreis, entgegennahmen, sondern auch die ihrer Soldaten, vermutlich gegen ein entsprechendes Entgelt.

In wissenschaftlichen Kreisen ist allgemein bekannt, dass die Funktionsstörungen aus dem Umtausch der *annona* in Geld langfristig nur durch allgemeine Ausgabe der Bezüge in Geld, genauer gesagt durch die erneute Einführung der Institution der in Geld ausgezahlten Bezüge behoben werden konnten. Wegen der wirtschaftlichen Unterschiede zwischen der östlichen und westlichen Reichshälfte (und wegen Untergang des Weströmischen Reichs) war es vor allem in der von Konstantinopel aus regierten Reichshälfte möglich, die *annona* in Bargeld umgetauscht zu beziehen. In der durch die Reformen von Kaiser Anastasius (491–518) wirtschaftlich und regierungsgemäß stabilisierten östlichen Reichshälfte blieb die eigentümliche Dichotomie der Vergütung in Geld und in Naturalien bis zum Ende der Epoche bestehen.[22]

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[20] CTh. 7, 4, 30 (409).

[21] CTh. 7, 4, 32 (412).

[22] Im Wortgebrauch der kaiserlichen *constitutiones* bedeutete die Auszahlung in Geld weiterhin keinen „Bargeldsold", sondern die (gemäß bestimmten Werten) „umgetauschte Produkten-*annona*" *(annona adaerata)*. Die Verordnung (CTh. 7, 4, 35) der Kaiser Theodosius aus dem Jahre 423 schreibt vor, allen dort genannten Beamten die Vergütung in gemäß dem amtlich festgesetzten Preis ausgerechneten Bargeld auszugeben *(„omnibus superius designatis emolumenta debita in pretiis dispositio culminis tui pro publica auctoritate taxatis praecipiat erogari")*.
Bei Durchsetzung dieser Regel brachte die Verordnung von Kaiser Anastasius (C. 12, 37, 19) eine endgültige Lösung. Sie schrieb vor, dass die Soldaten ihre *annona* gemäß der Taxe umgetauscht aufnehmen sollen, wie auch das *capitum,* und sie sollen keine Produkte verlangen, es sei denn, der Steuerpflichtige bietet es freiwillig an *(„annonas suas adaeratas secundum mensae adaerationem accipiant similiterque capitum: neque species petant, nisi sponte collator eas inferat.")*. Im Sinne der *Nov. Ius*. 128. (545) hatten die *praetorii praefecti* bei Verkündung der *indictiones* die auf die einzelnen Steuereinheiten entfallenden Steuermengen sowohl in Gold als auch in Produkten anzugeben *(„tam in specie quam in auro fiscalium causa imminet")*.

5. Zusammenfassung

Auch die durch den Namen von Diokletian geprägte Erneuerung des Staatsaufbaus, die das Römische Reich in der ersten Hälfte des 4. Jahrhunderts begleitete, kann als ein System von Reaktionen – im Allgemeinen typisch für die römische Verwaltungsgeschichte – in einer äußerst schwierigen historischen Situation angesehen werden. Der in seiner Funktion bereits angeschlagene römische Staat war gezwungen, seine militärischen Kräfte und die administrative Organisation erheblich zu erweitern, nachdem er die Grenzen seiner wirtschaftlichen Leistungsfähigkeit bereits erreicht hatte und keine weiteren Gebiete mehr hatte erobern können. Die zu dieser Erweiterung notwendigen Veränderungen konnten nur durch eine besser organisierte und intensivere, *horribile dictu,* unterdrückendere Nutzung der zur Verfügung stehenden Kräfte und Ressourcen durchgeführt werden. Wie Alföldy bereits darauf hingewiesen hat, betraf dieses Betätigen der Reichsorganisation um jeden Preis alle niedrigeren Schichten der Gesellschaft als „offene und brutale" Unterdrückung.[23] Der Unterschied zwischen den Erwartungen der kaiserlichen Regierung und den Möglichkeiten der am Rande ihrer Leistungsfähigkeit stehenden Bevölkerung ging langfristig mit Verarmung der Bevölkerung und mit einer allmählichen Verkümmerung der Staatsorganisationseinheiten einher.[24]

Auch in einer der bestimmenden Institutionen der Verwaltungsfinanzierungspraxis, in der in der vorliegenden Studie nur kurz analysierten *annona militaris* können Funktionsstörungen und Inkonsequenzen nachgewiesen werden, die für das ganze System kennzeichnend waren. Stabilisierung der Staatsfinanzierung, Stärkung der kaiserlichen Macht und Betätigung der Verwaltung auf einer breiteren Basis vermochten nicht, das Gegengewicht gegen die aus der Funktion sinngemäß folgenden Probleme zu halten. Diese waren: ungleichmäßige Belastungen, Korruptionsmöglichkeiten, erhebliche Verluste bei Abwicklung der Beitreibung und der Auszahlungen. Als Beweis soll hier auf die Begründung der oben bereits erläuterten kaiserlichen Verordnung (CTh. 7, 4, 35) hingewiesen werden. Sie stellt mit ungewöhnlicher Ehrlichkeit fest, dass die Einnehmer die als Sold der Soldaten und Beamten dienende *annona* „tief aus der Eingeweide der Bevölkerung herauskratzen werden" *(„graviter ex provincialium visceribus eruebant").*

Sogar ohne eingehende Bewertung des Systems der *annona-munera* kann festgestellt werden, dass eine längerfristige Aufrechterhaltung außergewöhnlicher und außerordentlicher Staatsfinanzierungsmethoden, die kurzfristig zwar Stabilität gewährleisten, erhebliche Risiken in sich trug. Das neue System der Staatsfinanzierung – trotz seiner unbezweifelbaren Erfolge – trug die Gefahr in sich, dass das Reich im Kampf um das Überleben seine zur Erneuerung notwendigen wirtschaftlichen und humanen Ressourcen aufbraucht.

[23] „…die offene, oft brutale Unterdrückung, die zur Sicherung der erforderlichen Arbeits- und Abgabenleistungen notwendig war und ebenfalls wahllos, die meisten sozialen Gruppen innerhalb der niederen Bevölkerung betraf". G. Alföldy: *Römische Sozialgeschichte*, Wiesbaden 1984[3], 145.

[24] G. Ostrogorsky: *Geschichte des byzantinischen Staates*, München 1963, 33.

The Regula "nasciturus pro iam nato habetur" and the Appearance of the Expression "mulieris portio" in the Digest and its Consequences*

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Abstract

Interesting as it may be, there are some instances in contemporary Romanistic, when a certain regula is considered by secondary literature as if it were a rule of general application, consequently those not versed deeply enough in Roman law, might as well deem that such a rule could enjoy an overall usage, that is independently from time and place.

One amongst these regulae is presented by Paul in the Digest (Paul. D. 1, 5, 7 [lib. sing.de port., quae lib. damn. conc.]), which contains the famous phrasing "Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur […]". In contrast to this widely cited text, it is likewise interesting to have recourse to a case, where Ulpian reports about an imperial rescript related to the admission of the application of SC Plancianum (cf. Ulp. D. 25,4, 1 pr. – 1 [24 ad ed.]). In this text, another famous, and extensively quoted wording appears, namely the expression mulieris portio. The scrutiny of the aforesaid particular case and its secondary literature, as well as its legislative echoes may lead to a layered examination of the above phrase, as well as a more nuanced understanding of the stance of the foetus in Roman law.

Key words: *portio mulieris; definition; nasciturus; regula; foetus; SC Plancianum.*

It is highly interesting that contemporary Roman law studies are bursting with cases in the scope of which secondary literature credits general meaning and validity to certain *regulae* or a *definitones*. This attitude can easily end up in letting a non-expert draw such conclusions that these *regulae* and *definitiones* were generally true, accepted and applicable throughout the history of Roman law, or at least during a major part of it. However, if we take a closer look at this complex issue, we can easily find out that the actual situation was much more nuanced. Consequently, this doesn't mean that the compact statements in the forms of *regulae* and *definitiones* weren't true, yet, it should also be taken into account that these concise assertions could better understood if they are analysed in-depth, and placed in their actual social-economic-political context. The approach described above is all the more important, because secondary literature has a tendency to regard Roman jurists as such people who were experts in casuistic, but who were not really fond of pure theory.[1] This leads to the famous notice of a Roman jurist concerning the dangers of *definitiones* themselves.

1. General remarks

As a mosaic in the Casa del Poeta Tragico of Pompeii warns possible intruders about the watchdog inside with the tag *"Cave canem!"*, we might as well use it at this point as a guideline to refer to the hidden dangers of definitions in legal education, even if the phrase *"Cave definitiones!"* doesn't appear in the sources of Roman law. However, as the former can be seen in a display cabinet of the Museo Nazionale di Napoli, the latter can be observed in the Digest of Justinian.

Iav. D. 50, 17, 202 (11 epist.)

Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset.

With regards to this text, a very widespread, and presumably not fully adequate, or even misleading interpretation should be pointed out. Generally this text is understood to refer to the dangers of definitions on the basis of the distortion of the original meaning of whatever is subject to definition.[2] In this passage, however, the form *subverti* is a passive *infinitivus*, while

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1 Cf. Andreas Wacke: Zum dolus-Begriff der actio de dolo. *RIDA* XXVII (1980). 354. See also essentially with a corresponding tone Ph. J. Thomas: Alternative Paradigm for Roman Law. *RIDA* XLV (1998). 656–657.

2 This approach is clearly traceable in the Hungarian literature, even in the current one, at that. Cf. Pólay 1988, 84; lately Siklósi Iván: A nemlétező, érvénytelen és hatálytalan jogügyletek elméleti és dogmatikai kérdései a római jogban és a modern jogokban. [Theoretical and Dogmatical Questions of the Non-existing, Null and Void Transactions in Roman Law and in Modern Legislations] Doktori értekezés, ELTE ÁJK, 2013. 20. However, it should also be noted that in the English translations of the Digest, a totally different approach stands in the centre. Samuel P. Scott's translation for instance understands this passage as follows: "Every definition in the Civil Law is subject to modification, for a slight discrepancy may render it inapplicable". Consequently, it is obvious that the aforesaid approach, peculiar mainly to the Hungarian literature, cannot be universalised.

the form *coniuctivus praesens imperfectum* of the verb *possum*, *posse*, *potui* expresses possibility – the explanation of the subjunctive lies in the fact that the sub-clause is introduced by the conjunction *ut*. The predicate refers to the subject of the passive infinitive, that is to *definitio*. Consequently, the demolition and the destruction described by the verb *subverto*[3] refers to *definitio* itself. It would by all means be curious, however, if the essence of anything were even subject to change, because anyone says so. In other words, it is clear that black won't become white just because we expect it to be.

2. A regula and an actual case: regulations with regards to the foetus in Roman law

The actual case in question is a text by Ulpian, related to SC Plancianum (Ulp. D. 25,4, 1 pr. – 1 [24 ad ed.]), in which text the term *portio mulieris vel viscerum* comes up, which term is for the most part conveniently referred to merely under the form *portio mulieris*. It is common knowledge that in connection with the foetus' legal stance it is stated that even in its mother's womb it is deemed to be fully a human being, whenever the question concerns advantages accruing to it, when born. However, before its birth, its existence is never assumed in favour of anyone else, that is it cannot be of any benefit to anyone before its birth.[4] However, as Wolfgang Waldstein pointed out, there is a tendency in contemporary literature, in the scope of which the foetus is simply considered as the part of the woman, or the woman's body (*portio mulieris*).[5] A closer scrutiny of this topic can help us better understand the Roman rules related to the foetus.

2.1 Excursus: contemporary rules regarding the stance of the foetus in some European civil codes

Firstly, it would be wise to scan through the rules in some of the contemporary civil codes around Europe, in order to empirically point out that the European legal tradition sticks strictly to Roman law.

According to the German Civil Code (Bürgerliches Gesetzbuch) a human being's legal capacity starts from birth, or to be more precise, when the process of being born is accomplished (Vollendung).[6] As the Austrian code puts it, even the still unborn child (Kind) can have recourse to legal protection, from the very moment of his or her conception (von dem Zeitpunkte ihrer Empfängnis). In addition, the code stipulates that whenever a certain legal issue is related to an unborn child's rights, the child should by all means be considered as already born – with special rules applying to stillborn children.[7] Similarly to the previous two regulations, the Italian code also stipulates that legal capacity begins with the moment of being born. In addition to this, however, there are rules that clearly state that all regulations that defend the interests of the foetus are subordinated to the fact of being born, with other words, the foetus' interests are legally protected, this protection is, however, is only given on the proviso that the foetus is born alive.[8]

As for the Hungarian rules, the former Civil Code of 1959 stipulated that a human being is subject to legal capacity from the moment of his or her conception, on condition that he or she should be born alive. However, the child can have recourse to a guardian even before his or her birth, should the protection of his rights or rightful interests need so, especially, when there is a conflict of interests between the child and his or her parent or legal representative.[9] As for the newly enacted Civil Code of 2013, the first statement of the law is analogous to the regulations in the former Civil Code.[10] The second expression is also similar, however, the formulation is somewhat different, or rather more subtle in the new Code.[11]

2.2 Approaches of the nasciturus in some manuals of Roman law

In modern secondary literature it is common knowledge that personality begins with being born alive from a free mother.[12] For the first look, it appears to be a rather simple issue, yet,

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[3] Cf. *Oxford Latin Dictionary* s. h. v.

[4] Cf. e.g. Földi András – Hamza Gábor: *A római jog története és institúciói.* [The History and Institutions of Roman Law] Budapest: Nemzeti Tankönyvkiadó, 2013[18]. 204. With this regards, it should, however, be noted that the origins of this rule go back to three sources at a time, namely Gai. 1, 147; Paul. D. 1, 5, 7 (lib. sing. de port.); Iul. D. 1, 5, 26 (69 dig.); Paul. D. 50, 16, 231 (lib. sing. ad SC Tert.). Yet, many authors underline that the term *nasciturus* cannot be found in the legal sources – at least not from this aspect. See for example Marianne Meinhart: D. 50, 16, 231. Ein Beitrag zur Lehre vom Intestat erbrecht des ungeborenen Kindes. *ZSS RA* LXXXII (1965). 193[18]; Max Kaser: *Das römische Privatrecht I.* Handbuch der Altertumswissenschaft X. 3.3.1–2. München, C.H.Beck, 1971[2]. 271[21]. As for the expressions applied with reference to a foetus it is worthwhile to cite Meinhart 1965, 199; Bernardo Albanese: *Le persone nel diritto privato romano*. Palermo, 1979. 11, with special attention tofootnote 17; Péter Orsolya: „Nasciturus pro iam nato habetur". A magzat pozíciója és a magzatelhajtás a római jogban. [The Stance of the Foetus and Abortion in Roman Law] *Jogtudományi Közlöny* 7–8/1991. 177.

[5] Waldstein pointed out that the term goes right back to Kaser himself. Cf. Wolfgang Waldstein: Ist „der partus bloßer Teil des Mutterleibs"? In: Martin Josef Schermaier – Johann Michael Rainer – Laurens C. Winkel (hg.): *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Köln – Weimar – Wien, Verlag Böhlau, 2002. 837.

[6] BGB § 1 Beginn der Rechtsfähigkeit. Die Rechtsfähigkeit des Menschen beginnt mit der Vollendung der Geburt.

[7] ABGB § 22. Selbst ungeborne Kinder haben von dem Zeitpunkte ihrer Empfängnis an einen Anspruch auf den Schutz der Gesetze. Insoweit es um ihre und nicht um die Rechte eines Dritten zu tun ist, werden sie als Geborne angesehen; ein totgebornes Kind aber wird in Rücksicht auf die ihm für den Lebensfall vorbehaltenen Rechte so betrachtet, als wäre es nie empfangen worden.

[8] Codice civile Art. 1 Capacitŕ giuridica. La capacitŕ giuridica si acquista dal momento della nascita. I diritti che la legge riconosce a favore del concepito sono subordinati all'evento della nascita.

[9] Cf. Act IV of 1959. § 9–10.

[10] Cf. Act V of 2013. § 2:2.

[11] Cf. Act V of 2013. § 2:3.

[12] Cf. Földi – Hamza 2013[18], 204. Correspondingly Nótári Tamás: *Római köz- és magánjog*. [Roman Public and Private Law] Szeged, Lectum Kiadó, 2011. 153. Essentially corresponding wording can also be found in Benedek Ferenc – Pókecz Kovács Attila: *Római magánjog*. [Roman Private Law] Budapest – Pécs, Dialóg Campus Kiadó, 2013. 107, though they fail to add any reference to a free mother.

it is far from being so. The obviously stillborn child was on no account considered to be born alive, nor was a preterm or a monstrous infant deemed so (cf. Law of the XII Tables 4, 1), however the legal stance of the foetus (referred mainly to as *qui in utero est* or *nasciturus* in the sources) is noteworthy, though. Authors almost unanimously claim that the legal stance of the foetus is best characterised by the fact that it is a dependent situation, namely dependent on the fact whether the foetus is born alive or not. Still, whenever the question concerns advantages accruing to it, the foetus is deemed to be fully a human being, even in its mother's womb, however, the acquisition of rights and obligations will only take place when born. Up to that point, the foetus merely expects these rights and obligations.[13] In comparison there's one generally cited text in the Digest, which is a Paulian paraphrase of Hippocrates' statement concerning birth.

Paul. D. 1, 5, 12 (19 resp.)

Septimo mense nasci perfectum partum iam receptum est propter auctoritatem doctissimi viri Hippocratis: et ideo credendum est eum, qui ex iustis nuptiis septimo mense natus est, iustum filium esse.

According to the text, it is generally held upon the authority of the most learned man, Hippocrates that a child perfectly formed may be born in the seventh month; and therefore it is established that a child who is born in lawful marriage after seven months is legitimate. Correspondingly with the text, the secondary literature generally points out with regards to this text that in the Roman thought – sticking mainly to the foundations of Hippocrates – a child born in the seventh month was considered as a person.[16] However, it is highly interesting that at the end of the text Paul mentions that a child born in the seventh month *ex iustis nuptiis*, is to be considered as *iustum filium* – consequently the fact that a new-born child is a human being and the legal reflexion with regards to this fact are clearly two different topics. At this point, the attribute *iustus* is important with regards to both *nuptiae* and to *filius* as well, with special attention on the fact how this attribute should be understood. This word has several meanings, especially for instance that a reward or a punishment is deserved or merited.[17] Similarly, it can designate people who are just, fair or impartial[18], as well as actions and states that are recognised or sanctioned by law, as a consequence considered as lawful or legitimate.[19] Consequently, being born in the seventh month the *filius* is merely mentioned as a legal "creature" or entity.[20] This could be important to emphasise at this point, as Roman jurists failed to have a specific notion for "personality" in the legal sense – even when they have reference to it (whatever circumscribed it may be) they do not use it in such a sense as modern civil lawyers do. A slight difference is made in the Hungarian literature by Orsolya Péter, who underlines that prior to its birth the foetus was not considered as a separate (!) entity, yet – in accordance with the ruling ideas of the Stoa – it was at least consideres as *in rerum natura esse*.[21]

The notion of "person" appears several times in the primary sources, still it would be a gross understatement to mention the term persona in connection with personality in Roman law.[22] It is widely known that besides the term *persona*, other expressions were likewise used, such as *caput* and *homo*. All three essentially focus on different aspects of the very same complexity of a human being. The term *persona* is the Latin equivalent for the Greek πρόσωπον, which means character, temper and mask. With regards to this latter meaning it is very interesting that this "mask" – similarly to the theatrical masks – represents a social role, which the particular individual ceased to wear any further upon their death, its substitute became the death mask, and the one "worn" alive (that is the personality with contemporary terms) was given to the heirs.[23] However, it is indicated in the primary sources that the Roman did not consider the foetus as *persona*.[24] The term *caput*, which means head or the uppermost part of the human body and hence applied mainly

[13] Cf. Földi – Hamza 2013[18], 204; Benedek – Pókecz Kovács 2013, 107; Nótári 2011, 153.

[14] Bessenyő András: *Római magánjog. A római magánjog az európai jogi gondolkodás történetében*. [Roman Private Law. Roman Private Law in the History of European Thinking] Budapest-Pécs, Dialóg Campus Kiadó, 2010[4]. 211.

[15] *Oxford Latin Dictionary*. Oxford, Clarendon Press, 1968. s. v. „iustus[2]".

[16] *Oxford Latin Dictionary* s. h. v.

[17] In this sense see e.g. lex XII tab. 3, 1: *„Aeris confessi rebusque iure iudicatis XXX dies iusti sunto"*; cf. Gell. Noct. Att. 15, 13, 11 és 20, 1, 42–45. Vö. *Oxford Latin Dictionary* s. h. v.

[18] To support this, see Herm. D. 1, 5, 2 (1 iuris epit.): *Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus*. Additionally see Benedek – Pókecz Kovács 2013, 107.

[19] In detail cf. Péter 1991, 177–178.

[20] Correspondingly Földi – Hamza 2013[18], 204.

[21] Bessenyő 2010[4], 536–537.

[22] Cf. Pap. D. 35, 2, 9, 1 (19 quaest.): *Circa ventrem ancillae nulla temporis admissa distinctio est nec immerito, quia partus nondum editus homo non recte fuisse dicitur*. In addition to this see Kaser 1971[2], 272[21]; Albanese 1979, 11[18]. Albanese adds however that in the secod source the noun *nasciturus* is substituted for the neutral *id* pronoun. Though Albanese's assertion is all in all precise, yet such an assumption cannot be excluded according to which the reason for the use of a neutral pronoun is explained by the fact that the actual sex of the child to be born is still unknown. This very same problem seems to appear in a text by Julian, (Iul. D. 1, 5, 26 [69 dig.]): in connection with the stolen pregnant female slave (*ancilla praegnas subrepta*) the jurist claims that the bona *fide emptor* did not obtain power over the child, as it is considered stolen (*tamquam furtivum*). The jurist here also applies the neutral pronoun *id*. Here it is obvious again that the sex of the child is unknown prior to its birth. As for the text by Papinian, it should be noted that it is placed under the title *ad legem Falcidiam*, and therefore it is all but dubious that the rule formulated in the text could be of general application – contrary to that by Julian, Iul. D. 1, 5, 26 (69 dig.), placed under the tilte *de statu hominum*, consequently it could more conveniently be stated that such a rule applied generally to issues related to the legal stance of a person, whereas the Papinian text was exclusively applicable with regards to the interpretation of lex Falicidia. Similarly Waldstein 2002, 838, who also compares these instances with another source (Paul. D. 50, 16, 231 [lib. sing. ad SC Tert.]), and the evaluation of the Papinian text (Pap. D. 35, 2, 9, 1 [19 quaest.]) is carried out this way. See also Waldstein 2002, 847.

[23] See e.g. Gai. 1, 160–162; Gai. D. 4, 5, 1 (4 ad ed. provinc.); Paul. D. 4, 5, 11 (2 ad Sab.); Iul. D. 41, 4, 10 (2 ad Minic.)

[24] Cf. Gai. 1, 9: *Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi*.

to free people, is best preserved in the technical term *capitis deminutio*, which makes manifold appearances in the primary sources.[25] In comparison, the expression *homo* comes up under the *summa divisio personarum* in Gaius.[26] Up to this point, it is clear that the Roman never used any of the above expressions with regards to the foetus, or they never used any of them in a positive or affirmative sense.[27]

3. The term mulieris portio in the primary sources

As the Roman considered it, the foetus was of a transient or transitory nature: as not yet born, it wasn't considered a human being (*homo*, in the sources *in rebus humanis nondum est*), on the other hand, however, as a consequence of its conception it still objectively exists (*in rerum natura est*), and as an independent entity – that is independent from its mother.[28] In contrast to this point of view, there are some who consider the foetus as the part of the mother's body: even most manuals claim that in Roman law *nasciturus* was not considered as a human being. Though this approach also bears Roman roots, still it is worthwhile to give a closer look to the case where the term *mulieris portio* turns up.

3.1 The case

Ulpian is the one who describes the case in the Digest (Ulp. D. 25, 4, 1pr – 1 [24 ad ed.]), which case is actually related to the reception of a custodian and the paternal recognition.

Ulp. D. 25, 4, 1 pr – 1 (24 ad ed.)

(pr.) Temporibus divorum fratrum cum hoc incidisset, ut maritus quidem praegnatem mulierem diceret, uxor negaret, consulti Valerio Prisciano praetori urbano rescripserunt in haec verba: „Novam rem desiderare Rutilius Severus videtur, ut uxori, quae ab eo diverterat et se non esse praegnatem profiteatur, custodem apponat, et ideo nemo mirabitur, si nos quoque novum consilium et remedium suggeramus. Igitur si perstat in eadem postulatione, commodissimum est eligi honestissimae feminae domum, in qua domitia veniat, et ibi tres obstetrices probatae et artis et fidei, quae a te adsumptae fuerint, eam inspiciant. Et si quidem vel omnes vel duae renuntiaverint praegnatem videri, tunc persuadendum mulieri erit, ut perinde custodem admittat atque si ipsa hoc desiderasset: quod si enixa non fuerit, sciat maritus ad invidiam existimationemque suam pertinere, ut non immerito possit videri captasse hoc ad aliquam mulieris iniuriam. Si autem vel omnes vel plures non esse gravidam renuntiaverint, nulla causa custodiendi erit".

(1) Ex hoc rescripto evidentissime apparet senatus consulta de liberis agnoscendis locum non habuisse, si mulier dissimularet se praegnatem vel etiam negaret, nec immerito: partus enim antequam edatur, mulieris portio est vel viscerum. Post editum plane partum a muliere iam potest maritus iure suo filium per interdictum desiderare aut exhiberi sibi aut ducere permitti. Extra ordinem igitur princeps in causa necessaria subvenit.

3.2 The issue of SC Plancianum

The SC Plancianum, to which this particular case is related, falls under the issue of the already mentioned *senatus consulta de liberis agnoscendis*, despite the fact that it appears under the title "*de inspiciendo ventre custodiendoque partu*" in the Digest.[29]

Even its proper spelling could be subject to debate (though in primary texts, the form Plancianum is exclusive), but which is more important at this point is its actual content: Kaser for instance describes the above mentioned case as the content of the SC Plancianum, while there are others who attribute a content related to lex Falcidia: Ulpian mentions once amongst the *senatus consulta* related to paternal recognition[30] (Ulp. D. 25, 3, 1, 10 [34 ad ed.]), while it makes its appearance in connection with the lex Falcidia by Modestinus (Mod. D. 35, 2, 59 [9 pandect.]). In the secondary literature, it was Albanese who expressly pointed out that there was for sure two *senatus consulta* in the history of Roman law with the very same name.[31]

3.3 Exegesis

In the time of the Divine Brothers, Marcus Aurelius and Lucius Verus, a husband named Rutilius Severus stated that his former wife was pregnant from him, therefore he claimed to be entitled to exercise his paternal rights over the child, and consequently he wanted to recognise the child as his. However, the former wife denied her pregnancy, as a result the husband claimed that a custodian should be appointed for the wife in order that the interests of the unborn child should be observed. The imperial rescript come forward with a totally new plan and a remedy, saying that if the husband persists in his demand, it will be most convenient for the house of a respectable woman to be chosen into which Domitia may go, and that three trustworthy and experienced midwives should examine her. Should all of them, or only two, announce that the wife seems to be pregnant, then the she must be persuaded to receive a custodian, just as if she herself had requested it. If she does not bring forth a child, her husband will know that he will incur dishonour, and that his reputation will be involved, and he will not unreasonably be held to have contrived this in order to injure his wife. If, however, all midwives, or their majority, declare that the woman is not pregnant, there will be no reason for the appointment of a custodian.[32]

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[25] Correspondingly see Péter 1991, 179.

[26] On this topic it is worth taking into consideration Paolo Ferretti: *In rerum natura esse in rebus humanis nondum esse. L'identitŕ del concepito nel pensiero giurisprudenziale classico*. Milano, Giuffrč Editore, 2008. Previously see Albanese 1979, 11–12.

[27] Correspondingly cf. Otto Lenel: *Palingenesia iuris civilis. Iuris consultorum reliquiae quae Iustiniani Digestis continentur ceteraque iurisprudentiae civilis fragmenta minora secundum auctores et libros*. Vol. II. Lipsiae, Ex officina Bernhardi Tauchnitz, 1889. 650; Paolo Ferretti: *In rerum natura esse in rebus humanis nondum esse. L'identitŕ del concepito nel pensiero giurisprudenziale classico*. Milano, Giuffrč Editore, 2008. 155.

[28] For a similar approach cf. Kaser 1971², 346; Adolf Berger: *Encyclopedic Dictionary of Roman Law*. New Jersey, Clark, 2010⁸. s. v. 'Senatusconsultum Plancianum'.

[29] Albanese 1979, 260[257]. As for the date of SC Plancianum see Plin. Epist. 10, 72–73. Cf. Albanese 1979, same place.; Kaser 1971², 346.

[30] Similarly cf. Waldstein 2002, 841; Ferretti 2008, 156.

[31] Correspondinly Waldstein 2002, 841; Ferretti 2008, 156–157.

[32] See also Ferretti 2008, 157.

In the first paragraph of this fragment Ulpian explains this unusual, but very original imperial decision giving a very detailed reasoning with regards to the verdict. Firstly, he point out explicitly that there's no place for the application of those *senatus consulta* in this matter that are related to the paternal recognition of a child (*senatus consulta de liberis agnoscendis*), which *senatus consulta*, however, are covered in depth in the previous title of the Digest. The reason for this inadmissibility of application is this: *partus enim antequam edatur, mulieris portio est vel viscerum*, in other words the child, before it is born, is a part or a portion of the woman, or of her entrails.[33] As a consequence, it turns out clearly that the use of the expression *portio mulieris vel viscerum* cannot by any means be generalised as a term used throughout ancient Roman history. As it is apparent from the case described above and the reasoning attached to it, this term is very likely a means of reasoning to establish the inadmissibility of a certain group of *senatus consulta*.[34] In addition to this, it is very interesting to refer to Waldstein's approach on this text, who underlines that the words used by Ulpian pertain to such a phase on the one hand, where the father is still not entitled to exercise any right whatsoever over the child, and another phase on the other hand, when the child after its birth can be claimed from the woman.[35] Resulting from all that have just been said, it is empirically justified that those who hastily point out that the Roman considered the foetus as the part of the mother's body are far from being fully true, to say the least. Ulpian's reasoning, however, continues emphasising that after the child's birth (*postquam editus*), the father is eligible to demand that the child should to be presented to the father, or even to be separated from its mother.

3.4 The interpretation of mulieris portio vel viscerum in the text

In connection with the expression *mulieris portio est vel viscerum*, it could be highly interesting to linger with the meanings of some elements of the aforesaid phrase, namely that of *portio* and *viscera*.

In Latin *portio* means a ratio, a part or a portion.[36] As for *viscera*, it refers to the soft, fleshy parts of the body in contrast to the bones, skin for instance; also the innermost parts of the human body containing the vital organs, and especially the internal organs in the abdomen. Additionally, it can also designate a woman's womb.[37] At this point it could be worthwhile to underline that according to Waldstein the term *portio* can also mean "interest" in a certain context, moreover *viscera* may refer to anything that is the nearest and dearest to a particular person. It should hastily be noted that Waldstein's interpretation concerning *portio* isn't compliant with primary sources, it could however be accepted if interpreted in tandem with a Paulian text, namely Paul. D. 1, 5, 7 (lib. sing.de port.). In this text there's an allusion to the issue of *commodum*, and even if this text won't entirely support Waldstein's view, still the direction seems to be the same.[38]

Paul. D. 1, 5, 7 (lib. sing.de port., quae lib. damn. conc.)

Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur: quamquam alii antequam nascatur nequaquam prosit.

In connection with the issue of *quae liberis damnatorum conceditur*, Paul wants to clarify who could be considered as *liber*. In this context, the first sentence tells us that the foetus should already be considered to be *in rebus humanis*, whenever its own *commodum* is in question.[39] The term *commodum* may refer to any advantage, benefit, profit, advantageous situation, interest, as well as convenience.[40] For the better understanding of the expression *in rebus humanis esse* another text could be referred to, which text is often presented hand in hand with the prior Paulian text.

Iul. D. 1, 5, 26 (69 dig.)

Qui in utero sunt, in toto paene iure civili intelleguntur in rerum natura esse. nam et legitimae hereditates his restituuntur: et si praegnas mulier ab hostibus capta sit, id quod natum erit postliminium habet, item patris vel matris condicionem sequitur: praeterea si an-

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[33] Cf. WALDSTEIN 2002, 846: „[…] die Worte Ulpians […] betreffen […] die Grenze zwischen der Phase, in welcher der Vater noch nicht eigene Rechte am Kind geltend machen kann, und der Zeit nach der Geburt, in der er das Kind nach eigenem Recht von der Frau herausverlangen kann […]".

[34] Cf. *Oxford Latin Dictionary* s. h. v.; FINÁLY Henrik: *A latin nyelv szótára*. [A Latin Dictionary] Budapest, Franklin-Társulat, 1884. s. h. v.; Hermann Gottlieb HEUMANN – Emil SECKEL: *Handlexikon zu den Quellen des römischen Rechts*. Jena, Verlag Gustav von Fischer, 1926. s. v. 'portio[3]'.

[35] Cf. *Oxford Latin Dictionary* s. h. v.; FINÁLY s.h.v. Concerning the manifold meanings of *viscera* see also WALDSTEIN 2002, 843 and 844, with footnote 20.

[36] Wolfgang WALDSTEIN: *Teoria generale del diritto. Dall'antichitŕ ad oggi.* Pontifica Universitŕ Lateranense, 2001. 168. Additionally see Wolfgang WALDSTEIN: Zur Stellung des nasciturus im römischen Recht. In: *A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag*. Miskolc, Verlag Bíbor, 1998. 47 skk. To the postclassical origins of the word *viscerum* see Emilio ALBERTARIO: *Studi di diritto romano I*. Milano, 1933. 61.

[37] Cf. FERRETTI 2008, 163.

[38] Cf. HEUMANN – SECKEL 1926, s. h. v.; *Oxford Latin Dictionary* s. h. v.

[39] Ferretti underlines that there is a possible parallelism between this fragment and a previously examined text by Celsus: Julian applies the term *in toto paene iure civili intelleguntur in rerum natura esse*, while Celsus uses the expression *quodammodo in rerum natura esse*. In this scope, there is a doubtless reference to actual existence, and also the restrictive nature of these expression refer to the dual stance of the foetus. In detail see FERRETTI 2008, 68–69. Concerning suspicions of interpolation cf. WALDSTEIN 2002, 848[28]. To this text see further ERDŐDY János: „Intelleguntur in rerum natura esse". A rerum natura kifejezés megjelenése és mibenléte a Digestában. [The Notion and the Meaning of *Rerum Natura* in the Digest] *Iustum Aequum Salutare* 2010/1. 160–161.

[40] Correspondingly see BESSENYŐ 2010[4], 212. Another source could be evoked here with regards to the foetus: Cels. D. 28, 5, 60, 6 (16 dig.). According to the case the following was stated in a will: "Let Titius be my heir to a third part of my estate, and Maevius be my heir to another third, and let Titius be my heir to the remaining third, if a ship should arrive from Asia within three months". According to Celsus, Titius will not immediately become the heir to half of the estate, for two heirs have been appointed. Consequently, Titius will either be an heir to half of it, or to two thirds, so that a sixth of the estate will be in abeyance, and if the condition should be fulfilled, Titius will be the heir to two thirds of the estate, but if it should not be fulfilled, the sixth will accrue to Maevius. If, however, Titius should die before the condition is fulfilled, and it should be fulfilled afterwards, the sixth of the estate which remained in abeyance will not accrue to the heir of Titius, but to Maevius; for Titius died when it was still doubtful as to whether he or Maevius would be entitled to the said sixth, since it could not be understood to have been given to him who was no longer in existence at the time it should have been allotted.

cilla praegnas subrepta fuerit, quamvis apud bonae fidei emptorem pepererit, id quod natum erit tamquam furtivum usu non capitur: his consequens est, ut libertus quoque, quamdiu patroni filius nasci possit, eo iure sit, quo sunt qui patronos habent.

As the jurist sees it, the still unborn are understood to be already in existence – by almost every provision of *ius civile*.[41] There are several examples given in the text to maintain this idea, such as for example estates legally descend to them, and if a pregnant woman is taken by the enemy, her child has the right of *postliminium*, and it also follows the condition of the father, or mother. Moreover, if a pregnant female slave is stolen, even after she may have brought forth in the hands of a purchaser in good faith, her child being stolen property cannot be subject to usucaption.[42] Consequently Julian recognises the foetus as a living creature[43], but there are no allusions whatsoever can be traced with regards to the differences between the legal stance of an already born person and a *nasciturus*. In comparison to the previously examined text by Paul, a very remarkable difference can be traced between the outer world in general which contains all existing entities as *in rerum natura esse*, and the human world (**res humanae*). Therefore a *nasciturus*, who is as a consequence, is still *in utero est* stands on the threshold: it exists already (*in rerum natura est*), though it doesn't enter the human world. It is merely on its way to get there – that's what the term *nasciturus* itself expresses. Thus, the view in secondary literature according to which the foetus' legal stance is a dependent or uncertain one is surely well-based: primary sources present manifold examples on this, the first indication of which could be the already cited Paulian text (Paul. D. 1, 5, 7 [lib. sing.de port., quae lib. damn. conc.]).[44] It is beyond debate that such a transient stance of a *nasciturus* demands increased protection and extra care – even by legal means, too.

4. Conclusions

It is clear from all that have been said that ont he one hand the rule covering the defence of the interests of the foetus (originally *qui in utero est* [in Medieval terms *nasciturus*[45]] *pro iam nato habetur, quotiens de commodis ipsius quaeritur*) grants protection to the still unborn child on a theoretical basis. On the other hand, the principle of *mulieris portio vel viscerum* (generally not properly and fully quoted) was merely a particular means of reasoning in the scope of an actual case, in connection with the applicability of *senatus consulta* on the topic of paternal recognition of a child.[46] Consequently, similarly to the text in which Iavolenus alerts about the jeopardies of definitions (Iav. D. 50, 17, 202 [11 epist.]), we could even mention some jeopardies with regards to legal *regulae*, too. However, at this point I hasten to emphasise that such dangers do not refer to the actual content of a *regula*, but sometimes rather to the meaning or interpretation attributed to her by other authors.

[41] On this see also Péter 1991, 177, where the term *in rerum natura esse* is interpreted as "natural entity".

[42] In addition cf. Mod. D. 27, 1, 2, 6 (2 excus.); Paul. D. 50, 16, 231 (1 ad SC Tertull.). To this see also Földi – Hamza 2013[18], 204; Joseph Plescia: The Development of the Doctrine of *Boni Mores* in Roman Law. *RIDA* XXXIV (1987). 292. It should however be noted that the conclusion drawn by Plescia, namely that Roman jurists in general considered the foetus as *mulieris portio vel viscerum* is inconsistent with the sources. It is also an erroneous assumption that the foetus was not regarded as as a legal entity, that is *homo*. In this respect suffice it to cite the differences between the expressions *persona*, *caput* and *homo*. Concerning *mulieris portio vel viscerum* it should not be forgotten that there is only one single instance in the Digest (Ulp. D. 25, 4, 1, 1 [24 ad ed.]), where it appears – therefore any conclusions to generalise this term are anything but far-fetched. Cf. Plescia 1987, 293.

[43] In the secondary literature see e.g. Nótári 2011, 153.

[44] For more details see Waldstein 1998, 41–61. Lately cf.Wolfgang Waldstein: *A szívébe írva. A természetjog mint az emberi társadalom alapja*. Budapest, Szent István Társulat, 2011. 133 sqq.

The Rules of Condemnation to the Mines in Imperial Rome

*Pál Sáry**

Abstract

Forced labour in the mines was often inflicted as a punishment in imperial Rome. What was the position of this penalty in the Roman penal system? What different degrees of this punishment were there? Who were condemned to the mines? What procedural rules had to be observed when this punishment was inflicted? What were the legal consequences of the condemnation? What was the legal position of the children of the convicted women? What were the living conditions in the mines? What do we know about the period of this penalty? What happened if a convict received a pardon? The paper tries to answer these questions on the basis of the primary sources.

Key words: *Roman criminal law; capital penalty; forced labour in the mines; servi poenae.*

Condemnation to hard labour in the mines was introduced as a new type of punishment in the Roman criminal law in the early Principate, when the great wars of conquest were finished, and the number of the prisoners of war – who could be sent to the mines – significantly decreased. This mode of punishment had been employed by the Egyptian rulers for ages; probably this foreign example also impressed on the Romans. From the term *metalli coercitio* Garnsey concludes that sentencing to the mines was originally not a legal penalty, but an aspect of *coercitio*.[1] As we can see from the fragments of the works of the classical jurists, by the second and third centuries this type of punishment was regulated circumstantially.

1. The penal system of imperial Rome

In classical Roman law the different penalties constituted a hierarchical system. Callistratus makes a distinction between capital and non-capital punishments. According to the jurist, the capital penalties were as follows: crucifixion, burning alive, beheading, condemnation to the mines, deportation to an island. The remaining punishments (relegation, labour on the public works, beating with rods) were non-capital, because they related to a person's reputation, not to the risk of his *caput*.[2] Consequently, condemnation to the mines was classed among the capital punishments, and – as Callistratus expressively states – it was the next punishment after death (*proxima morti poena metalli coercitio*).

Paul groups the penalties in another way. He distinguishes between three categories, as (1) extrem punishments (crucifixion, burning alive, beheading), (2) the penalties for less serious offences (condemnation to the mines, contests with gladiators, deportation), and (3) the mildest punishments (relegation, exile, labour on the public works, confinement in chains).[3] As we can see, condemnation to the mines is the next punishment after death in this system, too. Consequently, Callistratus and Paul took the same opinion in relation to the severity of sentencing to the mines.

2. The degrees of hard labour in the mines

There were three degrees of hard labour in the mines: *metallum*, *opus metalli* and *ministerium metallicorum*.[4] In the first and second centuries – as we can see below – both *damnatio in metallum* and *damnatio in opus metalli* were life sentences; the convicts became slaves in both cases. Ulpian makes mention of two differences between these two penal categories: (1) the *damnati in metallum* were weighed down with heavier chains than the *damnati in opus metalli*, (2) in case of an attempted escape the *damnati in opus metalli* were transferred among the *damnati in metallum*, while the *damnati in metallum* were more severely punished in such a case.[5]

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1 GARNSEY, Peter, *Social Status and Legal Privilege in the Roman Empire*, Oxford, 1970, p. 132, n. 1.

2 Call. D. 48.19.28 pr.–1.

3 PS 5.17.2(3).

4 Cf. MILLAR, Fergus, Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine, *Papers of the British School at Rome* 52 (1984), p. 139; SANTALUCIA, Bernardo, *Diritto e processo penale nell'antica Roma*, 2nd edn., Milano, 1998, pp. 250–251.

5 Ulp. D. 48.19.8.6.

Callistratus mentions only this latter difference between *metallum* and *opus metalli*, and he expressively states that in case of an attempted escape the *damnati in metallum* were punished by death.[6]

Ulpian writes the following about the third type of hard labour in the mines: 'Women are customarily condemned to the service of convicts in the mines, either permanently or for a period; in a similar manner [they may be condemned] to the saltworks. If, indeed, they are sentenced in perpetuity, they are made, as it were, *servae poenae*; but if they are sentenced for a fixed period, they retain their citizenship.'[7] Accordingly, *ministerium metallicorum* was a function reserved usually for female convicts. It could be a life or a fixed-term sentence: in the first case the convicts – as the *damnati in metallum* and the *damnati in opus metalli* – became slaves, in the latter case the convicts retained their freedom and their citizenship.

In all probability, the convicts who were sentenced to different degrees of hard labour had different tasks in the mines. There had to be some division of labour in every mine. According to Diodorus, in the Egyptian gold mines the different phases of the long working process were distributed among the different groups of the workers, for example, the task of the women and older men was grinding of the quarried stones in mills.[8] It seems very likely that the convicts sentenced to different degrees of mining work had different functions. The hardest physical works surely were done by the *damnati in metallum*, the tasks of the other convicts could be lighter.[9] Of course, the severity of the punishment depended on the kind of the given mine, too. We are told by Ulpian that condemnation to the lime quarries or to the sulphur mines were heavier than condemnation to the ordinary mines.[10]

3. Who could be condemned to the mines?

Both free men and slaves could be sentenced to the mines.[11] From the Roman citizens only the *humiliores* could be punished by this way; condemnation to the mines of *honestiores* were prohibited.[12] The exemption of decurions and their sons, soldiers, veterans and their sons from *metallum* and *opus metalli* is explicitly mentioned in the sources.[13]

Condemnation to the mines was employed widely.[14] According to our sources, *metallum* was the penalty for slaves who committed an atrocious injury,[15] or who forcibly seized booty from a wreck,[16] or who voluntarily dug up, or plowed out landmarks, or overturned trees used for that purpose.[17] The same punishment was inflicted on the freedman who conspired against his patron,[18] or who forcibly insulted his patron,[19] or who aspired to marry his patroness, or the daughter of the wife of his patron.[20] Similarly, condemnation to the mines was the penalty for *humiliores* who were guilty of forgery of wills or of any other written instruments or of coins,[21] or who stole anything from an imperial mine or from an imperial mint,[22] or who in the daytime took an article of moderate value from a temple,[23] or who were guilty of violating tombs,[24] or who set fire to a house or country residence through enmity,[25] or who maliciously set fire to growing crops of grain, or vines, or olive trees,[26] or who were guilty of swindling,[27] or who committed

[6] Call. D. 48.19.28.14 and 50.13.5.3. Of course, the convict, who left the mines under coercion, was not punishable. According to Tryphoninus, if the enemy captured a convict from the mines, and the convict was ransomed, he had to be returned to his punishment, but he was not punishable as a runaway from the mines, and his ransomer could receive a reward from the imperial treasury (Tryph. D. 49.15.12.17). We are told by Pomponius that 'A woman, condemned to the saltworks for a crime, was subsequently captured by petty brigands of a foreign nation and sold under the rules of trade. She was ransomed and reverted to her proper condition. The price paid was to be restored to Cocceius Firmus, a centurion, from the imperial treasury' (Pomp. D. 49.15.6; tr. Alan Watson). For a detailed analysis of this interesting Digest fragment, see WACKE, Andreas, Menschenraub und Lösegelderstattung: Ein Kriminalfall aus dem 2. Jh. n.Chr., in *Római jog és a magánjog fejlődése Európában: Tanulmányok Molnár Imre 75. születésnapjára* [Roman Law and the Development of Private Law in Europe: Essays in Honour of Imre Molnár in Occasion of His 75th Birthday], ed. by Éva Jakab, Szeged, 2011, pp. 241–264.

[7] Ulp. D. 48.19.8.8; tr. Watson.

[8] Diod. 3.12–14.

[9] According to Molnár, the convicted women had to cook and wash for the convicted men in the mines. See MOLNÁR, Imre, A császárkori Róma büntetési rendszere [The Penal System of Imperial Rome], *Acta Universitatis Szegediensis: Acta Juridica et Politica* 58 (2000), p. 372.

[10] Ulp. D. 48.19.8.10.

[11] Cf. Gord. C. 9.47.11.

[12] This exemption was violated by the emperor Gaius (cf. Suet. *Gaius* 27). See GARNSEY, pp. 135–136; MILLAR, pp. 128–129.

[13] Cf. Ulp. D. 48.19.9.11 and Call. D. 48.19.28.5 (decurions); Ulp. D. 50.2.2.2 and Alex. C. 9.47.9 (sons of decurions); Mod. D. 49.16.3.1 (soldiers); Marci. D. 49.18.3 and Ant. C. 9.47.5 (veterans and their sons).

[14] Cf. SALERNO, Francesco, *Ad metalla: Aspetti giuridici del lavoro in miniera*, Napoli, 2003, pp. 64–78.

[15] PS 5.4.22.

[16] D. 47.9.4.1.

[17] PS 5.22.2.

[18] D. 1.12.1.10.

[19] D. 37.14.1.

[20] PS 2.19.9.

[21] PS 5.25.1.

[22] D. 48.19.38 pr.

[23] D. 48.13.7(6).

[24] D. 47.12.11.

[25] PS 5.20.2.

[26] PS 5.20.5.

[27] D. 47.20.3.2.

a kidnapping,[28] or who seduced underage virgins,[29] or who administered an abortifacient or aphrodisiac draught,[30] or who were liable under the *lex Iulia de vi publica et privata*,[31] or who broke or pulled down the embankments of the Nile.[32] Under the persecutions, Christians were frequently sentenced to the mines.[33] Condemnation to mines and quarries for religious offences persisted through the fourth and fifth centuries; for example, under the reign of the Arian emperors many orthodox Christians were sent to the mines.[34]

4. The main procedural rules

In the city of Rome the right to sentence persons to the mines was exclusively reserved to the urban prefect (*praefectus urbi*). Ulpian mentions the following: 'In a letter of the deified Severus to Fabius Cilo, it is clearly stated that the urban prefect has a special competence to condemn persons to the mines.'[35] In the provinces the authority was conferred upon the governors to condemn delinquents to the mines. As Ulpian writes, 'Those who rule entire provinces have full power of the sword (*jus gladii*), and they are also permitted to send people to the metal mines.'[36] Considering the severity of this type of punishment, nobody could be sentenced to the mines in his absence.[37]

5. The legal consequences of the condemnation

If a free person was condemned to the mines, the most important legal consequence of the sentence was the loss of liberty.[38] Hence, in such a case, the convict suffered *capitis deminutio maxima*, and became a slave. Both *damnatio in metallum* and *damnatio in opus metalli* deprived free men of their freedom.[39] As we have already mentioned, the *damnati in ministerium metallicorum* became slaves only in the case when their sentence was a life sentence.

According to our sources, in cases of condemnation to *metallum*, to *opus metalli*, and to *perpetuum ministerium metallicorum* the convicts became slaves of the penalty (*servi poenae*),[40] who were neither in private nor in public ownership.[41] They were not the property of anyone: they were slaves without a master (*servi sine domino*).[42] Having no owner, they could neither be sold nor be manumitted. They could not buy their freedom. They could have no *peculium*. They could bind or benefit no one by contract, and they could not be noxally surrendered for a wrong. A transfer of property to them was void: they had no derivative capacity.[43]

We are told by Gaius that those who were condemned to the mines lost *testamenti factio*.[44] Antoninus Pius wrote in a rescript that if a person instituted heir has become a *servus poenae*, because condemned to be executed or to fight with beasts or to work in the mines, this will be treated as if the institution had not been made.[45] Neither the imperial treasury could acquire anything under a will through a person condemned to the mines (since the criminal was the slave of the penalty not of the treasury).[46] The only exception was the testamentary provision of maintenance which could be acquire by the treasury.[47]

If a married person was sentenced to the mines, the marriage was dissolved, since marriage was dissolved by slavery of either of the parties.[48] Paternal power was extinguished by being condemned to the mines either on the son's part or his father's.[49]

The property of the convicts was forfeited to the state.[50] Those condemned to the mines usually received also corporal punishment. We are told by Paul that those who broke into houses at night were scourged and sentenced to the mines.[51]

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[28] D. 48.15.7.
[29] D. 48.19.38.3.
[30] D. 48.19.38.5.
[31] PS 5.26.3.
[32] D. 47.11.10.
[33] Cf. Tert. *Apol*. 12.5 and 27.7. For further sources, see DAVIES, J. G., Condemnation to the Mines: A Neglected Chapter in the History of the Persecutions, *University of Birmingham Historical Journal* 6 (1958), pp. 99–107.
[34] Cf. Athan. *Hist. Arian*. 60. For further sources, see GUSTAFSON, Mark, Condemnation to the Mines in the Later Roman Empire, *Harvard Theological Review* 87 (1994), pp. 421–433.
[35] Ulp. D. 48.19.8.5; tr. Watson. Cf. Ulp. D. 1.12.1.10 and 37.14.1; Marci. D. 40.1.5 pr.
[36] Ulp. D. 1.18.6.8; tr. Watson. Cf. Plin. *Ep*. 10.58; Ulp. D. 37.14.1; Marci. D. 40.1.5 pr.; Gord. C. 9.2.6.1.
[37] Cf. Marci. D. 48.17.1.1; Ulp. 48.19.5 pr.; Gord. C. 9.2.6.1.
[38] Cf. Gai. D. 28.1.8.4; Ulp. D. 37.4.1.9.
[39] Cf. Ulp. D. 48.19.8.4.
[40] Cf. PS 3.6.29; Marci. D. 48.19.17 pr.; Herm. D. 48.19.36; Call. D. 49.14.12; Gord. C. 9.49.4.
[41] The slaves who were condemned to the mines did no longer belong to him whose property they had been before their condemnation (Ulp. D. 48.19.8.12). The *servi poenae* did not belong to Caesar or the fisc (Marci. D. 34.8.3 pr. and 48.19.17 pr.; Call. D. 49.14.12).
[42] Cf. PFAFF, Ivo, Servitus poenae, *Paulys Realencyclopädie der classischen Altertumswissenschaft*, Band II A,2 (1923), col. 1832. For a more detailed analysis of the legal position of the *servi poenae*, see ZILETTI, Ugo, In tema di 'servitus poenae', *Studia et documenta historiae et iuris* 34 (1968), pp. 32–109.
[43] See BUCKLAND, William Warwick, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian*, Cambridge, 1908, p. 277; IDEM, *Elementary Principles of the Roman Private Law*, Cambridge, 1912, p. 21.
[44] Gai. D. 28.1.8.4.
[45] Ulp. D. 29.2.25.3. Cf. Marci. D. 34.8.3 pr.–1 and 48.19.17 pr.
[46] Cf. Call. D. 49.14.12.
[47] Cf. Marci. D. 34.8.3 pr.
[48] Cf. Paul. D. 24.2.1. In A.D. 536, Justinian abolished the class of *servi poenae* to allow for continuity of the convict's marriage (Nov. 22.8).
[49] Cf. Inst. 1.12.3.
[50] Cf. Gai. D. 28.1.8.4; Gord. C. 9.49.4; Ant. C. 9.51.2.
[51] Paul. D. 47.18.2.

The slaves who forcibly seized booty from wrecks of ships were punished in a similar way.[52] In A.D. 303, during the persecution of Diocletian, an incalculable number of Christians in Pontus were brutally tortured and then condemned to the provincial copper mines.[53]

Persons sentenced to the mines were forbidden to make denunciations.[54] A slave condemned to the mines could not be tortured to give evidence against the person who was previously his owner.[55]

6. The legal position of the children of the convicted women

The legal position of the children of those women who were condemned to the mines is one of the most interesting questions. According to a rescript of Antoninus Pius, the status of the child who had been conceived before the condemnation of his mother to the mines was that of his mother previous to her condemnation.[56] Consequently, if the woman was free before her condemnation, the child was free. However, if the woman was a slave before her condemnation, she borned a slave. In the latter case the child was surely the property of the former master of his mother.

The child who had been conceived after the condemnation of his mother to the mines was born as a slave. However, such children could be manumitted and could be sold, too.[57] Consequently, in such a case the legal position of the child was different from the position of his mother. The child was not a *servus poenae* but very likely a *servus publicus* (owned by the state).

7. The living conditions of the convicts

The convicts lived under terrible conditions in the mines.[58] In A.D. 257, Cyprian, bishop of Carthago, addressed a letter to the Christians (among them to nine bishops, many presbyters and deacons) who suffered in the Numidian mines.[59] He received in reply three letters.[60] In these letters we can read about the fetters by which the feet of the convicts were bounded, about the rods by which their limbs were wounded, about their half-shorn head, about the lack of bread, clothes, beds and bathing facilities, and about the darkness, smoke and dirt by which the mine was filled.[61]

The different weighted chains of the convicts were already mentioned by us. About the corporal punishment of the convicts Callistratus writes as follows: 'Freedom is taken away from those condemned to the mines, since they may even be punished by flogging like slaves.'[62] The hair of the convicts was half shaved in order that they could be recognized easily in case of their escape. Those sentenced to the mines were often marked with a tattoo.[63] According to Suetonius, the emperor Gaius had many men of honourable rank tattooed and sent to the mines.[64] In A.D. 315, Constantine decreed that criminals (condemned to the gladiatorial schools or to the mines) should not be tattooed on the face but on the hands or calves in order to preserve the image of the divine, as represented by the face.[65]

The persons condemned to the mines could receive not only letters but also money and nourishment from their relatives and friends. About A.D. 171, Dionysius, bishop of Corinth, wrote to Soter, bishop of Rome, a letter in which he praised for his outstanding charity towards those Christians who had been condemned to the mines.[66] In the *Didascalia Apostolorum* (a Syriac document, about A.D. 250) Christians are exhorted to take care of those sentenced to the mines: to send them nourishment, and money to their guards in return for milder treatment.[67] The visiting of the convicts was also permitted in the mines. In A.D. 311, during the persecution of Maximin, St. Antony payed a visit to Alexandria and ministered to the confessors in the mines.[68]

8. The period of the penalty

Till the beginning of the third century A.D., both *damnatio in metallum* and *damnatio in opus metalli* were life sentences.[69] Callistratus quotes a Hadrianic rescript: 'No one ought to be condemned to work in mines for a restricted term; rather, he who has been condemned for a restricted term, even if he does work in mines should not be held to have been condemned to

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[52] Cf. Paul. D. 47.9.4.1.
[53] Cf. Eus. *Hist. eccl*. 8.12.10.
[54] Cf. Marci. D. 49.14.18.3.
[55] Cf. Pap. D. 48.18.17.3.
[56] Ant. C. 9.47.4.
[57] Cf. Ulp. D. 40.5.24.6.
[58] See ORTH, Ferdinand, Bergbau, *Paulys Realencyclopädie der classischen Altertumswissenschaft*, Suppl. IV (1924), col. 146; MILLAR, p. 124; LASSANDRO, Domenico, I 'damnati in metalla' in alcune testimonianze antiche, in *Coercizione e mobilitŕ umana nel mondo antico*, ed. by Marta Sordi, Milano, 1995, pp. 273–274.
[59] Cypr. *Ep*. 76.
[60] Cypr. *Ep*. 77–79.
[61] Cypr. *Ep*. 76.2; 77.3.
[62] Call. D. 49.14.12; tr. Watson.
[63] See GUSTAFSON, W. Mark, Inscripta in fronte: penal tattooing in Late Antiquity, *Classical Antiquity* 16 (1997), p. 81.
[64] Suet. *Gaius* 27.
[65] Const. C. Th. 9.40.2 = C. 9.47.17.
[66] Eus. *Hist. eccl*. 4.23.10.
[67] *Didasc*. 19.1.
[68] Athan. *Vita S. Ant*. 46.
[69] Mommsen writes about those condemned to the mines that 'sie wird nur auf Lebenszeit erkannt' (MOMMSEN, Theodor, *Römisches Strafrecht*, Leipzig, 1899, p. 949). Cf. WACKE, p. 251: 'Die Bergwerksstrafe… stets lebenslänglich.'

the mines. For his freedom remains, as long as the freedom of those condemned to public labour for life.'[70] A little later, however, the fixed-term sentences became normal.[71] Modestinus states that an indefinite sentence to the mines should be construed as one of ten years.[72] Constantine ordered a two-year condemnation to the mines for persons of poor condition who wrongly challenged a judicial verdict.[73] The phrase 'perpetual punishment of labor in the mines' in the post-classical sources also relates to the fact that in the later empire condemnation to the mines was not a life sentence in every case.[74]

9. The possibility and consequences of a pardon

The convicts could be pardoned by the grace of the emperor. We are told by Hippolytus that in the late second century A.D., Marcia, a concubine of the emperor Commodus, gained mercy from her lover for the Christians (including the later pope, Callistus) who had been sentenced to the mines of Sardinia.[75]

Under certain conditions, the provincial governors also could release the convicts from the mines. Antoninus Pius wrote in a rescript that a governor was able to release those found to be unfit for doing the work in the mines because of sickness or the infirmity of age, provided that they had served at least ten years and had some living relatives.[76]

The slaves who had been condemned to the mines did not revert to their masters, in the event of their receiving a pardon by the emperor, but became the property of the fisc.[77] Consequently, in such cases, the *servi poenae* became *servi publici*.[78]

The pardoned convicts who had been free before their condemnation regained their freedom. If they had been *ingenui*, they reverted to *ingenuitas*.[79] If they had been *liberti*, they became again the *liberti* of their former *patroni*.

According to Ulpian, if a soldier 'appoints a *servus poenae* heir, the institution will not be valid; but if at the time of the death he is found to be a citizen, the institution becomes validated, as if the inheritance were given at this time.'[80] The same jurist writes in another place that if a son has been condemned to the mines, and has been reinstated, he will be admitted to *bonorum possessio*.[81] We know from Hermogenian that in the case of a father the legal situation was the same.[82] According to Ulpian again, 'Where a son, who, at the time of his mother's death, was a Roman citizen, is taken into slavery before accepting the estate, he is not offered it by way of intestacy, even if he has later become free, unless perhaps in the case where he has been made a servus poenae and been restored to his former status by the emperor's prerogative.'[83] These and other Digest fragments prove that the pardoned convicts regained all their former rights in the field of the law of succession.[84]

The imperial act of grace restored also the rights of the patrons. Hermogenianus writes that 'If a patron or his freedman suffers deportation, and is subsequently reinstated, his rights at patron and of making application for *bonorum possessio* that have been lost are recovered; and this right is preserved also in the case where the patron or freedman has been condemned to the mines and is subsequently reinstated.'[85]

The rights of blood relationship also were restituted by the act of grace. Paul writes the following: 'A woman who had been condemned to the mines gave birth to a child whom she had conceived beforehand and was then reinstated by the emperor. It will be more humane to say that the rights of blood relationship [to the child] appear to be restored to her also."[86]

The pardoned criminals regained their public rights, too; they could hold public offices and could be obliged to undertake *munera*. As Ulpian writes, 'If someone condemned to the mines is granted *restitutio in integrum*, he may be summoned to undertake *munera* or hold office, as if he had never been condemned.'[87]

However, the pardoned convicts did not get back automatically their confiscated property. Emperor Gordian sent a rescript in these words to Callimorphus: 'A person condemned to a mine becomes a penal slave, and the property of a person who suffer such penalty is confiscated for the benefit of the fisc. Hence if such person was later freed by a pardon, as

[70] Call. D. 48.19.28.6; tr. Garnsey. Accordingly, in practice there were fixed-term sentences to hard labour in the mines. It is proved by the papyri also which document releases because the condemned had completed their five-year terms in the Egyptian alabaster quarries. Cf. GROEN-WALLINGA, Miriam J., and TACOMA, Laurens E., Contextualizing Condemnation to Hard Labour in the Roman Empire, in *Global convict labour*, ed. by De Vito, Christian Giuseppe, and Lichtenstein, Alex, Leiden, 2015, pp. 63–64.
[71] Cf. MILLAR, p. 139.
[72] Mod. D. 48.19.23.
[73] Const. CTh 1.5.3.
[74] Cf. Hon. CTh 2.14.1 = C. 2.14(15).1.2.
[75] Hippolytus, *Philosophumena* 9.2.12. Cf. STRONG, Anise K., A Christian Concubine in Commodus' Court?, *Eugesta* 4 (2014), pp. 238–259.
[76] D. 48.19.22.
[77] Cf. Ulp. D. 40.5.24.5 and 48.19.8.12; Val. C. 9.51.8.
[78] Cf. Plin. *Ep*. 10.31.
[79] Cf. PFAFF, col. 1832.
[80] Ulp. D. 29.1.13.2; tr. Watson.
[81] Ulp. D. 37.4.1.9.
[82] Herm. D. 37.4.2.
[83] Ulp. D. 38.17.1.4; tr. Watson.
[84] Cf. Paul. D. 34.1.11; Pomp. D. 40.4.46.
[85] Herm. D. 37.14.21 pr.; tr. Watson. Cf. Ulp. D. 48.23.1.
[86] Paul. D. 48.23.4; tr. Watson.
[87] Ulp. D. 50.4.3.2; tr. Watson.

you say, any property which he had belongs to the fisc rather than to him.'[88]

The pardoned persons could receive back their confiscated property only by a special imperial *beneficium*. We can read the following in a rescript of the emperor Antoninus Severus: 'Since you say that your father was sentenced to a mine, and his goods were, therefore, rightly taken by the fisc, the fact that only his punishment was remitted by an imperial pardon did not restore his property, unless he obtained a special grant thereof.'[89]

Consequently, restitution of the former status (*restitutio status pristini*) and restitution of the former financial condition (*restitutio in bona*) were two different acts.[90] While the former favour could be granted without the latter, the latter *beneficium* was evidently granted always together with the former grace.

[88] Gord. C. 9.49.4; tr. Fred H. Blume.
[89] Ant. C. 9.51.2; tr. Blume. Cf. Alex. C. 9.51.4.
[90] See REIN, Wilhelm, *Das Criminalrecht der Römer von Romulus bis auf Justinianus*, Leipzig, 1844, p. 271.

What Would 'Praetor Paulus' Do in 'Post-Lehman' World?

A Comparative Analysis of Lawmakers' Responses to the Spreading Practice of Fraudulent Transfers' Novel Ruses in Late Roman Republic's Liquidity Crisis and in 21st Century Hungarian 'Post-Lehman' Crunch: Some Morals of the 'Paulian Action'*

*József Benke***

Abstract

This contribution investigates certain parallelisms between laws and socio-economic settings of laws in two entirely different ages and legal regimes. Debtors' massive liquidity crisis in late Roman Republic and 21st century Hungarian 'post-Lehman' crisis of household debtors of mortgage home loans accounted in foreign currency are as similar to each other as the morals of the prolific ancient casuistics based upon the general-clause-like ruling upon actio Pauliana are useful to consider for new shrewd non-contractual fraudulent misconducts committed in contemporaneous Hungary, where such general regulation towards these kinds of tricks of fraus creditorum lacks. Therefore courts of higher instance felt themselves being obliged for finding a righteous answer to these problematic questions being emerged just in these days.

Key words: *Liquidity Crises; Roman Republic; Actio Pauliana; Fraudulent Conveyances; Fraudulent Transfers; Post-Lehman Crisis; Mortgage Home Loans Accounted in Foreign Currency; Comparative Law; Civil (Roman) Law; Hungarian Private and Bankruptcy Law.*

I. Comparability of ancient Roman law and Hungarian law in effect: Topicality, methods, hypotheses and key questions

1. 'The insolvency […] is no human comedy but the desperate conduct of those who are unable to meet their payments goes back to the origins of humanity. The law seeks to counteract the ruses of defaulting debtors in dire straits […]'[1] – stated the late Advocate General, *Ruiz-Jarabo Colomer* in his opinion delivered on 16 October 2008 in a case of reference for preliminary ruling, i.e. *Seagon v Deko Marty* before European Court of Justice. His statement, according to which these shrewd fraudulent misconducts and also the efforts of lawmakers towards them 'go back to the origins of humanity', will be easily justifiable through the very outcomes of this paper.

'Bankruptcy has become much more prevalent in the public consciousness since the global financial crisis. Not only have there been the spectacular failures of multinational banks and corporations, but also the rate of personal bankruptcy in North-America and Europe has reached levels not seen since the 1930 s'[2]. Massive financial crises produce indisputably such circumstances, under which debtors are inspired for new tricks of an agile getaway. A certain pile-up may demonstrably occur in debtors' practice of fraudulent tranfers for diminishing their patrimony as financial cover of their creditors' claims. Simultaneously, these phenomena stimulate particular legislative powers of state for making new laws towards these objectionable misconducts. This 'tug-of-war play' between lawgiver and mass of debtors struggling with their financial embarrassment has produced also a remarkable metajuristic outcome. *Belles-lettres* has been fructified by this very aspect for hundreds of years over and over: from *Cicero*'s letters to *Atticus*[3] to such as the Falstaff-figure of *Shakespeare*'s *'The Merry Wives of Windsor'*[4].

2. Proper legal comparativism obviously necessitates suitable reasons for the choice of each particular example to be analyzed. This paper concentrates on the correlation between debtors' massive liquidity crises as relevant socio-economic

* This scientific contribution is dedicated to the forthcoming 650th anniversary of establishment of the author's *Alma Mater*, the University of Pécs (in Hung. 'Pécsi Tudományegyetem', abbrev. 'PTE', in lat. *Universitas Quinqueecclesiensis* – estab. by *Louis I of Hungary* in 1367, the letter patent issued by *Pope Urban V*).

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1 Cf. the Opinion's Point No. 2. (originally in Spanish). See Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [ECR 2009 I-00767].

2 See SAFLEY, Thomas Max (ed.), *The History of Bankruptcy. Economic, Social and Cultural Implications in Early Modern Europe*, London 2013, p. ii.

3 Cf. Cicero, ad Att. I,1,3sq. See a detailed explanation later in Sub-Chapter 3.3.

4 In a wider perspective see ROSS, Charles, *Elizabethan Literature and the Law of Fraudulent Conveyance*, Aldershot 2003, p. 11–28.

background of increasing novel practice of inadmissible fraudulent transfers and lawmakers' responses to that in two entirely different ages of history, i.e. the late Roman Republic and the contemporaneous Hungary.

This research has been inspired by nowadays' example of Hungary discussed in the second place according to the chronological character of this contribution. Household debtors of mortgage home loans accounted in foreign currency suffered namely a massive liquidity crisis in Hungary. These new circumstances have inspired novel tricks of fraudulent conveyances, which were easily not foreseeable by legislator.

The 'Paulian action' either of the previous Civil Code (1959) or that of the new one (2013) was and is capable to act against these novel daedal fraudulent misconducts. For this reason, courts of higher instances felt themselves being obliged to find the righteous solution to these cases. Their non-mandatory recommendations were enacted and their published case-by--case decisions were made even *praeter* or *contra legem* [5]. The reason for the incapability of codified law lies in the very fact that these shrewd artifices of *fraus creditorum* were executed through non-contractual fraudulent transfers committed by individual debtors (natural persons): However, both of the Civil Codes' given tools denominated erroneously after their ancient Roman predecessor provides protection solely towards contractual transactions.

A good reason for looking back into legal history's depths lies in the need for proving that historical knowledge is capable for excluding the majority of legislative problems emerging from new and not easily foreseeable or rather unexpected socio-economic phenomena. Such massive economic, financial or liquidity crises are namely not unique but quite frequent in history, therefore (legal) historical perspectives can teach us diverse ways of solution. The reason for choosing ancient Rome for an analysis lies in two well-known facts. The one is that maybe the majority of European legal systems are enrooted in or at least inspired by the fruits of legal thinking based upon Roman law. Codified Hungarian law of obligations rests generally on Roman law based legal thinking. Another pillar of this kind of selection is the understood role of judicial power in the development of 'private law' in ancient Rome. This function of the judge also reveals in the Hungarian example discussed here.

The next righteous question is that why I chose this very period of Roman law? The sought period was namely that earliest era, in which lawmaker – presumably the *praetor* – produced the most efficient law towards the widest range of fraudulent misconducts. The basic problem in Hungarian law was namely just this very lack of such an efficient legal solution [6]. The measure of efficiency of examined laws was that more general the more efficient. The larger number of cases being able to be subsumed under the particular law's scope, the broader effect of this particular law. Thus, the sought 'law' was that one which offered at the earliest a general-clause-like ruling towards fraudulent conveyances' tricks. This very law was found namely in the praetor's edict appearing in Ulpian's commentary (D. 42,8,1 pr.) from the 1st century Bc. The praetor's edict offered a revocatory action denominated as *Pauliana actio* perhaps after a certain *praetor Aemilius Lepidus Paulus* in 53 BC towards these fraudulent misdemeanors.

Are there any other moments in history, which also permit or – contrarily – do not allow such a comparison? There are surely both. However, this paper cannot investigate its chosen problems global-wide. The enumeration could have been continued e.g. with an earlier example, like the 480/450 BC *Gortyn Code*'s fragment in X, 20–25 [7]. The list could have been broadened also by subsequent analogues, like the example either of

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[5] This problem is enlighted also by *Joseph Story*: '[…] there are many cases in which fraud is utterly irremediable at law; and Courts [of Equity] in relieving against it often go not only beyond but even contrary to the rules of law.' See STORY, Joseph, *Commentaries on Equity Jurisprudence as Administered in England and America*, 14th ed. H.W. Lyon (ed.) vol. I, Boston 1918, p. 261.

[6] The question of efficiency of law in connection with the core issue of this paper has already been emerged several times beforehand. See e.g. from English and US-American Law: CARLSON, Gray, *Is Fraudulent Conveyance Law Efficient?* In Cardozo Law Review 9/2 (1987), p. 643–684; McLAUGHLIN, James, *Application of the Uniform Fraudulent Conveyance Act*, in Harvard Law Review 46/3 (1933), p. 404–452.

[7] See X,20–25: *'αί δέ τις όπέλōν ἄργυρον ἒ άταμένος ἒ μōλιομέναs δίκας δοίē, αί μὲ εἴē τὰ λοιπὰ ἄκσια τᾶς ἄτας, μēδὲν ές κρέος ἔμēν τὰν δόσιν.'* I.e. 'If anyone owing money or losing a case or being sued should give anything away (*δοίε*) <either for his wife or mother or for any extraneous>, this gift [or free transfer (*δόσις*)] shall be invalid, if the rest (*λοιπάς*) of the property should not be equal to the obligation.' For diacritic marks and translation see WILLETTS, Ronald F., *The Law Code of Gortyn*, Berlin 1967, p. 48. Cf. BÜCHELER, Franz – ZITELMANN, Ernst [Hrsgg.], *Das Recht von Gortyn*, Frankfurt am Main 1885, p. 36. Some further observations are also inevitable. The general character of the cited Gortynian fragment is controversial. Accordingly the majority of scholars, the lines under X, 20–25 continues the prior rule under X, 14–20, which speaks about a case of prohibiting the gift between son and mother or husband and wife, and so the family or marital status of the contractors (and also other factors) follows the previous text. See BÜCHELER – ZITELMANN, *Das Recht von Gortyn*, p. 176–177; SEALEY, Raphael, *The Justice of the Greeks*, University of Michigan Press 1994, p. 80; KRISTENSEN, Karen Rørby, *Gortynian Debt Bondage. Some New Considerations on IC IV 41 IV–VII,47 and 72 I.56-II.2, X.25–32*, in Zeitschrift für Papyrologie und Epigraphik 149 (2004), p. 75; GAGARIN, Michael, *The Organization of the Gortyn Law Code*, in Greek Roman and Byzantine Studies 23 (1982), pp. 131, 138 and 140–141. However, some says in the opposite that the excerption of the lines X, 20–25 can be done without any damage in the text as a whole. This means that the previous lines (X, 14–20) do not have any effect on the following sentence under X, 20–25, which is totally tacit about the family or marital status of the contractors. Cf. KRÄNZLEIN, Arnold, *Eigentum und Besitz im griechischen Recht des fünften und vierten Jahrhunderts v. Chr.*, Berlin 1963, p. 53. See also METZGER, Rainer, *Untersuchungen zum Haftungs- und Vermögensrecht von Gortyn*, in Schweizerische Beiträge zur Altertumswissenschaft 13, Basel 1973, p. 92.
The legal effect applied in the rule is not less debatable. Scil. *'μēδὲν ές κρέος ἔμēν'* means ca. 'there is nothing to do with it', 'it shall be considered as undone'. See for that BÜCHELER – ZITELMANN, *Das Recht von Gortyn*, cit., p. 36. The ancient Cretans can obviously not be brought to account for the lack of 'modern' legal terms, this would be anachronistic. Therefore, interpretations are elusive and so they are floating between invalidity, nullity and ineffectiveness. For invalidity see e.g. WILLETTS, Ronald, F., *The Civilization of Ancient Crete*, Berkeley 1977, p. 222. and Ibid., *The Law Code of Gortyn*, cit., p. 48. For ineffectiveness see e.g. DARESTE, Rodolphe, *La loi de Gortyne*, in Bulletin de correspondance hellénique 9/9 (1885), p. 315 and nonetheless KRÄNZLEIN, *Eigentum und Besitz*, cit., p. 53.

the Elizabethan *Fraudulent Conveyances Act*, i.e. Statute of 13 Eliz. c. 5 enacted in 1571 within the so-called *Mid-Tudor Crisis*[8] or the 17th century *Castile*[9].

3. I shall explain the particular sense of some polysemantic expressions used within this paper well in advance. Thus, the word *'crisis'* is used in a neutral sense (Andreau[10]) aiming to imbue it with the minimum of ideological or theoretical content. According to this, crisis can be observed, if public opinion and authorities become acquainted with the massive malfunctions and the inevitable need for finding their essential remedy.

The term of *'general clause'* has no recognized distinct category in English law[11]. Thus, it is applied as a metaphrase of the traditional German term of *'Generalklausel'*, the functions of which has in fact a multiple evaluation[12] and a long history of doctrine[13]. Thus, 'general clause' is used here as 'the case law's gate for an invasion' (*Zweigert*[14]), a legal norm, the flexible or (semi-)opened hypothesis (*Hedemann*[15]) of which delegates power to judge and makes judge legally capable for disposing the norm to a wide range of originally unpredictable cases (cf. *Teubner*[16] and *Ohly*[17]).

This paper attempts also to accentuate the special private law profile of the analyzed shrewd tricks of fraudulent acting. It uses therefore the term of *'fraudulent misconduct'* instead of an orthodox terminology of fraudulent 'transfer' or 'conveyance'. These chicaneries are typically contractual ones but we shall not forget that total or partial fraudulent diminution of debtor's patrimony can be committed either through legal acts or through real acts of active or even passive behaviour.

II. The 'general clause' towards gesta in fraudem creditorum enacted during the economic crisis of late Roman Republic

1. Procedural remedies towards the manifold fraudulent misconducts

The subject-matter of fraudulent conveyances has had a broad popularity for several centuries both in ancient Roman law and contemporary laws – whether in EU-law[18] or in national laws'[19] researches. The past decade produced four monographs[20] on the present issue's broadened historical and

We shall not forget that also the legal position of protected third party is debatable: if he is the debtors' heir or other *extraneus* or both. See MAFFI, Alberto, *Ancora sulla condizione giuridica della donna nel codice di Gortina*, in Dike 15 (2012), p. 102, 107–108, 117; GAGARIN, Michael, *Women's Property at Gortyn*, in Dike 15 (2012), p. 91. Cf. furthermore MAFFI, Alberto, *Lo statuto dei 'beni materni' nella Grecia classica*, in Index 40 (2012), p. 91–111. and GAGARIN, Michael, *Women and the Law in Gortyn*, in Index 40 (2012), p. 57–67.
For history of this period see e.g. WILLETTS, Ronald F., *Aristocratic Society in Ancient Crete*, London 1955, *passim*; Ibid., *Ancient Crete. A Social History from Early Times until the Roman Occupation*, London 1965, p. 82–83; Ibid., *The Civilization of Ancient Crete*, cit., p. 164, 169–170, 178; STEFANAKIS, Manolis I., *The Introduction of Coinage in Crete and the Beginning of Local Minting*, in CHANIOTIS, Angelos (ed.), *From Minoan Farmers to Roman Traders: Sidelights on the Economy of Ancient Crete*, Stuttgart 1999, p. 259–260; GUIZZI, Francesco, *Private Economic Activities in Hellenistic Crete. The Evidence of the Isopoliteia Treaties*, in ibid., p. 235–246; VIVIERS, Didier, *Economy and Territorial Dynamics in Crete from the Archaic to the Hellenistic Period*, in ibid., p. 221–234; CHANIOTIS, Angelos, *Milking the Mountains. Economic Activities in the Cretan Uplands in the Classical and Hellenistic Period*, in ibid., p. 199; MARANGOU, Antigone, *Wine in the Cretan Economy*, in ibid., p. 269–278; BARTA, Heinz, *'Graeca non leguntur?' Zu den Ursprüngen des europäischen Rechts im antiken Griechenland*, vol. I, Wiesbaden 2010, p. 345–346.

[8] The parallelism has already been stated by 16th century *John Cowell*, who declared in *Institutiones Iuris Anglicani*: *'Et etiam apud nos, quae actioni Paulianae aliquo modo respondet, a statuto Regni suppeditata* [on the margin: *'an. 13. Eliza. c. 5'*], *quod omnem sive terrarum sive bonorum alienationem irritam reddit, quae a debitore in fraudem creditorum facta est […]'* Cf. COQUILETTE, Daniel R., *The civilian writers of Doctors' commons*, London 1988, p. 79sq. See furthermore WILLEMS, Constantin, *Actio Pauliana und fraudulent conveyances. Zur Rezeption kontinentalen Gläubigeranfechtungsrechts in England*, Berlin 2012, p. 141–142.

[9] Cf. FORSTER, Wolfgang, *Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts*, Köln – Weimar 2009, p. 256.

[10] See ANDREAU, Jean, *Banking and Business in the Roman World*, transl. by J. Lloyd, in *Key Themes in Ancient History*, Cambridge University Press 1999, p. 100–101.

[11] See e.g. WHITTAKER, Simon, *Theory and Practice of the 'General Clause' in English Law*, in GRUNDMANN, Stefan – MAZEAUD, Denis (eds.), *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification*, The Hague 2006, p. 58.

[12] See e.g. RÖTHEL, Anne, *Normkonkretisierung im Privatrecht*, Tübingen 2004, p. 29–33.

[13] Cf. SCHMIDT, Martin, *Konkretisierung von Generalklauseln im europäischen Privatrecht*, Berlin 2009, p. 16–21.

[14] *'Einfallstore des Richterrechts'* – see ZWEIGERT, Konrad – KÖTZ, Hein, *Einführung in die Rechtsvergleichung: auf dem Gebiet des Privatrechts*, 3. neubearb. Aufl., Tübingen 1996, p. 71.

[15] See HEDEMANN, Justus Wilhelm, *Die Flucht in die Generalklauseln: eine Gefahr für Recht und Staat*, Tübingen 1933, p. 58.

[16] See TEUBNER, Günther, *Standards und Direktiven in Generalklauseln. Möglichkeiten und Grenzen der empirischen Sozialforschung bei der Präzisierung der Gute-Sitten-Klauseln im Privatrecht*, Frankfurt am Main 1971, p. 60sq.

[17] See OHLY, Ansgar, *Generalklausel und Richterrecht*, in Archiv für die civilistische Praxis 201 (2001), p. 6sqq.

[18] See e.g. LINNA, Tuula, *Actio Pauliana – Actio Europensis? Some cross-border insolvency issues*, in Journal of Private International Law 10/1 (2014), p. 69–88. and FORNER DELAYGUA, Joaquim Joan, *Derecho Europeo: La acción pauliana bajo el TJCE (una opción discrepante de Reichert II)*, in ibid. (coord.), *Protección del crédito en Europa: la acción pauliana*, Barcelona 2000, p. 137–150.

[19] See cursorily e.g. GERHARDT, Walter, *Die systematische Einordnung der Gläubigeranfechtung. Habilitationsschrift*, Göttingen 1969. and on that WACKE, Andreas, *Zur Geschichte und Dogmatik der Gläubigeranfechtung. Rezensionsabhandlung*, in Zeitschrift für Zivilprozeß 83 (1970), p. 418–435. See furthermore KOZIOL, Helmut, *Grundlagen und Streitfragen der Gläubigeranfechtung*, Vienna 1991.
Cf. the following chapters in FORNER DELAYGUA, *Protección del crédito en Europa*, cit.: HOFFMANN, Nadja, *La actio pauliana en Derecho alemán: impugnación de los acreedores según la ley de impugnación y la regulación referente a la insolvencia*, p. 15–42; RIVERO HERNÁNDEZ, Francisco, *La acción pauliana en Derecho Español*, p. 43–72; CHAZAL, Jean-Pascal, *La acción pauliana en Derecho francés*, p. 73–94; STEVENS, Robert – SMITH, Lionel, *La acción pauliana en Derecho inglés*, p. 95–112; MARTINELLI, Domenico, *El papel del elemento subjetivo del acto revocable según la doctrina italiana y española*, p. 113–136.

[20] Recently WILLEMS, *Actio Pauliana und fraudulent conveyances*, cit. See further GREVESMÜHL, Götz, *Die Gläubigeranfechtung nach klassischem römischen Recht*, Göttingen 2003; DEL PINO-TOSCANO, Felipe, *Recursos procesales contra el 'fraus creditorum' en el derecho romano clásico*, Sevilla 2002; KROPPENBERG, Inge, *Die Insolvenz im klassischen römischen Recht. Tatbestände und Wirkungen ausserhalb des Konkursverfahrens*, Köln et al. 2001.

comparative analysis, which belonged also to the 'pet subjects' of some nearly contemporaneous romanists, civilists, legal historians[21] came either from 'continental'[22], 'Anglo-Saxon'[23] or 'mixed'[24] legal cultures. However, the context provided in this paper is not much analyzed in the rotund literature.

Once differentiation and naming of legal remedies towards *fraus creditorum* caused a long-term dispute among Romanists, their dating is not less discussible. The key issues of the institutions' arborescent and often antagonistic interpretations are as follows.

According to the literature, the *restitutio in integrum* towards a *res sua*'s *traditio* [*mancipatio*] for *fraus creditorum* under Inst. 4,6,6 may be either pre-classical or classical[25] origin or even Justinian's reconstruction[26], and it can also be interpreted either as an independent procedural remedy[27] put out by the *praetor*'s particular decret[28] or as the legal consequence[29] of a successful revocatory action, e.g. such as the 'Paulian action' compilated under D. 42,8,1 pr.[30]

The controversies about the *interdictum fraudatorium* are also not a little spectacular. Its pre-classical precursors[31] and origin and even the institution's term used in the sources[32] were as much debated[33] as arguable was the tool's parallel relationship to the *actio in factum* in D. 42,8,1 pr.[34] and as controvertible was its interdictal aspects, i.e. its restitutive and possessorious character[35].

According to Ulpian's edict-commentary (*libro 66 ad edictum*) in D. 42,8,1 pr. *'Ait praetor: »Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo«.'* Namely, 'the praetor says that »where any act has been committed for the purpose of fraud [i.e. fraudulent misconduct] with anyone who was not ignorant of that, to the curator of property or to anyone else, who, in a case of this kind, has a right to institute such a proceeding, within that year, in which he has this right to sue, I will grant an action, which is also maintained against the party, who committed it.«'[36]

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[21] See e.g. MEILI, Friedrich, *Die geschichtliche Entwicklung des internationalen Konkursrechts*, in *FS Bar*, Zürich 1908, p. 5sqq; PIANO MORTARI, Vincenzo, *L'azione revocatoria nella giurisprudenza medievale*, Milano 1962, p. 230.

[22] See e.g.: RUDORFF, Adolf August Freidrich, *Über die Rutilische Concursordnung und das fraudatorische Interdict*, in Zeitschrift für Rechtsgeschichte 8 (1869), p. 62–99; HUSCHKE, Georg Eduard, *Über die Rutilische Concursordnung und das fraudatorische Interdict*, in Zeitschrift für Rechtsgeschichte 9 (1870), p. 329–366; REINHART, Theodor, *Die Anfechtungsklage wegen Verkürzung der Gläubiger. Actio Pauliana nach römischem und gemeinem Recht*, Winterthur 1871; MAIERINI, Angelo, *Della revoca degli atti fraudolenti fatti dal debitore in pregiudizio dei creditori*, Firenze 1898.
In the 20th century see e.g. BUTERA, Antonio, *Dell'azione pauliana o revocatoria*, Torino 1934; GHESTIN, Jacques, *La fraude paulienne*, in *Mélanges Marty*, Toulouse 1978, p. 569sqq; ANKUM, Johan Albert, *De Geschiedenis der „Actio Pauliana"*, Zwolle 1962; GERHARDT, *Die systematische Einordnung der Gläubigeranfechtung*, cit.; DEL PINO-TOSCANO, Felipe, *La sistematización de la insolvencia en el Digesto*, in Derecho y conocimiento 1 (2001), p. 341–352; SIČ [=SZŰCS], Magdolna, *Cessio Bonorum of Roman law*, in Zbornik Radova 43/2 (2009), p. 259–280.

[23] See some of the recent ones: ALBERT, Theodor C., *The Insolvency Law of Ancient Rome*, in California Bankruptcy Journal 26/12 (2005); BISCOTTI, Barbara, *Debtor's Fraud in Roman law: An Opportunity for Some Brief Remarks on the Concept of Fraud*, in Fundamina 17/2 (2011), p. 1–13.
Cf. some of the priors: RADIN, Max, *Fraudulent Conveyances at Roman law*, in Virginia Law Review 18/2 (1931–1932), p. 109–130. and Ibid., *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, in California Law Review 27/1 (1938), p. 1–14; MIZE, Sharon Cormack, *The Revocatory Action*, in Loyola Law Review 32/1 (1986), p. 191–216. Also historically quite comprehensively see e.g. BUMP, Orlando F., *Fraudulent Conveyances. A Treatise Upon Conveyances Made by Debtors to Defraud Creditors, Containing References to All the Cases Both English and American*, Baltimore 1872.

[24] See e.g. BORAINE, André, *Towards Codifying the Actio Pauliana*, in South African Mercantile Law Journal 8/2 (1996), p. 213–232.

[25] See e.g. GREVESMÜHL, *Die Gläubigeranfechtung*, cit., p. 25–30.

[26] See D'ORS, Xavier, *El interdicto fraudatorio en el derecho romano clásico*, Rome 1974, p. 59–64.

[27] See LENEL, Otto, *Die Anfechtung von Rechtshandlungen des Schuldners im klassischen römischen Recht*, in *FS Schultze*, Leipzig 1903, p. 6; SOLAZZI, Siro, *La revoca degli atti fraudolenti nel diritto romano*, 3rd rev. ed. vol. I. Naples 1945, p. 18; ANKUM, *Actio Pauliana*, cit., p. 38; First similarly even G. IMPALLOMENI, Giambattista, *Studi sui mezzi di revoca degli atti fraudolenti nel diritto romano classico*, Padua 1958, p. 12; GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 26.

[28] See KARLOWA, Otto, *Römische Rechtsgeschichte*, vol. II, Leipzig 1901, p. 1090. and CARRELLI, Edoardo, *'Decretum' e 'sententia' nella 'restitutio in integrum'*, Bari 1938, p. 6.

[29] See LAURIA, Mario, *Iurisdictio*, in *Studi Bonfante*, vol. II, Milan 1930, p. 514.

[30] See as final opinion of IMPALLOMENI, Giambattista, *'Fraudatorium interdictum'*, in Labeo 23 (1977), p. 83–91; RAEPSAET-CHARLIER, Marie-Thérèse, *La XXVIIIe Session de la SIHDA*, in Revue internationale des droits de l'antiquité 21 (1974), p. 345. See also the 'predecessors' such as PALUMBO, Filippo, *L'actio Pauliana nel diritto romano e nel diritto vigente*, Naples 1935, p. 9. and SEIDL, Erwin, *Die Jurisprudenz der Statthalter Ägyptens in der Prinzipatszeit*, in *Studi Paoli*, Florence 1956, p. 667.

[31] Thereto see esp. GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 38–41.

[32] Cf. D. 36,1,69,1–2 (Valens lib. 3 fideicommiss.); D. 46,3,96 pr. (Papinian lib. 11 resp.).

[33] For its classical origins see KRÜGER, Hugo – KASER, Max, *Fraus*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 63 (1943), p. 150. n. 3; IMPALLOMENI, *Revoca*, cit., p. 64; ANKUM, *Actio Pauliana*, cit., p. 53; RICCOBONO, Salvatore, s.v. *interdicta*, in *Novissimo Digesto Italiano* VIII, Torino 1962, p. 797; GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 37.
On the contrary, towards the originality of the term see BESELER, Georg, *Unklassische Wörter*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 56 (1936), p. 81; SEGRÈ, Gino, *Interdictum fraudatorium*, in Bullettino dell' Istituto di Diritto Romano 'Vittorio Scialoja' 48 (1941), p. 38; SOLAZZI, *Revoca* I, cit., p. 94; D'ORS, Álvaro, *Varia Romana. II. La llamada »acción Pauliana«*, in Anuario de Historia del Derecho Español 20 (1950), p. 777.

[34] The interdict was to be applied namely towards those, who possess, then again the actio against those, who don't, or those, who do 'own' an incorporeal asset (like an action against a third) – as Ulpian corresponds in *lib. 6 disputationum* under D. 42,8,14: *Hac in factum actione non solum dominia revocantur, verum etiam actiones restaurantur. Ea propter competit haec actio et adversus eos, qui res non possident, ut restituant, et adversus eos, quibus actio competit, ut actione cedant.*

[35] Cf. *Ulpian* D. 42,8,14 and nonetheless *Labeo* cited by *Venuleius lib. 6 edictorum* under D. 42,8,25,6. Accordingly the latter see GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 37–38. and 179–182.

[36] Translated by the author.

The exaggerated 'hunt of interpolations'[37], even such great, usually righteous hyper-critic investigators of *emblemata Triboniani* like *Lenel*[38] or *Beseler*[39], found nothing against the classical origin of the phrase of *'quae fraudationis causa gesta erunt'*. Although the key expression's origin is doubtless, the problems of the interpolations are not only formal, because these can decide, whether here is a matter of an *in integrum restitutio* (cf. *Solazzi*[40], *Ankum*[41], *Impallomeni*[42]) or an *actio* (named as *'Pauliana'* or whatever). At the same time, these uncertainties are not much conclusive ones, because their effect does not touch relevantly the legal consequence of the remedies, which is anyhow revocatory accordingly the probably original words of Ulpian in D. 42,8,1,2[43].

Thus, the phrase of *'gesta in fraudem creditorum'* means debtor's every unlawful misconducts for defrauding a creditor according to the verisimilar original wording of the *praetor* and *Labeo* and in respect of the commentaries of *Ulpian* on the praetor's edict[44]. Therefore, the words *'quae fraudationis causa gesta erunt'* means 'whatsoever is conducted so as to defraud' or 'where any act has been committed for the purpose of fraud'. This formation of law apparently reach a quite *unusually range of abstraction*. The efficiency of the edict could therefore increase as compared to the pre-classical remedies mentioned above. This very outcome must have been the goal of the lawgiver. Whether the remedy was a revocatory action or a special order of the *praetor* for restitution, its range of effectivity can easily be proved by the classical era's wide casuistics under D. 42,8 (see *infra*).

Ulpian clarified praetorian words in his Commentaries as 'they are general and cover anything done to defraud, such as an alienation or whatsoever transaction'[45]. The most abstract formulation of fraudulent misconducts is the word of *'gesta'* applied by the *praetor* itself in the 1st century Bc. This is followed by the less abstract explanation of Ulpian, the leading authority[46] of this Digest-title. His words describe *'gesta'* as *factum*, *alienatio* and *contractus*. This kind of interpretation is succeded by the *responsa* of numerous *jurisconsulti*[47] who came out with the enumeration of multiple and colourful cases based upon the praetor's abstract sentence. These are the precise appearances of the fraudulent misconducts either of *doing* or *alienating* or *contracting* something.

2. Prolific Roman casuistics of shrewd fraudulent misconducts

The two millennia old Roman casuistics of shrewd fraudulent misconducts proves the stunning artifice of Antiquity's man: whether on the side of the debtors or on that of the lawmakers. These cases compiled into Justinian's Digest were not at all hypothetic, because the cited *responsa iurisperitorum* had always been given out in living cases but not in theoretical ones. For the classification of the casuistics I use Pandectistics' basic terminology. I do this for showing that every legal fact, which can reduce the patrimony, is applicable for attaining fraudulent misconducts towards the creditors' claims. The following enumeration and grouping aimed a nearly exhaustive outcome:

The edict was put into effect, on the one hand, on the ground of fraudulent *legal acts*. The edict became operative in the case of fraudulent misconducts, which were committed through legal acts of the *private law* (i.e. *privatrechtlichen Rechtsakte*). In this case debtors could *remit positive assets*: through the abalienation of any tangible or intangible assets or things on the ground of manifold *iustae causae*[48], i.e. without consideration (free of charge)[49] or for a consideration but in case of *laesio enormis*[50] in a purchase[51] or by a sort of annuity[52]. Relevant fraudulent misconducts could be committed furthermore through acceptilation or by giving release from liability for a debt[53] or by releasing anyone from an agreement[54] or from a pledge[55], moreover by compensation or by slave manumission[56].

The edict become operative not only in case of legal acts for remitting positive assets but also if debtors *undertook negative assets* or *liabilities*, like e.g. through assumption of debts[57]

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37 Cf. LENEL's *'Interpolationenjagd'*.
38 Cf. LENEL, *Die Anfechtung von Rechtshandlungen*, cit., p. 5–6 and 9–10.
39 See BESELER, Georg, *Romanistiche Studien*, in Tijdschrift voor Rechtsgeschiedenis 10 (1930), p. 199sq.
40 Cf. SOLAZZI, *Revoca* II, cit., p. 18sqq.
41 ANKUM, *Actio Pauliana*, cit., p. 38sqq.
42 IMPALLOMENI, *Revoca*, cit., p. 12sqq.
43 *… Quodcumque igitur fraudis causa factum est, videtur his verbis revocari, qualecumque fuerit: nam late ista verba patent. Sive ergo rem alienavit sive acceptilatione vel pacto aliquem liberavit.*
44 Cf. e.g. D. 42,8,1 pr.; D. 42,8,6,10.
45 Scil. D. 42,8,1,2 … *haec verba generalia sunt et continent in se omnem omnino in fraudem factam vel alienationem vel quemcumque contractum.*
46 His Commentaries on the Edict are namely much wider cited among the paragraphs of the Digest's title 42,8, than any other jurists' *opera* appearing there. Cf. D. 42,8,1–3; eod. 6 and 10.
47 Such as Julian, Paul, Gaius, Papinian, Marcel, Venuleius Saturninus, Callistrate and Scaevola.
48 *Passim* – e.g. Ulp. D. 42,8,1,1: *quaecumque in fraudem eorum* [*sc. creditorum*] *alienata sunt*.
49 See Ulp. D. 42,8,6,11. See also ALBERTARIO, Emilio, *L'uso classico e l'uso giustinianeo di «extorquere»*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 32 (1911), p. 317–318.
50 Cf. Paul. D. 42,8,7 and nonetheless Venuleius D. 42,8,8.
51 See Ulp. D. 42,8,6,11.
52 Ulp. D. 42,8,10,15.
53 Cf. Ulp. D. 42,8,1,2: *acceptilatione aliquem liberare*.
54 Cf. Ulp. D. 42,8,1,2: *pacto aliquem liberavit*.
55 See Ulp. D. 42,8,2: *si pignora liberet* and Ulp. D. 42,8,13.
56 Ulp. D. 42,8,6,5: *quemadmodum si eum [sc. servum] in fraudem manumisisset*. Cf. SCHULZ, Fritz, *Die fraudatorische Freilassung im klassischen und justinianischen römischen Recht*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 48 (1928), p. 197–284.
57 Ulp. D. 42,8,2: *quem alium in fraudem creditorum praeponat*.

or by obligating oneself without any acceptable reason for a third's performance[58] or by realizing an unjustified enrichment to a third through paying by mistake[59] or nonetheless via giving a dowry[60] or a trust (*fideicommissum*)[61] or by any payment of money for defrauding a creditor[62] etc.

The edict extended not only to legal acts of private law but to *legal acts of public law* as well, like to the frauds via a false lawsuit or even by a false execution and by an intended loss in a trial or through providing one who owes him with an exception[63].

The edict will become also operative, when fraudulent misdemeanors are conducted not by legal acts but through either commissive or omissive *real acts*, like by conscious allowance or tolerance of *usucapio* of a *res sua*[64], or by bringing no suit against a debtor for releasing him by lapse of time[65], permitting an action to come to end[66] (debated[67]), or failing to appear in court[68], furthermore by intentional[69] non-exercise (*non-usus*) of a usufruct or a servitude or by the dereliction of an asset[70].

In contrary to all this, the edict will *remain inoperative* to a person who does not increase his assets, who does not take means to acquire property which he can obtain. The reason is that the edict has reference to such as diminishing the patrimony[71], and not to those who act in such a way as not to become more wealthy[72]. Thus, the edict is passive in the case e.g. of rejecting an estate whether inheriting it by the law or by the terms of a will[73] or in the case of refusing to accept a legacy[74].

I shall remark *en passent* that modern American legal thinking stays on a different view. Some US courts stated namely that there is a fraudulent transfer by the renunciation of a legacy or a testamentary benefit[75]. We shall summarize the prolific casuistics' classification based upon *Pandektenrecht* in the schematic Table I in the Appendices.

In respect of the flourishing casuistics of fraudulent misconducts built up to the praetor's edict, we shall settle that the analyzed edictal law is a *general-clause*, which unsurprisingly owns a certain *delictual* character. The edict became namely operative, if two inevitable conditions met: on the one hand, the parties' conscious[76] misdemeanour for defrauding the *fraudator*'s creditor, and, on the other hand, the result of this misconduct, namely the partial or total deminution of the debtor's patrimony[77].

3. Attempts to date praetor's edict upon the 'Paulian action'

Although the denomination of this action to a certain *'actio Pauliana'* is something enigmatic and controversial, the dating of the edict can be concluded quite certainly. The attempts to authentically denominate this procedural remedy as *Pauliana actio* caused a centuries-long dispute[78], because not only the attributive of 'Pauliana' was indeed questionable but even the noun of 'actio'.

I have to affirm that the researches' arborescent outcomes about the naming do not help us in the exact dating. The reason lies in the fact that the naming after a certain *Paulus* – might

[58] See Ulp. D. 42,8,3 pr.: *sive se obligavit fraudandorum creditorum causa*.
[59] See *'se obligavit'* under Ulp. D. 42,8,3 pr. in another interpretation.
[60] Cf. Ulp. D. 42,8,14.
[61] In contrary: Pomp. D. 42,8,19. See furthermore SCHWARZ, Fritz, *Die Funktion des Irrtums bei Erfüllung gänzlich oder teilweise nicht geschuldeter Fideikommisse*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 68 (1951), p. 307–312.
[62] Ulp. D. 42,8,3 pr.: *sive numeravit pecuniam*.
[63] See Ulp. *lib. 66 ad ed.* under D. 42,8,3 pr.: *vel ei praebuit exceptionem sive se obligavit fraudandorum creditorum causa.*
[64] See Ulp. D. 42,8,3,2: *qui aliquid fecit, ut desinat habere quod habet, ad hoc edictum pertinet.*
[65] Cf. D. 42,8,3,1… *a debitore non petit, ut tempore liberetur.*
[66] See continuously D. 42,8,3,1… *litem mori patiatur…*
[67] The phrase *'pati litem mori'* is controversial, because its effect to decrease a property is disputable just like its classical origin. Cf. SOLAZZI, Siro, *La revoca degli atti fraudolenti nel diritto romano*, in *Studi e documenti di storia e diritto*, Roma 1902, p. 20sqq; LENEL, Otto, *Interpolationenjagd*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 45 (1925), p. 35–38.
[68] See also Ulp. *lib. 66 ad ed.* in D. 42,8,3,1: *Gesta fraudationis causa accipere debemus non solum ea, quae contrahens gesserit aliquis, verum etiam si forte data opera ad iudicium non adfuit…*
[69] Ulp. D. 42,8,3,1: *usum fructum vel servitutem amittit*; eod. D. 42,8,4: *si non utatur servitutibus*.
[70] Gai. D. 42,8,5: *rem suam pro derelicto habuerit, ut quis eam suam faciat*.
[71] Ulp. D. 42,8,6,2: *noluit enim adquirere, non suum proprium patrimonium deminuit*.
[72] Cf. Ulp. D. 42,8,6 pr.: *non [sc. pertinet] ad eos, qui id agunt, ne locupletentur*.
[73] Ulp. D. 42,8,6,2: *qui repudiavit hereditatem vel legitimam vel testamentariam, non est in ea causa, ut huic edicto locum faciat.*
[74] Ulp. D. 42,8,6,4: *si legatum repudiavit, cessare edictum*.
[75] Cf. *Renunciation of a Legacy as a Fraudulent Conveyance*, Recent Cases, in Virginia Law Review 33/4 (1947), p. 516–517. and GAMIN, Dean David, *Renunciation of Testamentary Benefit as Fraudulent Transfer*, in Case Western Reserve Law Review 37/ 1 (1986–1987), p. 148–165.
[76] See the edict's drafting in D. 42,8,1 pr.: *qui fraudem non ignoraverit.*
[77] For that see most recently KLINCK, Fabian, *Die Grundlagen der besonderen Insolvenzanfechtung: Gläubiger- und Vertrauensschutz im Übergang vom Prioritäts- zum Gleichbehandlungsgrundsatz*, Berlin 2011, p. 7–8. See also e.g. NEYSES, Andrea, *Die Insolvenzanfechtung in Mehrpersonenverhältnissen*, Tübingen 2012, esp. p. 37–41.
[78] See e.g. RUDORFF, *Rutilische Concursordnung*, cit., p. 62sqq. and 83; HUSCHKE, *Rutilische Concursordnung*, cit., p. 329sqq; REINHART, *Die Anfechtungsklage*, cit., p. 16sq; TAMISIER, Louis, *De l'action paulienne en droit romain et en droit français*, Thèse, Paris 1875, p. 17; SERAFINI, Enrico, *Della revoca degli atti fraudolenti*, vol. I, Pisa 1887, p. 3sqq and 79sqq; LEONI, Giuseppe, *Dell'azione Pauliana nel diritto romano. Studio*, Torino 1900, p. 33; LENEL, *Die Anfechtung von Rechtshandlungen*, cit., p. 18sqq; COLLINET, Paul, *L'origine byzantine du nom de la Paulienne (après 533 – VIIe siècle)*, in Nouvelle revue historique de droit français et étranger 43 (1919), p. 187sqq; FERRINI, Contardo, *Di una nuova teoria sulla revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, in *Opere di C. Ferrini*, vol. III, Milano 1929, p. 315, 333; WEIß, Egon, *Vorjulianische Ediktsredaktionen*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung 50 (1930), p. 255; PALUMBO, *L'actio Pauliana*, cit., p. 13sq; ALBERTARIO, Emilio, *A proposito della denominazione dell'actio Pauliana*, in *Studi di diritto romano*, vol. III, Milano 1936, p. 523sqq; SOLAZZI, *Revoca* I, cit., p. 89sqq; D'ORS, Álvaro, *Varia Romana* II, cit., p. 776; IMPALLOMENI, *Revoca*, cit., p. 1; D'ORS, Xavier, *El interdicto fraudatorio*, cit., p. 47sqq.

that be the *praetor Aemilius Lepidus Paulus* in 53 BC or whoever else – is preconceived after a debatable text of Paul (D. 22,1,38,4), which the expression *'actio pauliana'* solely appeared in. Respectly the text, which deals with the *fructus restituendi* of the fraudulently abalienated assets, a stable and constant preconception has emerged. This deeply ingrained into common scientific knowledge, according to what D. 22,1,38,4 speaks with no question about the procedural remedy under D. 42,8,1 pr. Therefore, some attempts, including even those, which criticized the text's origins[79], aimed to make a direct connection between the remedy's naming and dating.

The method of dating uses a *terminus ante quem* and a *terminus post quem* for defining the period, during which the praetor's edict upon this procedural remedy must have been arisen. This method is scholarly correct but the goal of reducing this period to a particular year, in which a certain Paulus was invested as praetor, is preconceived. Thus, the 'fruits' of these efforts are scientifically illusive, although they indeed seem to be pretty, because a certain Paulus, namely the above mentioned Aemilius Lepidus truly existed in the scholarly proven period of the edict's enactment. According to these uncertainties I shall investigate a *period* and so not a certain year, which the praetor's edict compiled under D. 42,8,1 pr. has come from.

The Augustan Age, so the time around the beginning of our calendar is supposed to be the *terminus ante quem* the edict had to be enacted in, because Labeo, who lived in this period, had to be already acquainted with its regulation in respect of Ulpian's commentaries to the Edict compiled into § 6, § 10 and § 12 under D. 42,8,6. The celebrated classical authority cited here some cases and questions from him. The text of § 12[80] is sometimes[81] cited as the evidence for Labeo's knowledge about the edict, but this opinion is not so much convincing. The Labeonian phrase in this text proves rather his ignorance of the edict, than his acquaintance of that. On the contrary, the texts under § 6[82] and under § 10[83] in D. 42,8,6 are probably capable for proving[84] Labeo's knowledge about the content of the edict. We shall therefore accept that the edict has already been enacted approximately by the last decade Bc.

'Verum hoc ridiculum est de magistro' – wrote *Cicero* to *Atticus* (ad Att. I,1,3) in 65 BC in a legal matter. According to the affair's matters of fact, *Atticus'* uncle, *Caecilius*, was cheated out of a large sum of money by *P. Varius*, and has taken an action against his brother, *A. Caninius Satyrus* about some assets, which, he says, were fraudulently made over to him by Varius. The other creditors – among them *L. Lucullus, P. Scipio* and the man, who was expected to act for them at the sale, if the goods were put up for auction, *L. Pontius* – have made common cause with him. According to Cicero's opinion, it was absurd to talk of 'acting' for them at that time. So, Caecilius asked Cicero to plead against Satyrus. Besides, Cicero rejected to act because of a personal incommodiousness[85]. Cicero used the empty word *'agere'* in his letter, which has produced a century long dispute among romanists and civilists[86]. Some (*Huvelin*[87], *Lenel*[88]) stated that the particular remedy was the *interdictum fraudatorium*. Some others (*Serafini*,[89] *Costa*[90] and *Palumbo*[91]) believed that it was the *actio Pauliana*, which could be started. According to some other researchers (*Solazzi*[92], *Ankum*[93]), the *in integrum restitutio ob fraudem* was also not held to be impossible to suing with, like an *actio in factum* in D. 43,4,1 pr.[94] respectly some others (e.g. *X. D'Ors*[95]). In contrary, *Grevesmühl*[96] held most

[79] Like GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 62sqq. – esp. p. 69.

[80] D. 42,8,6,12: *Simili modo quaeritur, si servus ab eo, qui solvendo non sit, ignorante domino ipse sciens rem acceperit, an dominus teneretur. Et ait Labeo hactenus eum teneri, ut restituat quod ad se pervenit aut dumtaxat de peculio damnetur vel si quid in rem eius versum est. Eadem in filio familias probanda sunt. Sed si dominus scit, suo nomine convenietur.*
Respectly Labeo's reference to the *actio de peculio* and that of *in rem verso*, I think that this text can prove rather the ignorance of the edict than his knowledge about it. Simply finding a preclassical jurist's name in a text under implied title of the Digest concerning our topic, is not enough evidence for stating that this jurist would have been acquainted with the edict parsed in the Digest's title in question.

[81] Like GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 63.

[82] D. 42,8,6,6: *Apud Labeonem scriptum est eum, qui suum recipiat, nullam videri fraudem facere, hoc est eum, qui quod sibi debetur receperat: eum enim, quem praeses invitum solvere cogat, impune non solvere iniquum esse: totum enim hoc edictum ad contractus pertinere, in quibus se praetor non interponit, ut puta pignora venditionesque.*

[83] D. 42,8,6,10: *Si quid cum pupillo gestum sit in fraudem creditorum, Labeo ait omnimodo revocandum, si fraudati sint creditores, quia pupilli ignorantia, quae per aetatem contingit, non debet esse captiosa creditoribus et ipsi lucrosa: eoque iure utimur*

[84] Labeo's notion of *'fraudem facere'* in D. 42,8,6,6 namely trustworthily follows the edict's strict logic about the nature of the *fraus creditorum*. The edict's cast of mind lies in the texts under pr. and § 2 and 4 in D. 42,8,6. In D. 42,8,6,10, the text after *quia* is without much doubt Ulpian's commentary, and the rest can not prove Labeo's knowledge, unless if the first part of the sentence, according to which *si quid cum pupillo gestum sit in fraudem creditorum*, came from him. If this is true, Labeo knew the edict, because he formulates his text – at least accordingly Ulpian – just as the edict sounds in D. 42,8,1 pr. about *quae fraudationis causa gesta erunt*.

[85] Transl. after E.O. Winstedt, *Cicero, Letters to Atticus*, Vol. I. 2nd ed., in Loeb Class. Library, London et al., 1919, p. 5–7.

[86] E.g. Koziol, *Gläubigeranfechtung*, cit.,62), p. 48sqq.

[87] P. Huvelin, *Études sur le furtum dans le très ancien droit romain. I. Les sources*, Lyon 1915, p. 467.

[88] O. LENEL, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, 3rd ed. Leipzig 1927, p. 435.

[89] Serafini, *Revoca* I, cit.,121), p. 77.

[90] E. Costa, *Cicerone giureconsulto*, Vol. I. Bologna 1927, p. 155.

[91] PALUMBO, *L'actio Pauliana*, cit.,73), p. 14.

[92] SOLAZZI, *Revoca* I, cit.,70), p. 46–47.

[93] ANKUM, *Actio Pauliana*, cit.,65), p. 44.

[94] *Ait praetor: "Si quis dolo malo fecerit, quo minus quis permissu meo eiusve, cuius ea iurisdictio fuit, in possessionem bonorum sit, in eum in factum iudicium, quanti ea res fuit, ob quam in possessionem missus erit, dabo."*

[95] See X. D'ORS, *El interdicto fraudatorio*, cit.,69), p. 179–180.

[96] See GREVESMÜHL, *Gläubigeranfechtung*, cit.,63), p. 32–36.

recently that none of these scholars were right, and Caecilius could most conceivably plead with the so-called *in integrum restitutio propter dolum*.

According to these standpoints, the debated case shows us that we shall accept that the remedy in the edict under D. 42,8,1 pr. was the one, with what Caecilius could claim with the least probability. Therefore, our *terminus post quem*, after which the edict had to be announced, is the middle of the seventh decade Bc. So, the period, in which the edict must have been proclaimed, is to be placed after 65 BC and before Labeo's age. This era indeed coincided with some severe crisis of the late Roman Republic.

4. The socio-economic background of the 'new' law

Various reasons were elaborated in the Romanistics, which prudentially explain the new characteristics and novel methodology of the edict in D. 42,8,1 pr. Referring to some suitable changes in the notion of *possessio rei servandae causa*, one of them operates with the cancellation of the *interdictum fraudatorium* and that of the *in integrum restitutio*. Another stunning argument – here against the necessity for a special remedy towards *fraus creditorum* until Labeo's age – is reasoning with the so-called *'erweiterter Arglistbegriff'*, according to which the expanded notion of *dolus* was capable for subsuming the matters of *fraus creditorum* under the *actio de dolo* (recently see both by *Grevesmühl*[97]). These logic interpretations are, however, *idem per idem*, because they explain the changes of law with the changes of law. But sole real reasons for the actual modification of law lie essentially beyond the law as such, that is to say, in the particular law's socio-economic setting. Thus, we shall try to discover some factors among the socio-economic circumstances prevailing between the seventh or sixth and the first decade BC, which most probably effected a necessity for the enactment of such an edict.

The huge complexity of reasons for the fall of the Roman Republic is well-kown among legal historians. Some monstrous is even only the 21st century researches' outcome upon the late republic's downfall[98]. Therefore, I shall here not concentrate on each single elements of this insane intricacy[99] like intern and extern wars, disasters, storms (60 BC), earthquakes (56 BC), floods (54 BC), fires (50 BC) or like agricultural catastrophes, unrestrained political ambitions, hoping for abolition of debts, coin hoards, inflation, cupidity for money, love of luxury, boundless practice of money lending, deflation or like the expanded political, electoral, judicial and financial corruption etc. The massive appearance of the novel shrewd tricks of *fraus creditorum* operated as a cause and also as an effect of this complexity of critical elements. The enormous need for newer and newer credits[100] and also the sore need for possibilities of avoiding the payback of these credits served namely as a reason and as an outcome of the crisis-factors at the same time.

However, if we ignore the above mentioned giant outcomes of nowadays' scholarship upon the crises in the downfall of Roman Republic, we shall turn to credible, contemporaneous sources like *Sallust*, *Cicero* or *Caesar*. According to *Sallust*, the middle part of the 1st century BC being invesitgated here was such a period, 'from that onwards the conduct of our ancestors declined, not slowly as previously, but like a torrent. The young men were so corrupted by luxury and wealth that it could justly be said, that they were men who could neither maintain their own family possessions, or allow others to do so'[101].

Cicero's 2nd oration against Catiline is to be referred here. We shall, however, not forget that the orator of genius was able to use all of imaginable – grammatic, rhetoric, poetic, psychological etc. – tools of his disarming orations. His reference to the six classes of enemies of the republic in the Catiline II (II,17–25) is to be examined here. Considering also the subjective tools of Ciceronian orations[102], it is clearly ascertainable that his

[97] See most recently both by GREVESMÜHL, *Gläubigeranfechtung*, cit., p. 58. and 65.

[98] For only the 21st century literature in chronological order see e.g. ARBIZU, José María, *Res Publica Oppressa. Política Popular en la crisis de la República (133-44 a.C.)*, Univ. Complut. de Madrid 2000; BRENNAN, Corey, *The Praetorship in the Roman Republic*, Vol. 2: 122 to 49 BC, Oxford U. P. 2000; DAVID, Jean-Michel, *La République romaine: de la deuxième guerre punique à la bataille d'Actium, 218-31. av. J.-C. Crise d'une aristocratie*, Paris, 2000; LINKE, Bernhard – STEMMLER, Michael (eds.), *Mos maiorum. Untersuchungen zu den Formen der Identitätstiftung und Stabilisierung in der römischen Republik*, in Historia – Einzelschriften, vol. 141, 1st ed. Stuttgart 2000; NICOLET, Claude, *Censeurs et publicains: économie et fiscalité dans la Rome antique*, Paris 2000; SUÁREZ PIÑEIRO, Ana María, *Las leges iudiciariae ante la crisis de la República Romana (133-44 a.C.)*, in Latomus Revue et collection d'études latines 59 (2000), p. 253–275; CANALI DE ROSSI, Filippo, *Il ruolo dei patroni nelle relazioni politiche fra il mondo greco e Roma in età repubblicana ed augustea*, in Beiträge zur Altertumskunde 159, München – Leipzig 2001; MOURITSEN, Henrik, *Plebs and Politics in the Late Roman Republic*, Cambridge U. P. 2001; GABRIELLI, Chantal, *Contributi alla storia economica di Roma repubblicana. Difficoltà politico-sociali, crisi finanziarie e debiti fra Ve III sec. a.C.*, Côme 2003; ROSILLO LÓPEZ, Cristina, *Fraude et contrôle de contrats publics à Rome*, in AUBERT, Jean-Jacques (ed.), *Tâches publiques et entreprise privée dans le monde romain*, Geneva 2003, p. 57–94; HOLLANDER, David, B., *Money in the Late Roman Republic*, Columbia U. P. 2007; SANTANGELO, Federico, *Sulla, the Elites and the Empire: A Study of Roman Policies in Italy and the Greek East*, Leiden 2007; ROSILLO LÓPEZ, Crfistina, *La corruption a la fin de la République romaine (IIe-Ier s. av. J.-C.)*, Stuttgart 2010; PÓKECZ KOVÁCS, Attila, *Les crises politiques à la fin de la république romaine et le senatusconsultum ultimum (121-40 av. J.-C.)*, in CHEVREAU, Emmanuelle et al. (eds.), *Carmina iuris. Mélanges en l'honneur de Michel Humbert*, Paris 2012, p. 679–692; GOLDEN, Gregory K., *Crisis Management During the Roman Republic. The Role of Political Institutions in Emergencies*, Cam. U. P. 2013; C. Steel, *The End of the Roman Republic 146 to 44 BC: Conquest and Crisis*, Edinburgh U. P. 2013; VON UNGERN-STERNBERG, Jürgen, *The Crisis of the Republic*, in FLOWER, Harriet I. (ed.), *The Cambridge Companion to the Roman Republic*, 2nd ed., Cambridge U. P. 2014, p. 78sqq; AUBERT, Jean-Jacques, *The Republican Economy and Roman Law: Regulation, Promotion, or Reflection?*, in ibid., p. 167sqq.; PÓKECZ KOVÁCS, Attila, *Economic Crisis and Senatus Consultum Ultimum*, in VAN DEN BERGH, Rena – WILDENBOER, Liezl (eds.), *Meditationes de iure et historia: Essays in honour of Laurens Winkel*, Pretoria 2014, p. 729–737.

[99] See recently VERBOVEN, Koenraad, *54-44 BCE: Financial or monetary crisis?*, in LO CASCIO, Elio (ed.), *Credito e moneta nel mondo romano*. Incontri Capresi di storia dell'economia antica. Convegno internazionale, Capri 2000. Bari 2003, p. 49–68.

[100] See e.g. WASSINK, Alfred, *Inflation and financial policy under the Roman Empire tothe Price Edict of 301 A.D.*, in Historia 40 (1991), p. 471sqq.

[101] Cf. Hist. Fr. 1,13.

[102] Cf. e.g. WOOTEN, Cecil, *Cicero's Philippics and Their Demosthenic Model: The Rhetoric of Crisis.* UNC Press, 1983. and recently MORSTEIN-MARX, Robert, *Mass Oratory and Political Power in the Late Roman Republic*, Cambridge U. P. 2008, *passim* but esp. p. 30. n. 110.

description about the socio-economic situation in 63 BC was a very factual and lucid report. Out of the mentioned six classes four are here relevant.

To the first class belong those, who have enormous debts, and still have more monstrous possessions, so they are rich in lands, in houses, in money, in slaves, in all things, and yet hesitate to diminish these assets to add them to their credit. Their intention and their cause are most shameless. They are expecting the war for an abolition of debts [103].

To the second class belong those, who are harassed by debts, yet are expecting supreme power, they wish to become leaders, when the republic is in confusion, so they may gain those honours, which they despair of when the State tranquils. If they had already got that, for which they wish with greatest madness, they think that they will become consuls, dictators or even kings – over the ashes of the city [104]. Obviously they aimed also to avoid the payback through their new political power.

There is a third class of elders in age, colonists, who became possessed of unexpected and sudden wealth, boast themselves extravagantly and insolently; these men, while they build like rich men, while they delight in farms, in litters, in vast families of slaves, in luxurious banquets, have incurred great debts. They have even inspired some needy men to entertain the same hopes of plunder as themselves [105].

The fourth class is composed of overwhelmed people, who will never recover themselves. Those, who are constrained by their old debts partly from nonchalance, partly from incompetence in managing their businesses, partly from cupidity for extravagance, and are worn out with bail bonds, lost cases and seizures of their goods, are said to be betaking themselves in numbers to that camp both from the city and the country. These are lazy insolvents, who, if they cannot stand at first, fall so, that even their nearest neighbours do not know anything of it [106].

It is obvious that Cicero's report on the status of the 'state's enemies' does not cover the apparently much wider part of the 'society', which could be the addressee of the praetor's edict. But it is a sufficient evidence for showing a financial crisis and especially a crisis in debtors' liquidity, which is going to appear not as sequence of isolated incidences during a few decades of the mid 1st century BC, but as an organic progress based on manifold structures of causes [107].

Confirming the previous statement, in late *fifties* BC, we can diagnoze that critical points of relevant financial and monetary circumstances were intensifying. Accordingly some scholars, the history of the credit crisis may have gone back to the summer of 54 BC, when interest rates were doubled [108]. In the *fourties*, Caesar wrote in *de bello civili* (cca 48 BC) that 'credit was beginning to fail in Italy, and the debts could not be paid… arbitrators should be appointed for making an estimate of the pre-war values of the debtors' properties, which should be handed over in payment to the creditors.' [109] The *lex de modo credendi possidendique intra Italiam* (45 BC) required creditors to invest part of their wealth in land, and the possibility of *cessio bonorum* was instituted at the same time, so insolvent debtors were allowed to cede their property to their creditors while retaining enough to sustain themselves [110].

Without further ado, I would urge to accept Sallustian, Ciceronian and Caesarian lines above as satisfying evidences of such a crisis from the sixties to the fourties BC, which was fit for inspiring the mass of illiquid debtors for defrauding their creditors through manifold daedal tricks. This new factor of novel shrew practice of fraudulent transfers obviously motivated the lawgiver for a 'big jump' towards these misconducts. The praetor's great leap in the edict can only be explained with this bloody fool hunger and the craving for the never-enough amount of money in such obscure times, like the declension of the late Roman Republic during the few decades of the mid 1st century Bc.

Cicero's brilliant amphibological phrase of *caritas nummorum* [111] compresses the description of the relevant socio-economic situation: literally as slakeless cupidity for money and technically as scarcity of coins [112] or as costliness of cash… [113]

However, these phenomena are not unique in history of course. Money lenders' and loanees' similar seduction of money and hunger for fortune has produced comparable circumstances in the post-Lehman world and so also in Hungary – just in these days…

[103] Cf. Cat. II,18.
[104] See Cat. II,19.
[105] Cf. Cat. II,20.
[106] See Cat. II,21.
[107] See CRAWFORD, Michael H., *Le problème des liquidités dans l'Antiquité classique*, in Annales. Économies, Sociétés, Civilisations 26 (1971), p. 1229: 'En ce qui concerne les années 80 et 70, et à nouveau le début des années 40, nous sommes donc en présence de trésors exceptionnellement importants, et dont un grand nombre n'a pas été récupéré du fait de la mort violente et prématurée de leurs propriétaires. Durant les deux périodes, d'autres facteurs contribuent à une pénurie de monnaie. Pendant les années 60, on a émis peu de monnaie nouvelle, et la pression sur les débiteurs aura donc été s'accentuant régulièrement jusqu'au point d'explosion de l'année 63. La situation au début des années 40 est assez différente, du fait que les émissions effectuées sous César sont parmi les plus importantes jamais faites sous la République…'
[108] For the many other factors of the financial and monetary crisis enumerated above in IV.3.C.a. recently see e.g. VERBOVEN, *Financial or monetary crisis?*, cit., *passim*.
[109] *Caesar* de bello civili III,1.
[110] Cf. e.g. FREDERIKSEN, M. W., *Caesar, Cicero and the Problem of Debt*, The Journal of Roman Studies, 56 (1966), p. 128–141.
[111] *Cicero* ad Att. IX,9.
[112] 'un sens très technique qui marque la rareté des espèces.' See NICOLET, Claude, *Les variations des prix et la 'théorie quantitative de lamonnaie' à Rome, de Cicéron à Pline l'Ancien*, in Annales. Économies, Sociétés, Civilisations 26 (1971), p. 1219.
[113] See VERBOVEN, *Financial or monetary crisis?*, cit., p. 51.

III. Massive liquidity crisis in contemporaneous Hungary and answers of courts upon novel ruses of fraudulent misconducts

1. Brief preliminary remarks

'You can't teach an old dog new tricks' – esp. the one which already knows nearly all of them… Romans surely did. Some Hungarian courts of higher instance learned the lesson, and among them the Regional Court of Appeal (hereinafter RCA) of Pécs solved the task through the inspirations of the bimillennial morals of Roman Law. 'Bankruptcy has become much more prevalent in the public consciousness since the global financial crisis. […] the rate of personal bankruptcy in North-America and Europe has reached levels not seen since the 1930 s'[114]. This nearly global financial crisis caused massive liquidity disabilities for millions of Hungarian individuals and households.

Lawmaker has not yet institutionalized private personal bankruptcy in Hungarian legal system, although this legal institution would have been able to hinder those non-contractual tricks of fraudulent conveyances, what this contribution's previous chapter was about. This second section of the paper contains four trains of thought. First shall be the enumeration of facts symptomatizing the massive liquidity crisis. This is followed by the summary of newly emerged shrewd fraudulent practice, which was clearly inspired by these very circumstances. A flashing on relevant Hungarian laws is next, and this chapter ends up then with the analysis of courts' legal solutions given out accordingly these novel cases of fraudulent misconducts.

2. 'Post-Lehman Crisis' of household debtors of mortgage home loans accounted in foreign currency

According to an analysis of the Central Bank of Hungary[115], the *post-Lehman* phase of the financial crisis (after 2008) has exposed a number of weaknesses in the banking sectors of the European Union's new Member States. One of these is the prevalence of lending in foreign currency. While banks themselves in these countries have not taken on sizeable currency risk directly, they passed it on to households (and the corporate sector as well). With large depreciations taking place or looming in the region, the currency risk at households (and corporates) without a natural hedge is now being transformed into credit risk for the banking sector. This is creating a serious problem in maintaining financial stability[116].

I shall correct these statements for the example of Hungary, because they are factually and even juridically misleading. The banks, which liquidated the loans physically or factually in Hungarian Forint (hereinafter: HUF), accounted these HUF-loans in foreign currencies – mostly in Swiss Franc (henceforth: CHF) – without any obligation or liability of the Bank for a real financial capability for liquidating the loans in the contracted foreign currencies themselves. The allegedly liquidated amount of foreign currency was sometimes totally unavailable for the money lenders.

According to the published data of the Hungarian Central Statistical Office[117], the number and also the amount of the relevant loans – namely foreign currency mortgage home loans accounted but not liquidated in the particular foreign currency – continued to increase disregarding the 2008 *Lehman*-crisis.

There were 24 financial institutions, i.e. 21 banks and 3 mortgage lending institutions, which continued to lend for the households. The 96% of the overall amount of credits was concentrated around these institutions in 2008, which liquidated 146,000 loans in the amount of 952 Billion HUF of credit, the 88% of which were accounted but factually not liquidated in the given foreign currency.

The overall number of loans was 358,500 in the overall amount of 3,875 Billion HUF, the 61% of which were accounted in the foreign currency by the end of 2008. This covered the Hungarian GDP's 14%.

The repayment periods stayed around 15 years from 2008 till nowadays. The proceeding of growth of the mortgage home loans for households accounted in foreign currencies is very strange, esp. regarding our posterior knowledge of the 2008 crisis. The number of these loans increased continuously from 2004 to 2009 from 28,000 to 364,000 and the total amount of these loans increased also continuously from 2004 but to 2010 from 143 Billion HUF to 2,820 Billion HUF[118] (rounded data).

The other side of this phenomenon is the statistics of the amounts of the debts and the rate of non-performing loans (hereinafter: NPLs) from this kind of mortgage home loans according to the data of the Central Bank of Hungary[119]. By the end of March 2013 the overall amount of debts from loans reached 6,892 Billion HUF, from which the overall amount of NPLs was 1,240 Billion HUF increased with 15% per year. From 2009 to 2013, the statistics of NPLs (more than 90 days of delay) among household debtors is drastic and tragic. The number of mortgage home NPLs accounted in foreign currencies increased from 2.5% to 15.5%, whilst the number of equity home NPLs increased from 4% to 25%.

Jointly these facts show us that hundreds of thousands of people, i.e. the NPLs' debtors and those who are related to them – whether accounted in foreign currencies or not – are involved within this crisis. They had a serious chance to lose mortgaged real property they are living in. The way of the execution was a direct[120] individual proprietary execution started by the financial institution or the factor which bought the arrears from the former creditors.

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[114] See SAFLEY (ed.), *The History of Bankruptcy*, cit., p. ii.

[115] See CSAJBÓK, Attila – HUDECZ, András – TAMÁSI, Bálint, *Foreign currency borrowing of households in new EU member states*, in Occasional Papers of the Central Bank of Hungary 87 (August 2010).

[116] See CSAJBÓK/HUDECZ/TAMÁSI, *Foreign currency borrowing*, cit., p. 4.

[117] Cf. http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_zrh001b.html?45 [15 Sept. 2014].

[118] Cf. http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_zrh001b.html?45 [15 Sept. 2014].

[119] Cf. http://www.portfolio.hu [15 Sept. 2014].

[120] In this case debts can be recovered without any civil process thanks to the form of the deed.

This paper cannot analyze the wide range of political, legal, financial and economic actions and tools, which has been made and used by the Hungarian Government and Parliament towards these problems from 2010. Some of them are well known from the international press.

Some data, which were published by the Hungarian News Agency, can easily elucidate the measures of crisis in September 2014. There are some 400 financial institutions, which will have to re-account the loans of about 1.3 Million households, from which cca 680,000 are the consumer debtor of the so-called 'foreign currency loans' in the overall amount of approximately 1,000 Billion HUF. In the case of already closed transactions, the amount is to be reimbursed in HUF but in the case of current transactions, the amount is to be deducted from the debtors'arrears.

3. Novel practice of non-contractual fraudulent misconducts committed by individual debtors

The analysis of some relevant published or even unpublished cases before Regional Courts of Appeal (i.e. RCA) or Courts of Justice (i.e. CJ) shows us two unsurprising facts. The one is that all of the examined examples of new fraudulent misconducts appeared in those legal disputes, which emerged eminently from households' mortgage home loan accounted in foreign currency (mostly in CHF). The other fact is that the debtors' defrauding actions were accomplished after 2009 without any exemption. Thus, there is a direct correlation between the household debtors' liquidity crisis and the increase of debtors' new tricks of fraudulent misconducts. Here are their common characteristics summarized.

During the past few years courts have been continuously meeting with the novel technique of fraudulent conveyances. These were implemented not by contracts or any other private transactions but by compulsory acts of the State. Namely, debtors tried to defraud their creditors, on the one hand, through a voluntary performance of a court decision made either in a litigious or a non-litigious [121] civil process, or, on the other hand, through a proprietary execution process based also upon a court decision or directly upon a public notary's deem.

However, the direct connection between defrauding contract or unilateral statement and deminuition of patrimony lacks in all cases. This is the very fact, which makes Hungarian civil law's 'Paulian action' inapplicable. Thus, the fraudulent conveyance is executed directly by a fraudulent civil process or by a fraudulent judicial enforcement process, the rules of which are apparently followed. The debtor's assets are alienated, therefore, just by these very processes, the petitioners of which are namely the debtor's pseudo-creditors (strohmann). It is also relevant that the misused process serves as original mode of acquisition of property.

If a fraudulent misconduct is executed by no voluntary performance of a fraudulent civil process, debtors could make either a statement of acknowledgment of debt in a directly executable deed filled out by public notary [122], or, they could use a 'figurehead' (strohmann) as plaintiff or claimant, who sued them for the performance of a certain debt. The hidden aim of the parties was to reach a judicial sentence against the debtor.

The next common relevance of the cases was that the alleged debts stemmed either from a false or from a non-existent legal act. These legal acts were most frequently such contracts, the *iusta causa* of which was either children's maintenance or other alimentary supports [123] or even different kinds of wages from employment contracts [124] or money loans from contracts antedated to an earlier date as the due-date of the mortgage home loans lent for the debtor by financial institutions [125] or even certain combinations of these *causae iustae* [126].

Thanks to the mentioned *tituli iusti*, the acknowledged or sued debts have priority in the ranking order of debts' execution during the judicial enforcement process in respect of section 165(1) points a)–c) of Act LIII of 1994 on Judicial Enforcement (hereinafter: AJE). These falsificated debts have then such a high priority in the judicial enforcement process, which has primacy even to those mortgage home loans, which also have a high ranked priority compared to other debts without mortgage.

The aim is therefore reached. The cover of these loans was fraudulently transferred to the debtors' pseudo-creditors without any direct use of a contract or that of a unilateral private law statement. The former [127] and also the new [128] Hungarian Civil Code (hereinafter: HCC) instituted the *actio Pauliana* towards fraudulent contracts and such unilateral private law statements. Thus, this very action became hardly applicable, if not inapplicable for cases depicted above.

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[121] See the RCA of Győr Case No. Pf.II.20.339/2010. Published in: BDT2011.2426, where 'BDT' is the Repertory of Judicial Decisions and subsequent code marks the year and the serial number of each case.

[122] See RCA of Pécs Case No. Pf.VI.20.526/2012. Publ. in: BDT2012.2818. Cf. also the unpublished decision of RCA of Pécs Case No. Pf.VI.20.701/2012. and that of the Court of Justice of Kaposvár Case No. 3.G.40.122/2011 and Court of Justice of Székesfehérvár Case No. 32.P. 21.036/2011. These kinds of debts can be executed directly, without any previous litigious or non-litigious process, thanks to the type of deem. The inevitable fraudulent cooperation of the public notary and that of the bailiff is also probable. It was e.g. easily recognizable that – in seven different cases – deems of acknowledgements of debts were filled by the same public notary and also the enforcement processes were led by the same bailiff.

[123] Cf. the unpublished decision of RCA of Pécs Case No. Pf.VI.20.701/2012.

[124] See RCA of Győr Case No. Pf.II.20.339/2010. Publ. in: BDT2011.2426. Cf. furthermore the unpublished sentence in Court of Justice of Kaposvár Case No. 3.G.40.122/2011.

[125] See RCA of Pécs Case No. Pf.VI.20.526/2012. Publ. in: BDT2012.2818.

[126] Cf. the unpublished judgment of the Court of Justice of Székesfehérvár Case No. 32.P. 21.036/2011, according to what the parties combined the title of employment contract and alimentary support. The parties combined the title of employment contract and antedated money loan in a case also before the Court of Justice of Székesfehérvár – cf. Case No. 32.P. 20.959/2012.

[127] Scil. Act IV of 1959.

[128] Scil Act V of 2013.

4. Short presentation of relevant Hungarian laws

Personal bankruptcy is not yet institutionalized in Hungarian legal system. Therefore, domestic law knows merely the institution of corporate bankruptcy. Thus, debtor's personal status is the only relevant factor in consideration of fraudulent conveyances. Namely legal situations deeply differ regarding the debtors' natural or legal personality, however, creditors' personal status has not got much point. The two different situations have three diversified legal regimes (obviously with no regard of penal law) within two Acts. The HCC is to be applied, when debtors are individuals[129]. If they are legal persons, the applicable law will be either the Hungarian Bankruptcy Act (hereinafter: HBA[130]) or the HCC. It depends on the insolvency situation: If the debtor becomes insolvent, the applicable law will be the HBA.

Although the new HCC was under codifying process just by the time of the sky-rocketing of risks from currencies' floating, the new HCC's rules for an *actio Pauliana* did not result in any considerable modification. However, a Civil Code ought not to be codified for volatile crisis situations. So, former [s.203(1)] and new [s.6:120(1)] *Paulian actions* are equal in both HCCs: 'A *contract* by which the basis for satisfying a third person's claim has been deprived entirely or in part shall have no legal force in respect of such third person if the other party acted in bad faith or had a gratuitous advantage originating from the contract.' Accordingly the former HCC's section 199 and the new HCC's section 6:2(2), this rule is duly applicable also to *unilateral statements*.

The legal consequence is that such contracts or unilateral statements become relative unenforceable. This is a strong and sharp sword but the arm fencing with it is cutty and weak. Legal consequences of fraudulent conveyances in modern law can be in principle trifold: the invalidity[131] and the dual ways of voidability (contestability). The insolvency law implies invalidity but private law usually[132] implicates relative unenforceability[133]. The rule's puissance results that fraudulent alienation is valid and effective in respect of every third persons (*extranei*) but it is unenforceable respectly the defrauded creditor. The fraudulently alienated asset is therefore maintained exclusively for the claims of the defrauded creditor in a proprietary execution. Thus, in respect of this creditor, this very asset is to be handled as if it would not be alienated at all. If fraudulent transfers were invalid, a legal consequence of *restitutio in integrum* would make conveyed assets reachable for every creditor. This fact makes it useful in corporate insolvency law.

The other side of the coin is the regulation's weakness respectly its narrow scope, because *non-contractual* fraudulent misconducts of *individual* debtors are untouchable by HCC's *Paulian action*. We shall recognize in the above summarized cases that fraudolous individual debtors used just this very vacuum of law (*lacuna legis*) for their goals. There was a single draft (1882, *Apáthy*) within the long history of codification of Hungarian civil law (1870–2013), which could have filled this lacune[134].

Due to the non-contractual character of debtors' fraudulent misconducts HCC is not applicable in cases depicted above. HBA is also inapplicable respectly the individual debtors' personal status, although HBA's rules[135] towards fraudulent conveyances and preferences would bring somehow up an extensive guard net.

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[129] Accordingly the regulation of HBA's section 2(1), the HBA shall apply to all economic operators and their creditors. Its section 3(1)a) defines economic operators as business associations, public-benefit organizations, law offices, notaries' offices, patent practitioners offices, court bailiff's offices, European public limited liability companies, cooperative societies, different funds and much more like these.

[130] Scil. Act XLIX of 1991.

[131] Cf. the New Civil Code of the Netherlands (NBW) Book 3 Art. 45. (1): 'Indien een schuldenaar bij het verrichten van een onverpflichte rechtshandeling wist of behoorde te weten dat daarvan benadeling van een of meer schuldeisers in hun verhaalsmogelijkheden het gevolg zou zijn, is de rechtshandeling vernietigbar…'. See FEENSTRA, Robert, *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht*, Leiden 1994, p. 301–302.

[132] The *actio Pauliana* in the first Draft (1957) of the former HCC under its section 183 ordained voidability. Then, Supreme Court disputed the second draft's (1958) regulation upon relative unenforceability, but this one was accepted. The Supreme Court's predecessor, i.e. the Curia – *'Kúria'* is the successor of the former Supreme Court – hold also this second standpoint correct in the 1910's. Cf. Curia Sentences: No. P. I.2428/1913, in 'Magánjogi Döntvénytár' (Private Law Reports; PLR) VIII 144; No. 4764/1917, in PLR XII 61; No. 2922/1907, in PLR II 98; No. P. VI.1303/1911, in PLR VI 23.

[133] See e.g. French Code Civil Art. 1167: 'Ils peuvent aussi, en leur nom personnel, attaquer les actes faits par leur débiteur en fraude de leurs droits.' Cf. Belgian Law: Burgerlijk Wetboek Art. 1167: ‚Zij kunnen ook in hun eigen naam opkomen tegen de handelingen die hun schuldenaar verricht heeft met bedrieglijke benadeling van hun rechten.' Cf. STUYCK, Jules, *Belgium*, in Commercial and Economic Law Suppl. 11 (1998), p. 87: '… every creditor can petition for a declaration stating that a legal act between his debtor and a third party is unenforceable against him, if it fraudulently neglects his claim…'

[134] If it would have come into force at all… See s. 807 in *Apáthy*'s Draft of the Hungarian Law of Obligations 1882, which ordained that contesting the fraudulent abalienation is possible even in the case, when it was realized or implemented through a civil procedural act of judicial proprietary execution. In case of successful suing not only the alienation but the judicial decision based upon that would also be made unenforceable, and so the *fraudis particeps* is obliged to refuse his rights *in rem* gained thiswise, or to delete that right from the register of real estates, or to re-assign the fraudulently acquired right *in personam*, or to restore the defraudingly acceptilated rights, or to give release from liability for a fraudolous debt etc. See APÁTHY, István, *A magyar kötelmi jog tervezete indokolással. Általános rész.* (= *Draft and Motives of Hungarian Law of Obligations. General Part*) Budapest 1882, § 807.

[135] Cf. HBA section 40(1) points a)–c): The creditor and – on behalf of the debtor – the liquidator may file for legal action before the court within 90 days from the time of gaining knowledge or within a one-year limitation period from the date of publication of the notice of liquidation to contest a) contracts concluded by the debtor within 5 years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, if intended to conceal the debtor's assets or to defraud any one creditor or the creditors, and the other party had or should have had knowledge of such intent; b) contracts concluded by the debtor within 2 years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, if intended to transfer the debtor's assets without any compensation or to undertake any commitment for the encumbrance of any part of the debtor's assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party; c) contracts concluded by the debtor within 90 days preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, if intended to give preference and privileges to any one creditor, such as the amendment of an existing contract to the benefit of a creditor, or to provide financial collateral to a creditor that does not have any.

Does our 'last chance' lie then in criminal law? Namely, committing a criminal act carries also private law liability, as if the damage has been caused by the crime committed. The new Hungarian Criminal Code[136] incorporates two acts of crime – i.e. 'fraudulent bankruptcy'[137] and 'concealment of assets for avoiding a liability'[138] – which show a clear parallelism to the casuistics appearing in D. 42,8. However, if a civil affair could be decided only by a criminal law tool, this way of dispute resolution would be a poor one.

5. The courts' solutions contrary to or beyond the law

In respect of the foibles of codified law, we shall turn to the jurisprudential and judicial attempts for expanding the HCC-rule's scope. The so-called *Experts' Proposal* (2008) of the new HCC stretched the scope of the new Code's examined rule for situations, in which the benefits from committed fraudulent conveyances are acquired by an *extraneus*[139] like by a fraudulently established new legal person (i.e. civil society organizations or business associations). However, anterior judicial praxis has already known these tricks for about a decade[140] and this solution is not less clearly inapt for the here examined cases, too. The next element to be investigated is the Opinion of the Supreme Court's Collegium for Civil Matters *No. 1/2011. (VI. 15.) PK*. This non-mandatory opinion tried to further widen the scope of the former HCC's *actio Pauliana*. Unfortunately, this effort was as inappropriate as unnecessary. The Opinion's section 1 stated, namely, that the law in question is applicable also towards fraudulent *unilateral statements* – like fraudolous *public commitments* or such *prizes*. According to the above cited section 199 of HCC and section 6:2(2) of NHCC, the *Pauliana* was duly applicable to these cases without further ado. This statement is therefore superfluous.

The Supreme Court fixed under section 2 of its cited Opinion that the law in question is to be applied for fraudulent *assignments* and *assumptions of debt* or such *transactions of rights being subject to trade* (like patents, trade marks, copyrights, shares and stakes or rights for medical practice). These ideas of the Opinion were proposed and even criticized by some RCA-judges[141]. The criticism is somehow correct. Namely, these transactions are implemented by nominated or even by innominated transactions, which are obviously regarded as contracts, what examined law is readily applicable for.

The manifold shrewd non-contractual tricks of fraudulent misconducts resulted also versatile legal solutions. I shall fix in advance that all of touched courts were able to recognize the problems in every single cases. The one part of them just shrugged, emphasized the cognition of matters of facts and also their legal qualification, but stated also that legal system does not offer a clear solution, and therefore ignored to find out how the discovered legal vacuum can be filled up. They stated that there are *'de iure'* fraudulent transfers and also *'de facto'* deprivations of the basis for satisfying a third person's claims: The second type cannot be subsumed under the HCC's *actio Pauliana*. This way of dispute resolution can be also respectful, because application of law *contra legem* is not everyone's cup of tea. Thus, it is more correct, if 'judicial boldness' takes its place in courts of *higher instances*: the higher the better.

Some other courts of higher instance indeed tried to invent a righteous solution. Namely, the RCA of Győr[142] stated that section 203 of HCC is applicable also for such contracts, *by which* the parties aim to *quit judicial enforcement procedure* by which they reach the deprivation of the basis for satisfying a third person's claims.

Then, the RCA of Pécs fixed in its case-by-case decision that if *actio Pauliana* were inapplicable in cases of so-called *'de facto'* fraudulent conveyances so far as the transfer is implemented by a judicial execution, the invalidity rules of contracts would be able to be applied with the existence of their well-known further conditions (here regardless of which). If the *conditio sine qua non* of such claims did not exist, like in the given and also similar cases before the RCA of Pécs, the court would hold that such a lawsuit cannot be granted. Thus, judges felt themselves obliged to find a justifiable another title for successful claiming. And they succeeded.

The judicial panel of RCA of Pécs kept in mind that if a fraudulent debtor abalienates an asset for a strohmann through a proprietary execution process, this will acquaint the asset through an official resolution made in an official auction. Thus, the panel applied s.120(1) of the former HCC, according to which: 'A person who has acquired a thing in good faith by

[136] Scil. Act C of 2012 on the Criminal Code.

[137] Cf. section 404(1) Any person who, in connection with the imminent insolvency of an economic operator covered by the HBA, actually or fictitiously, diminishes the economic operator's assets: a) by concealing, disguising, damaging, deteriorating or destroying, or by making unusable such assets or any part thereof; b) by concluding a fictitious transaction, or recognizing a doubtful claim; or c) by other means, in contradiction to the requirements of prudent management; and thereby prevents the satisfaction of his creditor or creditors in part or in whole is guilty of a felony punishable by imprisonment between one to five years.

[138] Cf. section 405(1) Any person who conceals his assets serving as cover for a debt existing under a contract made in writing, and thereby prevents settlement of the debt in full or in part is guilty of a misdemeanor punishable by imprisonment not exceeding one year.

[139] Cf. section 5:94(5).

[140] See so-called 'uniformity decision in civil matters' of the Supreme Court No. 1/2002. PJE (Supr. Court takes these decisions for ensuring uniformity of the application of the law). Cf. furthermore the published decisions EBH2000.326.I, BH2004.462.II and BH1997.549. (EBH = published doctrinal or theoretical court decision, BH = published court decision, in both cases abbreviations marked with year and serial number of the case.).

[141] See KEMENES, István, *Remarks to the Draft of the Supreme Court's Opinion upon the Jurisdiction of Fraudulent Conveyances*, orig. in Hungarian, RCA of Szeged, 10 June 2011; ZÁMBÓ, Tamás, *Some Observations on Fraudulent Transfers*, orig. also in Hungarian, RCA of Győr, 4 April 2011.

[142] See Case No. Pf.II.20.339/2010. Publ. in: BDT2011.2426.

means of official resolution or auction shall gain ownership irrespective of the previous owner. This provision shall not apply to the sale of real property by auction.' Section 5:41(1) of the new Civil Code is similar to this.

There were two weaknesses of the cited law, which had to be eliminated to reach the wanted resolution. The one is the content of the notion of 'good faith' and the other is the fact that fraudulently abalienated assets are mainly real properties in these cases, and this fact seems to exclude the law's application. The judicial panel stated therefore that the last sentence of the law, which reduces the previous sentence's scope, does not concern the condition of good faith but it concerns the rule upon the irrespectivity of the previous ownership.

The other side of the coin is the special *ex lege* notion of good faith. It has to be defined – according to the constant judicial practice and also the Official Motives of NHCC – in respectly of s. 5(3) of Act CXLI of 1997 upon Real Estate Registration (hereinafter RER). It says that 'any data of record entered in the real estate register for the benefit of a party acquiring in good faith shall be construed as true even if it deviates from the actual legal status. For the purposes of real estate registration, a person acquiring a right in a real property by payment of consideration, as trusting in the real estate register, shall be construed as a party acting in good faith.'[143] According to this definition, the acquisitioner of property acts in good faith, if he has not and ought not to have any knowledge about the fact that the official resolution or auction, by which he acquainted the property, was unlawful.

For the purpose of finding an appropriate and righteous legal solution, the RCA of Pécs had to re-define this notion of good faith. This reasoning appeared in a published case[144] and also as non-mandatory Recommendation of the Civil Collegium of the RCA of Pécs *No. 2/2013. (V.31.) PK*. The author of this paper was a collaborator of framing this reference, which was accepted by the Civil Collegium of the Kúria (Supreme Court) and also by the vast majority of other four RCAs' Civil Collegiums.

The recommentadion stated namely that the rules upon *actio Pauliana* of HCC 'cannot be applied, if the basis for satisfying a third person's claim has been deprived entirely or in part through a judicial enforcement process based on a false debt from an unlawful contract. If the petitioner can prove that the acquisitioner of the debtor's property acted in connection with the judicial execution in bad faith, so if he had or should have had knowledge about the fact that the official resolution or auction, by which he acquainted the property, was unlawful, the s. 120(1) of HCC and and the s. 62(1)a) of RER is to be applied, and therefore the property of the acquisitioner is to be deleted from the Real Estate Registration' (i.e. a kind of *restitution in integrum*).

The aim was therefore reached. The interest for stopping these new shrewd non-contractual fraudulent misconducts was higher than the risk of trade's harm by this notion of good faith. Besides, the heavy burden of proof of the thouched creditors can easily erode these risks of trade. A prognosis seems to be shaping: Parallelisms between ancient Roman and nowadays' casuistics of *fraus creditorum* are just about to widen…

The schematic Table II in the Appendices summarizes these prolific solutions, their diversified legal sources and also their manifold legal consequences in respect of the contemporaneous typology of fraudulent misconducts; and Table III encompasses the consolidation of the previous two tabellae.

IV. Conclusions

Praetor – *Paulus* or whoever else – invented righteous answer for severe problems in late Roman Republic. His resolution is avowed to be ingenious and capable even for perpetuality. Each of the subsequent generations either of imperial Rome or medieval England or even that of 21st century Hungary could have their lesson from late Roman Republic wallowed in a totality of crisis. Thus, our response to the question formulated in the heading of this contribution shall be: *'Probably the same.'*

We shall agree with *Ruiz-Jarabo Colomer*: 'The genius of the Roman jurists ensured that the main features of the *actio Pauliana* have survived intact to this day. Despite the differences between the legal systems of the Member States, the solutions which those systems offer in respect of disposals of assets in fraud of creditors have a common genetic code…'[145] This is paper tried to investigate the survivals of this 'genetics'.

[143] See RCA of Pécs Case No. Pf.VI.20.526/2012. Publ. in: BDT2012.2818.
[144] Similarly by sections 5:172(2) and 5:173(1) of NHCC.
[145] See Case C-339/07 Seagon v Deko Marty – see *supra* n. 4.

V. Appendices

TABLE I

THE SCHEME OF CLASSIFIED ANCIENT ROMAN CASUISTICS OF *GESTA IN FRAUDEM CREDITORUM*

SCHEME OF CLASSIFICATION					EXAMPLES OF CASUISTICS		
THE EDICT	*OPERATIVE*	legal acts	***legal acts of private law***	remit positive assets	*abalienation of assets*	*for a consideration in case of laesio enormis*	*in purchase*
							in an annuity
						without consideration	
					acceptilation		
					release	*from a liability for a debt*	
						from an agreement	
						from a pledge	
					compensation		
					manumission		
				undertake negative assets or liabilities	*debts' assumption*		
					obligating oneself groundless for a third's performance		
					realizing an unjustified enrichment to a third		
					giving a dowry		
					giving a trust		
					any defrauding payment of money		
			legal acts of public law		*false lawsuit*		
					false execution		
					intended loss in a trial		
					providing a debtor with an exception		
		real acts	***commissive***		*dereliction*		
			omissive		*conscious tolerance of usucapio of a res sua*		
					bringing no suit for a release by lapse of time		
					permitting an action to come to an end		
					failing to appear in court		
					intentional non-exercise of a usufruct or a servitude		
	INOPERATIVE	**not increasing the assets**			*a simple non-doing for not gaining any fortune*		
		acting as not to become more wealthy			*reject an estate inherited by law*		
					reject an estate inherited by will		
					refusing to accept a legacy		

TABLE II

THE SCHEME OF LEGAL REMEDIES TOWARDS CONTRACTUAL AND NON-CONTRACTUAL FRAUDULENT MISCONDUCTS COMMITTED EITHER BY NATURAL OR LEGAL PERSONS IN CONTEMPORANEOUS HUNGARIAN LAW

TYPOLOGY OF FRAUDULENT MISCONDUCTS		SOURCES OF LAW	DEBTOR'S STATUS	LEGAL CONSEQUENCE
CONTRACTUAL MISCONDUCTS SUCH AS CONTRACTS AND UNILATERAL STATEMENTS	*by which basis for satisfying a third's claim has been deprived totally or partly*	**HCCs**	every natural&legal person	*RELATIVE INEFFECTIVENESS*
	assignments assumptions of debt transactions of patents, trade marks, copyrights, shares and stakes or rights for medical practice	**HCCs & Opinion of Supreme Court 2011**		
	to conceal the debtor's assets or to defraud any creditor(s)	**HBA 1991 : § 40(1)**	economic operators under liquidation proceeding	*CONTESTABILITY*
	to transfer the debtor's assets without any compensation			
	to undertake any commitment for the encumbrance of any part of the debtor's assets			
	if the stipulated consideration constitutes unreasonable and extensive benefits to a third			
	to give preference and privileges to any one creditor			
	amendment of an existing contract to benefit a creditor			
	to provide financial collateral to a creditor without it			
NON-CONTRACTUAL MISCONDUCTS SUCH AS LEGAL ACTS AND REAL ACTS	*false judicial enforcement process based on defrauding (false execution)*	**HCCs & Recomm. Of RCA of Pécs**	every natural&legal person	*RESTITUTIO IN INTEGRUM*
	diminishing actually or fictitiously the economic operator's assets and thereby preventing the satisfaction of creditor(s) in part or in whole - by concealing, - by disguising, - by damaging, - by deteriorating, - by destroying, - by making assets unusable, - by concluding a fictitious transaction, - by recognizing a doubtful claim, - by any imprudent management	**Criminal Code 2012 : § 404**	imminently insolvent economic operators covered by HBA	*PRIVATE LAW LIABILITY BASED UPON CRIMINAL RESPONSIBILITY*
	concealing the assets serving as cover for a debt existing under a written contract, and thereby preventing the settlement of the debt in full or in part	**Criminal Code 2012 : § 405**	every natural & legal persons	

TABLE III

THE CONSOLIDATION OF TABLE I AND TABLE II IN RESPECT OF THE ANCIENT ROMAN CASUISTICS[146]

RECAPITULATORY SCHEME OF CLASSIFICATION			EXAMPLES OF ROMAN CASUISTICS	
THE OPERATIVE PAULIAN EDICT *in white&shaded boxes* AND **LEGAL REMEDIES OF HUNGARIAN CIVIL LAW** *in shaded boxes*	BY *CONTRACTUAL* FRAUDULENT MISCONDUCTS	***legal acts of private law***	*abalienation of assets*	*for a consideration in case of laesio enormis*
				without consideration
			acceptilation	
			release	*from a liability for a debt*
				from an agreement
				from a pledge
			compensation	
			~~*manumission*~~	
			debts' assumption	
			obligating oneself groundless for a third's performance	
			realizing an unjustified enrichment to a third	
			giving a dowry	
			~~*giving a trust*~~	
			any defrauding payment of money	
	BY *NON-CONTRACTUAL* FRAUDULENT MISCONDUCTS	***legal acts of public law***	*false lawsuit*	
			false execution	
			intended loss in a trial	
			providing a debtor with an exception	
		real acts	*dereliction*	
			conscious tolerance of usucapio of a res sua	
			bringing no suit for a release by lapse of time	
			permitting an action to come to an end	
			failing to appear in court	
			intentional non-exercise of a usufruct or a servitude	

[146] Scil. shaded boxes contain cases which have diversified legal remedies also in contemporaneous Hungarian legal system – i.e. either in former or in new HCC or in HBA or in recommendations, opinions and published case-by-case decisions of Hungarian courts of higher instances. White boxes encompass, however, either anachronistical cases (*manumissio* or *fideicommissum*) or cases, which do not have civil law remedy, therefore, these are to be resolved on a criminal law basis (civil law liability based upon criminal responsibility). I remark that the new HCC acknowledges the contract of 'fiduciary asset manamegent', which is somehow connatural to the legal institution of 'trust' in the English law.

Notes about Sport Finance in Rome

Adolfo A. Diaz Bautista Cremades *

Abstract

Sport competitions were soon in the ancient world, an important social and cultural element. Many sportsmen in the Roman Empire are dedicated at it as a professional way, athletes enjoyed great social recognition and obtained, in case of triumph, great benefits. To finance the dedication of the athletes was used the contractual figure mutuum, money- loan, with the agreement that the borrower should return only the amount of the capital and elevated interests, case victory, assuming the banker the risk of losing

Key words: *Sport; Roman law; mutuum; sponsorship.*

Both the show of sport and the athletes' activity have deserved more attention in the Hellenic world than in the Roman world [1], since sport competitions originated in Greece [2]. In the legal field, studies are quite limited [3]. According to the sources, we know that the social position with regard to athletes was very honourable [4] and that they did not commit *defamation* [5], as it was common for theatre actors and, in general, people who worked in the show business [6]. The most prominent athletes were granted with exemptions for civil posts [7] and excuses from the tutelage [8].

In Rome there were professional athletes, exclusively dedicated to competition [9], in imitation of Greek athletes. Even the

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1 WACKE, A. Athleten als Darlehensnemer nach römischen Recht, in *SDHI*. 44 (1978) pp. 439–440, the author quotes many bibliography.

2 A sign of the social importance of sports in the Roman world can be found at St. Paul's reference in Corinthians 9:24-27: *Nescitis quod hi, qui in stadio currunt, omnes quidem currunt, sed unus accipit bravium? Sic currite, ut comprehendatis. Omnis autem, qui in agone contendit, ab omnibus se abstinet; et illi quidem, ut corruptibilem coronam accipiant, nos autem incorruptam. Ego igitur sic curro non quasi in incertum, sic pugno non quasi aerem verberans; sed castigo corpus meum et in servitutem redigo, ne forte, cum aliis praedicaverim, ipse reprobus efficiar.*

3 AMELOTTI, A. La posizione degi atleti di fronte al diritto romano, in *SDHI* 21 (1955) pp. 123–156. Regarding accidents in sports competitions *vid.:* WACKE A. Unfälle bei Sport und Spiel nach römischen und geltenden Recht, en *Z. f. Geschichte d. Sports u. d. Körperkultur,* Köln 3, 1 (1977) and regarding loans granted to the athletes, please see note 1 in the work aforementioned.

4 In *Coll.*0.6 they are likened to the great orators, justice growers, the best judges and governors… *et oratores maximi et iustitiae satellites inveniantur et iudiciorum optimi tam athletae quam gubernatores in omni loco aevoque felices.*

5 Ulp. 6 ad ed. D.3.2.4pr.: *Athletas autem Sabinus et Cassius responderunt omnino artem ludicram non facere: virtutis enim gratia hoc facere. et generaliter ita omnes opinantur et utile videtur, ut neque Thymelici neque xystici neque agitatores nec qui aquam equis spargunt ceteraque eorum ministeria, qui certaminibus sacris deserviunt, ignominiosi habeantur.*

6 *Ulp. 6 ad ed.* D.3.2.2.5: *Ait praetor: „ qui in scaenam prodierit, infamis est". scaena est, ut Labeo definit, quae ludorum faciendorum causa quolibet loco, ubi quis consistat moveaturque spectaculum sui praebiturus, posita sit in publico privatove vel in vico, quo tamen loco passim homines spectaculi causa admittantur. eos enim, qui quaestus causa in certamina descendunt et omnes propter praemium in scaenam prodeuntes famosos esse Pegasus et Nerva filius responderunt.*

7 Once they had fought all their life and had been crowned at least three times, one of them in Rome or Ancient Greece, without being corrupted or buying their rivals. C.10.54.1 (*Diocl. Maxim.* undated), *Hermogeni*: *Athletis ita demum, si per omnem aetatem certasse, coronis quoque non minus tribus certaminis sacri, in quibus vel semel Romae seu antiquae Graetiae, merito coronati non aemulis corruptis ac redemptis probentur, civilium munerum tribui> solet vacatio.* [A los atletas se les suele conceder exención de cargos civiles, si prueban que compitieron durante toda su vida y fueron coronados, al menos tres veces, en certamen sacro, una de ellas en Roma, o en la antigua Grecia, y no corrompieron, ni compraron, a sus adversarios] Spanish Trans. Díaz Bautista *et alii*: *Conspectus constitutionum Diocletianii,* Dykinson, Madrid, 2013, p. 25. The last advice from Diocletian's text suggests the frequency, certainly high, of tricks and corruptions in sports competitions in that time.

8 *Mod. 2 excus.* D.27.1.6.13: *Ulpianus libro singulari de officio praetoris tutelaris ita scribit: athletae habent a tutela excusationem, sed qui sacris certaminibus coronati sunt.*

9 As we know from literary and epigraphic sources that tell stories such as the one about the famous quadriga driver, Gaius Appuleius Diocles, described in CIL, XIV, 2884: *c(aivs) appv]leivs diocles agitator factionis rvssatae / [nati]one hispanvs lvsitanvs annorum xxxxii mens(ivm) vii d(ievrm) xxiii / [pri]mvm agitavit in factione alb(ata) acilio aviola et cornelio pansa con(n)s(vlibvs) / [primv]m vicit in factione eadem m(anio) acilio glabrione c(aio) bellicio torqvato con(n)s(vlibvs) / [item p]rimvm agitavit in factione prasina torquato asprenate ii et annio libone co(n)s(vlibvs) primvm vicit / [in faction]e rvssata laenate pontiano et antonio rvfino co(n) s(vlibvs) svmma qvadriga agitavit annis xxiiii missvs ostio iiii (mille) cclvii / [vicit i(mille) ccc] clxii a pompa cx singvlarvm vicit i(mille)lxiiii inde praemia maiora vicit lxxxvii xxx(milivm) xxxii ex his seivges iii xxxx(milivm) xxviii / [ex his seivge]s ii l(milivm) xxviiii inde septeivge i lx(milivm) iii binarvm vicit cccxxxvii trigas ad hs xv(milia) iiii ternarvm vicit li ad honorem venit ii(milia) / [dccc tvlit s]ecvndas dccclxi tertias dlxxvi qvartas ad hs i(mille) i frvstra exit i(mille)cccli ad venetvm vicit x ad albatvm*

gladiators -whose social relevance we know from the sources- could constitute a more sporting spectacle than bloody[10]. By the second century, prizes and crowns given to athletes became multimillionaires[11].

Possibly, what at the beginning were just honourable prizes, with great social regard, soon became valuable presents that the soldier, the politician or the distinguished athlete could alienate for their own benefit. Later on these were considered again as symbolic prizes, such as the current sport medals, but linked to the payment of important amounts of money and maybe, in some cases, a life pension, as it happens nowadays with compensatory military medals. The texts that we know refer more to the crowns awarded to the athletes than the civic or military rewards. Therefore, it is clear that professional sport was a way of life for Roman athletes, but, as in any time, the athlete needs a secure source of funding whilst he achieves success, because without this it is not possible to live to train.

In Rome, generally, this sponsorship of the professional athlete was possible through the mutual. This is a contract[12] for which a person -the lender- gives an amount of money (or any other perishable good) to another person -the borrower- in order to give it back to the lender after a period of time or after fulfilling a condition. In this way the mutual was a loan of money[13].

This type of contract, as present in the Roman world as in our time, had a problem in its economic conception: from the business point of view, the loan of money is an investment for the lender as he receives a profit in interests for the time he cannot use that money that is lent and for the risk he has to take with such a business. However, since the early days, jurists were contrary to the natural output of interests in the loans of money[14].

The exception to this prohibition of usury were those loans in which the obligation of returning the amount received was subject to the good faith of the financed transaction, so that -if the undertaken business were prevented by the borrower because of *force majeure*- he was free from returning the money. In this sense, the interest was to remunerate, not the risk of a breach of contract or the damage due to the passing of the time, but the risk that, in a specific way, the lender took in this type of deals in which he became a real sponsor.

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vicit lxxxxi inde ad hs xxx(milia) ii / [rettvlit qvaest]vm hs ccclviii lxiii(milivm) cxx praeterea bigas mi(liarias) vicit iii ad albatv(m) i ad prasinv(m) ii occvpavit et vicit dcccxv svccessit et vicit lxvii / [praemisit et vici]t (?) xxxvi variis generibus vic(it) xxxii eripvit et vicit dii prasinis ccxvi venetis ccv albatis lxxxi eqvos centenarios fecit n(vmero) viiii et dvcenar(ivm) i / insignia eivs / [3]to sibi qvo anno primvm quadrigis victor exstitit bis eripvit bis actis continetvr avilium teren(tivm) factionis avae primvm omnivm vicisse i(mille)xi ex qvibvs anno uno plvrimvm vincendo vicit / [3 at diocles qvo an]nno primvm centvm victorias conseVtvs est victor ciii singvlarvm vicit lxxxiii adhuc avgens gloriam titvli svi praecessit thallvm factionis svae qvi primvs in factione rvssata / [3 at dio]cles omnivm agitatorvm eminentissimvs qvo anno alieno principio victor cxxxiiii singvlarvm vicit cxviii qvo titvlo praecessit omnivm factionvm agitatores qvi vnqvam / [certaminibvs lvdorvm ci]rcensivm interfvervnt omnivm admiratione merito notatvm est qvod uno anno alieno principio dvobvs introivgis cotyno et pompeiano vicit lxxxxviiii lx(milia) i l(milia) iiii xl(milia) i xxx(milia) ii / [ille 3 fact]ionis prasinae victor i(mille)xxv primvm omnivm vrbis conditae ad hs l(milia) vicit vii diocles praecedens evm introivgis tribvs abigeio lvcido parato l(milia) vicit viii / [item praecedens c]ommunem venvstvm epaphroditvm tres agitatores miliarios factionis venetae [qui] ad hs l vicissent xi diocles pompeiano et lvcido dvobvs introivgis l(milia) vicit / [xii(?) ille 3] factionis prasinae victor i(mille)xxv 6et flavivs scorpus victor ii xlviii et pompeivs mvsclosvs victor iii dlviiii tres agitatores victores vi dcxxxii ad hs l(milia) vicervnt xxviii / [at diocles omnivm agitatorvm emi]nentissimvs victor i(mille)cccclxxii l(milia) vicit xxviiii nobilissimo titvlo diocles nitet cvm fortvnatvs factiones prasinae in victore tvsco victor ccclxxxvi l(milia) vicit ix diocles / [in victore pompeiano victo]r clii l(milia) vicit x lx(milia) i novis coactionibvs et nvmqvam ante titvlis scriptis diocles eminet qvod vna die seivges ad hs xl(milia) missvs bis vtrasqve victor eminvit adqve amplivs / [3] svisqve septem eqvis in se ivnctis nvmqvam ante hoc nvmero eqvorvm spectano certamine ad hs l(milia) in abigeio victor eminvit et sine flagello ali(i)s certaminibvs ad hs xxx(milia) / [vicit 3]vm visus esset his novitatibvs dvplici ornatvs est gloria inter miliarios agitatores primvm locvm obtinere videtvr pontivs epaphroditvs factionis venetae / [qvi temporibvs imp(eratoris) nostri anto]nini avg(vsti) pii solvs victor i(mille)cccclxvii singvlarvm vicit dccccxi ad dicoles praecedens evm victor i(mille)cccclxii inter singvlares i(mille)lxiiii isdem temporibvs / [pontivs epaphroditvs eripvit] et vicit cccclxvii diocles eripvit et vicit dii diocles agitator qvo anno cxxvii abigeio lvcido pompeiano introivgis tribvs victor ciii inter / [3 inter em]inentes agitatores introivgis afris plvrimvm vicervnt pontivs epaphroditvs factionis venetae in bvbalo vicit cxxxiiii pompeivs mvsclosvs factionis prasinae / [3 vicit] cxv diocles svperatis eis in pompeiano victor clii singvlarvm vicit cxxxxiiii ampliatis titvlis svis cotyno galata abigeio lvcido pompeiano introivgis qvinqve / victor ccccxxxv singvlarvm vicit cclxxxxvii.

[10] As it is suggested by Mañas Bastida, A.: *Gladiadores: el gran espectáculo de Roma*, Barcelona, 2013.

[11] As reflected, in detail, in the epigraphic inscription transcribed in note 9, which shows a total profit, for the famous quadriga driver, Gaius Appuleius Diocles, of almost 36 millions of sestertius. At the present time, that would be more than 15,000 millions of dollars, according to Struck, P. : Greatest of all time, in *Lapham's Quarterly,* (2010).

[12] Many authors, starting from Ihering, Pernice y Perozzi, hold that it is inappropriate to name *contract* to these kinds of agreements, not only because the Roman sources save such name but also because they consider that, originally, the obligation of making restitution originates more likely from a previous *datio* (the delivery of the *res*) than from a *conventio*. Other authors, such as Volterra (Instituciones de Derecho Privado Romano, trans. Jesús Daza Martínez, Civitas, Madrid, 1986, p. 485) believe that nothing proves the supposed absence of mutual consent in the origin of the obligation of making restitution, which is typical in the mutual; for instance, *Cels.* D. 12.1.32. Specifically, without going into the polemic, we choose to direct the Roman transactional categories to the modern legal taxonomy as a simple convention in order to explain the present legal entity known as a contract.

[13] Torrent Ruiz, A: Diccionario de Derecho Romano, v. *Mutuum*, Edisofer, Madrid, 2005, quoting Gaius's Institutions (3,90) he defines it as a *right in rem* contract, unilateral, *stricti iuris*, through which a person gives to another person the property of an amount of money or certain perishable goods, with the obligation of returning the same kind and quality of what was given.

[14] Torrent Ruiz (*O.c.*) points out that, despite the fact the mutual is essentially a gratuitous contract, there were interest rate regulatory laws (*leges fenebres*) since the Republican time, which proves the existence, in practice, of interests. However, -Torrent states- *even though the mutual was essentially gratuitous, in order to generate interests it was necessary to reach a special agreement* (stipulatio usurarium) *or the novation of the previous obligation for a new one that would include the interests;* although the author admits that it seems that the Ulpian's text included in D.46.3.5.2 suggests a "natural" accrue of interests of the loan. In any case, this idea evolves during the Roman Empire, so that in Diocletian's time (III-IV AC) the income of interests was considered as a natural part of the loan contract. Anyway, the prohibition of interests has been a constant element of our legal tradition. In the Bible there are many references that forbid the loan with interests, at least among Jews (Deuteronomy 23:19, Exodus 22:25, Leviticus 25:36, etc.) although usury is allowed with foreigners (Deuteronomy 23:20). Also Canon law, using the Aristotle's aphorism, *nummus non parit* (Politics 1, 3), will forbid a loan with interest.

This was the case of the *fenus nauticum* or *pecunia traiecticia,* which was a mechanism used since the Late Republican age to finance the maritime commercial trade. This was probably imported from the Greek Law[15], and it is considered to be a precedent of the modern insurance contract, given that it transfers the financial risk of the maritime activity from the ship-owner to the lender, who could only demand the restitution of the amount of the lent capital in case the ship happily arrived to the harbour.

The dynamic of the contract, which meant the acceptance of a great risk from the lender, made necessary the establishment of substantial interests, as well as other cautions on the lender's behalf; and that puts this legal entity far from the real mutual[16].

In D. 22.2, dedicated to maritime loan *(De náutico fenore)*, the compilers incorporated a text of Cervidius Scaevola, who was a jurist in Marcus Aurelius's time, about the increase of the amount owed by the borrower when the lender used to assume a high risk (*Scaev. 6 resp.* D.22.2.5). In the *pr.* we can notice, among others, two cases in which this was clear: if someone gave a huge amount of money to a fisherman for the rigging so if he caught something he would have to give the money back; and the case of who gave the money to an athlete for his training and sport shows so that if he won he would have to pay it back:

… nec dubitabis, si piscatori erogaturo in apparatum plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si vicisset, redderet.

The jurist adds in the next passage (*Scaev. 6 resp.* D.22.2.5.1) that in all these cases the deal, without stipulation, was used in order to increase the obligation:

In his autem omnibus et pactum sine stipulatione ad augendam obligationem prodest.

However, Scaevola holds, in the first part of *pr.,* that those were not really conditional deals[17], and it seems that the similarity of the loan made with the fisherman, with the *iactum retis,* which was an *emptio spei,* and the placing the compilers did with these passages in the *fenus nauticum*, lead us to think that both cases had a random nature. In the athlete's case, a big amount of money was lent with high interests, probably for the training expenses, and that he would only had to give it back if he won the competition because in such case he would get a much higher amount of money as a prize. Actually, that was probably a lender's share of the profits, as it could happen in the *pecunia traiecticia*[18]. Also, it is likely that the lender may have agreed with the athlete that this should return the money, with no exception, even if he did not win the competition. Only that way we can explain the surprising assumed fact that Ulpian tells in book *4 opinionum*[19], and that the compilers placed in D.4.2.23.2. An athlete, who had been unfairly detained by a lender, stopping him from going to the competitions, had been forced to allocate in the document a higher amount of money than he owed[20]; if that could be proved, the competent judge would rule that the *res* had to be returned to its fair terms:

Si faenerator inciviliter custodiendo athletam et a certaminibus prohibendo cavere compulerit ultra quantitatem debitae pecuniae, his probatis competens iudex rem suae aequitati restitui decernat.

This extract still causes perplexity, since it cannot be understood why the lender, who gave an amount of money to the athlete but allocating in the document a higher amount than the athlete received, would have any interest in stopping him from taking part in the competitions, given that, even if there would have been no withholding in the case the athlete was defeated, he was more solvent if he won, and thus, it would have been easier for the lender to get the money back. Maybe the text took into account the possibility of that the lender acted by bribery under another lender who did hope to speculate with the prize won by another athlete. Or maybe the sponsor had reasons (justified or not) of that the athlete could be defeated in the competition, which could prevent his right to collection.

Even if a lender could give money to the athlete, assuming the risk of not getting the money back if that one did not win the competition, the possibility of triumphing in the competition and therefore achieving a prize was a simple expectation, a *spes* that, "by no means", could be pawned through a private agreement in order to guarantee the debt; and even in the case a general agreement had been set with the aim of ensuring all debtor's property, this guarantee was not valid upon those future profits. That is the way Alexander Severus decided it in a rescript, in 233, addressed to Septimius, and included in C.8.16.5, under the general heading of *Quae res pignori obligari possunt vel non et qualiter pignus contrahatur*:

Spem eorum praemiorum, quae pro coronis athletis pensitanda sunt, privata pactione pignerare minime admittendum est: et ideo nec si generale pactum de omnibus bonis pignori obligandis intervenerit, tenet.

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[15] Torrent, *O.c.*, v. *fenus nauticum*.

[16] Torrent (*O.c.*) also states the simultaneity of a right of withholding (*pignus*) on the goods used as guarantee of the interest payment (generally 100% of the amount lent); as well as the quasi-essential form of the contract (*in fact, it was always contracted through a stipulatio that always contained the usurae ex pacto*).

[17] It refers to the conditional transactions in which the consideration increases depending on clauses such as "if you do not manumit", "if you do not do that" o "if I heal": *Periculi pretium est et si condicione quamvis poenali non existente recepturus sis quod dederis et insuper aliquid praeter pecuniam, si modo in aleae speciem non cadat: veluti ea, ex quibus condictiones nasci solent, ut „ si non manumittas", „ si non illud facias", „ si non convaluero" et cetera…*

[18] WACKE, cit. p. 445: Derartige "partiarische" Darlehen mit Gewinbeteiligung des Gläubigers sind für die Antike zumindest als Seedarlehen nicht unwahrscheinlich.

[19] There are doubts in the Romance language about the Ulpian's authorship of the *libri opinionum*. WACKE, cit. p. 449 considers it an *apokryphe Ulpian text.*

[20] The fact of allocating a higher amount is one of the most common tricks used by lenders in order to guarantee a higher remuneration than it is allowed; generally, taking advantage on the borrowers' needs. In this sense, in our present Spanish Law, article 1 of the Ley de 23 de junio de 1908 de represión de la usura (Ley Azcárate*)* [*Usury Repression Act of 23rd June 1908*]: *Será igualmente nulo el contrato en que se suponga recibida mayor cantidad que la verdaderamente entregada, cualesquiera que sean su entidad y circunstancias [Likewise, the contract will be null and void if it means a higher amount than what was really given, whatever the magnitude or the circumstances may be].*

However, the jurist Papinian (AC II) had pointed out in a *responsum* included in D.42.1.40, the possibility of seizing the prizes won by the athletes in case they were sued because of their debts.

Commodis praemiorum, quae propter coronas sacras praestantur, condemnato placuit interdici et eam pecuniam iure pignoris in causam iudicati capi.

Apparently, there is no contradiction between the Papinian's text and the Alexander Severus's rescript, given that the imperial decision forbids the common *pignus* relating to the possibility of achieving the prize, whilst the case-law extract is about seizing[21] the profits of a prize already won and therefore, using the modern administrative language, "already accrued".

Neither the Papinian's text refers exclusively to the prizes for the sports crowns, although maybe this was the most common case. From the general terms used by the jurist, it can be thought that those prizes linked to the crowns given as a result of a relevant military or political achievement could also be seized.

[21] The seizure of goods as a consequence of an execution of judgement, as it is known nowadays, is created in Roman Law as an evolution of the conventional pawn (*pignus in causa iudicati captum*) from an Antoninus's Pius rescript (138-161 dC). *Vid.* Díaz-Bautista Cremades, A.: *El embargo ejecutivo en el proceso cognitorio romano (pignus in causa iudicati captum)*, Marcial Pons, Madrid, 2013.

John Wilkes, the Wilkite Lawyers and Locke's Appeal to Law

Michael Conforti *

Abstract

England's Wilkite movement of the 1760 s has usually been viewed as a functional and instrumental effort to enlarge political consciousness and political participation through the use of new communicative strategies and techniques. Most historians have judged the consequences of these efforts to be largely transitory. Generally overlooked is the substantial and enduring contribution made by Wilkite lawyers, most notably John Glynn and John Dunning, but others as well, who instituted a series of well-coordinated lawsuits against the allegedly illegal acts of an executive believed to be insidiously enlarging its power at parliament's expense. These lawsuits were intended to be more than simple attempts to embarrass the government of George III or crass efforts to extract a bit of financial retribution for the excesses of government functionaries. Inspired by John Locke's 'appeal to law' and his political philosophy which privileged the rights of the individual over the interests of the state, these lawyers asserted the individual's right to be free from the intrusive searches of government particularly when those searches were intended to obtain evidence against a potential criminal defendant. These lawsuits, collectively the first of their kind in English legal history, served as a form of active political resistance to the policies of George's government. The victories won by the Wilkite lawyers helped redefine the idea of 'English liberties', an achievement which continues to be pertinent today.

Key words: *John Wilkes; John Locke; seizure of papers; general warrants; privacy; individual rights; personal autonomy; seditious libel; self--incrimination.*

1. Introduction

With the accession of George III to the throne in 1760 England experienced a period of acute political instability. During the 1750 s, the last decade of his predecessor's reign, a general unease pervaded English politics. To many it seemed as if 'English liberties', however defined, were endangered by an increase in Crown patronage and the political influence that went along with it, the growth of a large standing army under the government's control, a dramatic increase in taxation, and the political and economic complications presented by an ever-increasing national debt.[1] With the winding down of the Seven Years War these concerns again began to engage the attention of England's political nation.[2] Hard won liberties could easily be lost and this was a persistent worry among many of those who took an active role in the nation's politics. This anxiety over real and imagined threats to the 'ancient liberties' of Englishmen cast a pall over the way people viewed politics.[3] Thus, a vocal minority of the political nation believed that the constitution was dangerously imbalanced, with the executive aggressively arrogating power to itself at the expense of the legislative. Many believed that political change was necessary to ensure that the 'ancient constitution' would remain that paradigm of civil government in the known world that Englishmen proudly claimed it to be. Against this backdrop of political instability, John Wilkes and his adherents ('the Wilkites') seized the opportunity to advance their political agenda by transforming the English common law courts into instruments of political resistance.

On 19 April 1763, in George III's closing speech to parliament, the King praised it for approving the Peace of Paris ending the Seven Years War. In an anonymous pamphlet entitled *The North Briton* No. 45 Wilkes criticized the speech, lambasted the peace, and intimated that the King had been duped by his min-

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1 *The Case of the Five Millions, fairly stated: In regard to taxes, trade, law, lawyers, &c…* (London: printed for John Millar, 1758), 7, 8, 13, 17–19; John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge: Cambridge University Press, 1976), 3–9; Henry Horwitz, "Law, Liberty and Property, 1689–1776," in *Liberty Secured? Britain Before and After 1688*, ed. J.R. Jones (Stanford: Stanford University Press, 1992), 231– 264. I reproduce the language, grammar and spelling in the sources without any attempt at modernization.

2 H.T. Dickinson, *The Politics of the People in Eighteenth Century Britain* (New York: St. Martin's Press, 1995), 174; *see also*, Horwitz, "Law, Liberty and Property, 1689–1776," 273; *see generally*, Issac Kramnick, *Bolingbroke and His Circle, the Politics of Nostalgia in the Age of Walpole* (Cambridge: Harvard University Press, 1968), chap. 6.

3 A good example of this concern is Owen Ruffhead, *Ministerial Usurpation Displayed, and the Prerogatives of the Crown, with the Rights of Parliament and of the Privy Council, considered. In an Appeal to the People.* (London, 1760).

isters.[4] In response, the government issued a general warrant to determine the author of *The North Briton* No. 45. In what has come to be known as the 'affair of the general warrants', forty--nine people, including Wilkes, were ultimately arrested by servants of the Crown known as the King's Messengers and Wilkes was brought for questioning before the king's principal secretaries of states, Lords Halifax and Egremont. Incident to the same general warrant, Wilkes's private papers were also seized and examined by the government. Wilkes, however, was not the only voice the administration wanted to silence. In 1755 *The Monitor or British Freeholder* [hereinafter '*The Monitor*'] was established to advance the interests of London's commercial establishment. Arthur Beardmore, a lawyer and the 'man of business' for Richard Grenville, Earl Temple, became the principal writer for *The Monitor* and John Entick acted as editor.[5] After a summer during which *The Monitor* criticized the king's government for its 'mishandling' of the negotiations to end the Seven Years War, warrants were issued on 6 November 1762 for the arrest of Entick and two others.[6] On the same day a separate warrant was issued for the arrest of Arthur Beardmore and his clerk, David Meredith, as authors of *The Monitor*.[7] Entick's papers were also seized.

The arrest of Wilkes catapulted him to instant stardom as the defender of English liberties and opened the door for Wilkes and his followers to attack the King's government in the courts of law. Wilkes and several others initiated actions for damages based upon the traditional common law torts of false imprisonment, assault, and trespass, alleging that government officials had exceeded their authority. These government officials, in contrast, were quite certain that they were justified in employing general arrest warrants and general search warrants to preserve and protect the government.

Fully aware that attempts to challenge the ministry in parliament were likely to prove unsuccessful given the large majorities the government could muster in both houses of parliament, Wilkes and his lawyers, including Beardmore (who represented Wilkes in the early stages of his criminal prosecution), Serjeant John Glynn, John Dunning (the future Solicitor General and Lord Ashburton), Serjeant Richard Leigh, and James Eyre, the Recorder of London, sought an alternative forum to resist, through legal means, the policies of King George's government and they found it in the superior crown courts.[8] Through an unprecedented series of retaliatory lawsuits brought against government officials, the Wilkites used the central crown courts as a forum for the public expression of their dissatisfaction with the political *status quo* and as an instrument to resist, through well established legal procedures, what they viewed as the excesses of the government. Using arguments which combined traditional English common law principles with a discourse of natural rights, these lawsuits highlighted flaws in existing procedural and substantive law which, the Wilkites believed, sacrificed the rights of the individual to the interests of the state. These rights included, *inter alia*, the right to be free from compulsory self-incrimination, the right to be free from the unwarranted intrusion of the government into a person's private affairs, the right to think and act as free, autonomous, self-governing individuals, and the right to due process of law. Because these issues involved the intersection of juridical claims with political rights, the courts became a battleground in the political contests that raged throughout the decade of the 1760 s and into the 1770 s and the common law became a sword wielded by the Wilkites to neutralize the power of the king's ministers. While the courts were no strangers to political argument, this was the first time that ordinary subjects of the crown used the courts, rather than parliament or the press, as an instrument to attack the government.

As a result, these political activists transformed the courts into contested spaces in which they raised legal arguments emphasizing the security of the autonomous individual against the intrusive acts of the government. By privileging the rights of the person over the interests of the state, the Wilkites won meaningful legal protections for individuals and encouraged the active participation of individuals in very public, very contentious debates. Indeed, the Wilkites knew full well that the arguments they raised in the courts of law would become the grist for extended debate in the periodical press and in the pamphlet literature.[9] The political nation thus became engaged in a serious and extended discussion that brought about the contentious intersection of the most significant structures of political power in England – the royal court, the law courts, the press and parliament. While today courts routinely become involved in political questions and matters of government policy, the appro-

[4] Wilkes had been a persistent and oftentimes acerbic critic of King George's favorite, the Earl of Bute. Eventually, the public attacks became so vitriolic that Bute was forced to resign in April of 1763. He was succeeded by George Grenville. See, John Brewer, "The Misfortunes of Lord Bute: A Case Study in Eighteenth Century Political Argument and Public Opinion," *Historical Journal* 16, 1 (1973): 3–43.

[5] B.L. Add. MSS 22131, fol. 2. On Beardmore's role with *The Monitor*, see, Marie Peters, "The 'Monitor' on the Constitution, 1755–1765: New Light on the Ideological Origins of English Radicalism," *English Historical Review* 86, no. 341 (October 1971): 706–727; see also, *Calendar of Home Office Papers of the Reign of George III, 1760–(25 Oct.)1765*, ed. Joseph Redington (London: Longman & Company, 1878), no. 676, p. 201 (November, 1762). Temple was the former First Lord of the Admiralty and Lord Privy Seal and the brother of George Grenville, who was the current First Lord of the Treasury. Temple and Grenville were also the brothers-in-law of the "Great Commoner" and leader of the opposition, William Pitt the Elder, later the Earl of Chatham. Brief biographical sketches of many of the main characters are conveniently available in David Feldman, "The Politics and People of *Entick v. Carrington*," in *Entick v Carrington: 250 Years of the Rule of Law,* eds. A. Tomkins and P. Scott (Oxford: Hart Publishing, 2015), pp. 5–43.

[6] Guildhall MSS 214, vol. 3, fols. 294–295; *Calendar of Home Office Papers*, p. 248, Criminal Papers, vol. 10, page 153.

[7] B.L. Add. MSS. 22131, fol. 24 is a copy of the Beardmore warrant. See also, *Calendar of Home Office Papers*, p. 248, Criminal Papers, vol. 10, page 154.

[8] By 'superior crown courts' I mean the Court of King's Bench, the Court of Common Pleas, the Court of the Exchequer, the Court of Exchequer Chamber and the Court of Chancery. William Blackstone, *Commentaries on the Laws of England*, vol. 3 of 4 (Chicago: University of Chicago Press, 1979, facsimile of 1765 edition), 37–56. Hereinafter, this work will be cited as: __ *Commentaries* __.

[9] I demonstrate the way in which the legal arguments used by the Wilkites in court were transmitted to the greater political nation in Michael Conforti, *An Inconvenient Forum: Power, Politics and the English Common Law Courts in the Age of Mansfield* (Ph.D. dissertation, Fordham University, 2012).

priation of the courts by these mid-eighteenth-century English political activists was truly a novel political stratagem.

2. Historiography

Historians of eighteenth century Great Britain tend to avoid examining the Wilkite movement through the prism of the strategies, tactics, arguments, and rhetoric employed in these high profile legal cases.[10] When the cases in court are mentioned, they are viewed in isolation and not part of a larger, more comprehensive plan, scheme or design and certainly not informed by any discernible ideological content. Yet, the courts served as the primary venue where Wilkes and his followers consciously and deliberately painted the government with the broad brush of tyranny and attacked individual servants of the crown as the instruments of that tyranny.

John Brewer has engaged in a detailed examination of the Wilkite connection to the courts.[11] Brewer has argued that the Wilkites consciously and opportunistically used the courts to publicize a political agenda, essentially conservative in nature, premised upon the desire to maintain and protect the ancient liberties of Englishmen through demands for due process, equality before the law, responsible governance and judicial accountability.[12] While his observations are undoubtedly correct, Brewer did not examine the natural rights arguments deployed in these court cases which went beyond familiar claims premised upon the preservation of 'English liberties' as understood at the time.[13]

Brewer saw the Wilkite involvement in the courts as part of a broader development unfolding in the 1760 s which he described as "a qualitative shift in the argument about political reform comparable to the move from property to persons as the basis for the franchise."[14] According to Brewer, at the heart of this qualitative change was a substantive transformation in the pattern of political argument in Georgian England which resulted from the emergence of a widespread, popular, politicized press and which became, in Brewer's words, an alternative structure of politics. Men like John Wilkes and his followers took full advantage of this development to advance their program of political activism. However, Brewer identified Wilkes's novelty more as a matter of technique, emphasis and style than ideological content. According to Brewer, Wilkes's popularity was directly related to his ability to make use of political propaganda in all of its new and varied forms, most importantly the press, but including the courts as well.[15]

But I argue that there was more to Wilkite ideology than a backward looking plea to preserve the 'ancient constitution'. Wilkite ideology also included an appeal to natural rights, an assertion only mentioned parenthetically by Brewer and at odds with the views expressed by J.G.A. Pocock.[16] Pocock has argued that much of eighteenth-century English political thought was framed by Renaissance humanistic ideas of civic participation, the fear that government would eventually be corrupted by the lust for wealth and power, and the need for virtuous citizens to guard against that corruption.[17] For Pocock, therefore, Locke's political philosophy is largely irrelevant to understanding eighteenth-century political thought. Indeed, in his *Machiavellian Moment* Pocock asserted that to understand eighteenth--century political debate did not necessitate reference to Locke at all.[18] While the idiom of civic humanism was certainly part of the language of political debate in eighteenth-century Great

[10] See, e.g., Wilfrid Prest, *Albion Ascendant, English History 1660–1815* (Oxford: Oxford University Press, 1998), 196–197; Paul Langford, *A Polite and Commercial People: England 1727–1783* (Oxford: Oxford University Press, 1989), 358; Peter D. G. Thomas, *John Wilkes, a Friend to Liberty*, (Oxford: Clarendon Press, 1996), 125–126; Arthur H. Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (New Haven: Yale University Press, 2006), 88, 132, 160, 161–162.

[11] John Brewer, "The Wilkites and the Law, 1763–74: a Study of Radical Notions of Governance," in *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries*, eds. J. Brewer and John Styles (New Brunswick: Rutgers University Press, 1980), 128–171. Strikingly, the cases which are discussed at great length here merit only two pages in a lengthy and brilliantly conceived essay. Ibid., 142–143. Recent efforts to engage with some of the issues raised here can be found in a collection of essays on *Entick v. Carrington*: A. Tomkins and P. Scott, eds., *Entick v Carrington: 250 Years of the Rule of Law* (Oxford: Hart Publishing, 2015). These essays are mainly concerned with analyzing and interpreting *Entick.* A recent effort to link the Wilkite movement with the First Amendment to the United States Constitution can be found in Roger P. Mellen, "John Wilkes and the Constitutional Right to a Free Press in the United States," *Journalism History* 41, 1 (Spring 2015): 2–10. In the United States, *Entick* has generated substantial interest among legal scholars given its important role in Fourth Amendment jurisprudence. See, *U.S. v. Jones*, 132 S. Ct. 945, 565 U.S. __ (2012).

[12] Brewer, "The Wilkites and the Law," 136, 139, 167, 168.

[13] John Brewer, "English Radicalism in the Age of George III," in *Three British Revolutions, 1641, 1688, 1776*, ed. J.G.A. Pocock (Princeton: Princeton University Press, 1980), 323–368.

[14] Brewer, *Party Ideology and Popular Politics at the Accession of George III*, 19.

[15] Brewer, "English Radicalism in the Age of George III," 139–160. H.T. Dickinson finds little evidence of a coherent ideology of opposition informing Wilkes's repertoire of political skills. H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-century Britain* (New York: Holmes and Meier Publishers, 1977), 210.

[16] Brewer, "The Wilkites and the Law," 142.

[17] For an excellent summary of Pocock's work, see, Norma Landau, "Eighteenth-Century England: Tales Historians Tell," *Eighteenth-Century Studies* 22, no. 2 (Winter, 1988–1989): 208–21.

[18] J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 423–424, 435–436; see also, e.g., Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), 124, 127, 129 and Pocock, *Politics, Language, and Time: Essays on Political Thought and History* (Chicago: University of Chicago Press, 1971), 144. Others have not been so willing to consign Locke to the eighteenth century's ideological dustbin. See, e.g., Isaac Kramnick, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (Cambridge: Harvard University Press, 1968); Caroline Robbins, *The Eighteenth-Century Commonwealthman : Studies in the Transmission, Development, and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (New York: Antheneum Press, 1968), 382–383. Neither Kramnick nor Robbins has examined what was happening in the law courts during the 1760 s for evidence in support of their positions.

Britain, Locke's political philosophy of individual rights was fast becoming an integral part of Britain's political language and served as an important inspiration for the Wilkite strategy of lawful resistance.

3. Developing a Theory of 'Lawful Resistance': Wilkes's Appeal to Law

Most historians have fallen victim to the lasting effects of Wilkite propaganda and have viewed the lawsuits brought by him, or at his urging, as simply a crusade against general warrants.[19] This is understandable since the government's use of general warrants evoked images of home invasions, mass arrests and close confinement, and certainly Wilkite propaganda made the most of this.[20] However, the two most successful lawsuits in advancing the Wilkite ideological program involved, not the issue of general warrants, but rather the question of the illegality of seizing a man's papers to be used as evidence against him. To the Wilkites the most pernicious threat to an Englishman's liberty lay with the taking up of a person's papers, without cause, and without the protective shield of a disinterested magistrate to guard against unlawful invasions into the secret and private affairs of a person. If such searches were legal, the evidence obtained could be used against the suspected criminal and, more likely than not, the papers seized would include the suspect's own words. In court this proof would be construed as admissions of guilt or confessions of wrongdoing. By seizing a person's papers, the government could do an end-run around the well established common law rule that no witness need give evidence against himself. In the context of a legal proceeding, this rule against self-incrimination was at the heart of a person's right to defend oneself against criminal charges brought by the heavy hand of state power. Wilkes and his attorneys understood that this kind of conduct posed a grave threat to 'English liberties' and they relied upon John Locke's theory of lawful resistance to do something about it.

Like Locke, Wilkes believed that the 'people', which included a broad spectrum of English society, were the ultimate repository of political power. In responding to an essay in the *Briton*, a pro-government paper, Wilkes rejected the claim that the root of disorder in England was the belief that "every individual is equally free by nature and therefore… has an equal right to intermeddle in the administration of public affairs: a principle… subversive of all government."[21] On the contrary, argued Wilkes:

> Government is a just execution of the laws, which were instituted by the people for their preservation: but if the people's implements, to whom they have entrusted the execution of those laws, or any power for their preservation, should convert such execution to their destruction, have they not a right to intermeddle? Nay, have they not a right to resume the power they have delegated, and to punish their servants who have abused? This is the voice of Locke, the voice of all laws, the voice of reason; and we own not the voice of tyrants and their abettors, nor the voice of the Briton.[22]

In *The North Briton* No. 33 Wilkes reasserted his belief in the right of the people to resist tyranny. He derisively portrayed the idea of passive obedience to royal power in this way:

> A Tory maintained, that the King held his crown of none but God; that he could not by the most flagrant violation of the laws, by the most tyrannical exercise of this power, forfeit his right, that the people were made entirely for him, and that he had a right to dispose of their fortunes, lives and liberties, in defiance of his coronation oath, and the eternal laws of reason, without the subject having any right to demand redress of their grievances, or if their demand was denied, to seek it for themselves.[23]

In No. 32 Wilkes elaborated on what he believed to be "the first principles of all free governments, and of all civil liberty", which included a right to resist based upon the natural right of self-defense:

> That there is a mutual contract, tacit or express, between a Prince and his subjects: that the sovereignty of England is in the three states, namely, King, Lords, and Commons: that self-preservation is the fundamental law of nature: that there lies no obligation upon Christians to passive obedience, when the Prince commands anything against the laws of our country, etc., etc., etc.[24]

Integrated into these short paragraphs are the fundamentals of Locke's political theory: self-preservation as the most basic of natural rights equally possessed by every person; the creation of civil government as a form of trust; the right to resist government when government violates that trust; and the right of individuals to alter the form of government in response to a betrayal of that trust.

Wilkes further elaborated on his understanding of English political theory in his *Introduction to the History of England*.[25] As an expression of Wilkes's political thought, this essay has eluded scholarly attention. There Wilkes recognized the primacy of the right of self-preservation in the law of nature.[26] He identi-

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[19] See, e.g., Thomas, *John Wilkes, a Friend to Liberty*, 125–126; Cash, *John Wilkes: the Scandalous Father of Civil Liberty*, 88, 132, 160, 161–162; George F. E. Rudé, *Wilkes and Liberty: a Social Study of 1763 to 1774* (London; Oxford; New York: Oxford University Press, 1970), 193–194.

[20] Still the best discussion of the uses of Wilkite propaganda is Brewer, *Party Ideology and Popular Politics*, chap. 9.

[21] John Wilkes, *The North Briton, revised and corrected by the author; illustrated with explanatory notes, and a copious index of names and characters*. 2 vols. (Dublin: Mitchell and Williams, 1764), No. 19, vol. 1, 101.

[22] *The North Briton*, No. 19, vol. 1, 101.

[23] *The North Briton*, No. 33, vol. 2, 187–188.

[24] *The North Briton*, No. 32, vol. 2, 180.

[25] Wilkes harbored thoughts of writing a multi-volume history comparable to that of David Hume. He never wrote more than the introduction which was published by Almon posthumously in John Almon, *The Correspondence of the Late John Wilkes, with his Friends*, vol. 5 (London: Richard Philips, 1805), 160–206.

[26] Ibid., 200.

fied the works of Locke and Sydney as two of the most valuable books available on the subject of the "nature, rise and extent, of all governments."[27] Wilkes asserted that the two great principles of government were "that power is originally from the people, [and] that resistance to unlawful acts of government is warranted by the constitution."[28] He quoted with approval Grotius's statement, in *De Jure Belli et Pacis* that: "If the king have a part of the supreme power, and the people or the senate have the other part, would the king invade the part not his own, he may be lawfully resisted…. When such a case happens, the king may also, by the right of war, lose his share of the supreme power."[29] Wilkes described this right of resistance as "the great maxim of all governments, the preservation of legal establishment."[30] Accordingly, when the possibility arose that, "though in the infinite lapse of ages a venal parliament or a profligate soldiery might arise who might bargain for our liberties, the people will not fail to resume their rights, and exercise themselves, on a great emergency, power they only lend to their magistrates and governors."[31]

Wilkes believed that the King George's government was abusing its power in what he perceived as the intentional corruption of parliament particularly by the King's tutor and favorite, the Earl of Bute.[32] Wilkes complained that Bute had bestowed many pensions and places on his countrymen thereby corrupting parliament and transforming it from an independent constituent part of the legislature into a subservient adjunct of the executive.[33]

In *The North Briton* No. 37, Wilkes employed a popular comparison used in eighteenth-century literature between ancient Rome and the British Empire to highlight this political corruption as the corrosive acid of government. According to Wilkes, one of the major causes for the decline of the Roman Empire was the use of bribery, intimidation and the proscription "of the most spirited and experienced and honest friends of the republic."[34] Wilkes then drew a parallel between the fall of the Roman Empire and circumstances well within the memory of Englishmen:

> In our own memory there has been a time, when the sum of twenty five thousand pounds issued from a certain place, upon a certain article, gave too just cause for melancholy reflections. By what magic influence and fascination of mind, was a former parliament, induced to deal with gross and fulsome panegyric the infamous Treaty of Utrecht, whilst the traitors, who made it, were held in utter detestation by the honest and discerning nation? I must desire, professing always a regard to decency, as well as my own safety, that I may not be misunderstood; for there is nothing farther from my intention, than to insinuate that there is the least similitude between the circumstances of last December [when the peace preliminaries were approved by parliament], and of June 1713.[35]

Wilkes spelled out in *The North Briton* No. 45 what he merely adverted to in No. 37. In criticizing the King's speech as it pertained to the articles of peace, Wilkes noted that the world knew how the approval of parliament was obtained: "The large debt on the civil list, already about half a year in arrear, shows pretty clearly the transactions of the winter."[36] This was a thinly veiled accusation that the approval of the Commons on the peace was bought by bribing many of its members in return for their favorable vote approving the peace.

Wilkes needed to look no further than Locke's *Second Treatise* to find a justification for lawful resistance to the state in the face of the government's bribery and chicanery in manipulating members of parliament. There Locke identified the executive's corruption of the legislature by bribery as one instance when government might be deemed dissolved, triggering the right of each individual to resist the actions of the state. In the *Second Treatise* Locke wrote that the executive:

> Acts contrary to his trust when he either imploys the Force, Treasure and Offices of the Society, to corrupt the Representatives, and gain them to his purposes: or openly pre-engages the Electors, and prescribes to their choice, such whom he has by Sollicitations, Threats, Promises, or otherwise won to his designs: and imploys them to bring in such who have promised before-hand, what to Vote and what to Enact.[37]

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[27] Ibid., 165–166. A catalogue of Wilkes's library, inventoried at over 900 books, shows that Wilkes owned the great works of Locke, Sydney, Milton, Montesquieu, Grotius, Pufendorf, Voltaire, and Rousseau. *A Catalogue of the Valuable Library of John Wilkes, esq : which will be Sold by Auction, by Samuel Baker…* (London, 1764), 1, 2, 4–6, 9, 11–12, 15, 17–18, 22, catalogue reference EC75.W6524.Zc764c, Houghton Library, Harvard University, Cambridge, MA. Wilkes's admiration for Locke is also evidenced in a manuscript review of the compilation and republication of the earliest editions of the *Two Treatises*. There he describes Locke as a "shining example for all men of genius of employing the abilities heaven has given them to fulfill the first of all duties, that to our country." John Wilkes, manuscript review of John Locke's *Two Treatises on Government*, Wilkes Letters (microfilm), William Clements Library, University of Michigan, vol. 3, fol. 9.

[28] Almon, *The Correspondence of the Late John Wilkes*, vol. 5, 174.

[29] Ibid., 195–196.

[30] Ibid., 197.

[31] Ibid., 203.

[32] Here I respectfully differ with Professor Brewer, who emphasizes the importance of the role of government corruption in the debates following the Middlesex Election of 1768. I obviously situate this important concern as gaining currency earlier in time. We agree, however, that it was a potent weapon of the opposition. See, Brewer, *Party Ideology and Popular Politics*, 250–257.

[33] *The North Briton*, No. 2, vol. 1, 10; *The North Briton*, No. 5, vol. 1, 23; *The North Briton*, No. 12, vol. 1, 59–60, 62, 64.

[34] *The North Briton*, No. 37, vol. 2, 211; perhaps a reference to the exclusion of Pitt and Temple from government.

[35] *The North Briton*, No. 37, vol. 2, 211–212.

[36] *The North Briton*, No. 45, vol. 2, 264.

[37] John Locke, *Two Treatises on Government*, 3d edition, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), Book II, chap. XIX, par. 222, p. 413. Locke's frame of reference here is undoubtedly the attempts by James II to pack parliament by the exaction of oaths from candidates to vote in favor of James's religious policies. Steve Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009), 185–186; Tim Harris, *Revolution, the Great Crisis of the British Monarchy, 1685–1720* (London: Penguin Books, Ltd., 2006), 229–236.

Such conduct, according to Locke, constituted a design to subvert the government amounting to a breach of trust warranting resistance by the people.[38] The parallel between Locke's theorizing and what Wilkes saw happening before his very eyes could hardly have been lost on Wilkes.

In the face of mounting evidence of 'ministerial despotism', Wilkes had to determine the appropriate response to the political situation that confronted him in April of 1763. Locke's 'appeal to heaven' was out the question – that would open Wilkes up to a charge of treason. He found the answer in the courts, the only department of government arguably independent of the crown, which he transformed, through his lawsuits, into an astonishingly effective political weapon.[39] In this Wilkes again seems to have been inspired by Locke for he made it clear that in most circumstances recourse to the law and the courts would be the most effective way to challenge a government's abuse of power. In Locke's paragraph 202 of the *Second Treatise*¸ which begins with the famous statement that, "Wherever law ends, tyranny begins," Locke argued that whenever a magistrate exceeded the authority given him by the law he ceased to be a magistrate and became an ordinary member of society.[40] In the following paragraph, where Locke posed the question of whether or not the commands of a prince may be opposed, his answer was that the nature of lawful resistance depended upon the kind of political system established in a particular place.[41] In a mixed government such as England's, illegal acts by government officials required, in the first instance, recourse to the courts:

Supposing a Government wherein the person of the chief magistrate is not thus sacred; yet this Doctrine of the lawfulness of the *resisting* all unlawful exercises of his power, will not upon every slight occasion indanger him, or *imbroil the Government*. For where the injured party may be relieved, and his damages repaired by Appeal to the Law, there can be no pretense for force, which is only to be used, where a man is intercepted from appealing to the Law [emphasis in original].[42]

Given Wilkes's familiarity with Locke's ideas and the similarity between his views on lawful resistance and Locke's, the plan of action implemented by Wilkes and the Wilkite attorneys seems more than mere coincidence. And, the significance of Wilkes's position on lawful resistance was not lost on the government. The following statement in No. 45, regarding the people's right to resist ministerial despotism, was quoted in the information brought against Wilkes for seditious libel.[43] Wilkes proclaimed:

Is it to be expected between an insolent excise man, and a peer, gentlemen, freeholder, or farmer, whose private houses are now made liable to be entered and searched at pleasure… a nation as sensible as the English, will see that a spirit of Concorde, when they are pressed, means a tame submission to injury, and that a spirit of liberty ought then to arise, and I am sure ever will, in proportion to the weight of the grievance they feel. Every legal attempt of a contrary tendency to the spirit of Concorde will be deemed a justifiable resistance, warranted by the spirit of the English constitution.[44]

The government also charged that the following remark in No. 45 amounted to seditious libel:

The King of England is only the first magistrate of this country, but is invested by law with the whole executive power. He is, however, responsible to his people for the due execution of the royal functions, and the choice of ministers, etc. equally with the meanest of his subjects in this particular duty…. The prerogative of the crown is to exert the constitutional powers entrusted to it in a way, not of blind favor and partiality, but of wisdom and judgment. This is the spirit of our Constitution. The people have that prerogative, and, I hope, the fine words of Dryden will be in graven on our hearts: "freedom is the English subject's prerogative."[45]

These statements came very close to advocating that sovereignty resided in the people at large rather than in the king-in-parliament, although Wilkes was careful never to go that far. And when considered in light of Wilkes's theory of lawful resistance, the government's reaction was predictable, even if the public's overwhelming support of Wilkes was not. Both sides operated under the assumption that they were acting in self-defense, which almost everyone agreed was a foundational precept of natural law. The law of seditious libel was founded on the basic principle that the government had the right, and indeed the obligation, to ensure good order by defending itself against public statements that might destabilize a regime.[46] The government had acted to defend itself by silencing *The North Briton* and *The Monitor* through the use of general arrest warrants and general search warrants. The Wilkites would defend themselves by recourse to the courts.

4. Planning a Strategy of 'Lawful Resistance' to Tyranny

On May 14, 15, and 16 John Wilkes launched his counter-offensive against the government. Wilkes commenced eight separate lawsuits seeking damages against various government

[38] Locke, *Two Treatises on Government*, Book II, chap. XIX, par. 222, p. 413.
[39] I have traced developments regarding the independence of the English judiciary elsewhere. See, Conforti, *An Inconvenient Forum*, chap. 1.
[40] Locke, *Two Treatises on Government*, Book II, chap. XVIII, par. 202, pp. 400–401.
[41] Ibid., Book II, chap. XVIII, par. 203, p. 401.
[42] Ibid., Book II, chap. XVIII, par. 207, p. 403.
[43] PRO TS 11/878 contains a copy of the information against Wilkes as author, printer or publisher of *The North Briton* No. 45.
[44] *The North Briton*, No. 45, vol. 2, 266.
[45] Ibid., No. 45, 268.
[46] 4 *Commentaries* 152. On the history of the law of seditious libel from the late seventeenth through the eighteenth century, see, among many others, James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, University of North Carolina Press, 2004), chap. 10; Philip Harling, "The Law of Libel and the Limits of Repression, 1790–1832," *Historical Journal* 44, no. 1 (March 2001): 107–134.

officials arising out of his arrest. The journeymen printers seized in the dragnet of 29 April 1763 also commenced fifteen separate actions for their false arrests.[47] Shortly thereafter, on 2 September 1763, *The Monitor* defendants commenced eleven separate actions for false imprisonment.

Apparently Wilkes's legal advisors disagreed regarding the best way to proceed. In Wilkes's papers is an analysis of Arthur Beardmore's early management of the legal proceedings entitled "Observations Relate[d] to Mr. Beardmore's conduct and Management of Mr. Wilkes Causes and were drawn at Mr. Wilkes's Request."[48] The unidentified author of the analysis suggests that initially the advice of counsel was to proceed immediately with one or two "comprehensive and well digested actions" against the secretaries of state and the messengers and have them tried during the Easter Term of 1763. The lawyers also disagreed about the applicability of 24 George II, chap. 44, which immunized constables and justices of the peace from lawsuits when acting pursuant to a validly issued warrant. But, argued the author of the "Observations", this statute was never meant to "shelter arbitrary and insolent Ministers of State… in the most wanton acts of Tyranny and Injustice…." The author advocated an immediate trial, "when mankind are ripe for the decision of the grand question of the legality of the first warrant and before the Paper which is the object of it [referring to *The North Briton* No. 45] could have been condemned as a Libel." A successful verdict would "be a striking memento to future ministers and for ever deter them from sporting with the Liberty of an Englishman."[49] Plainly, this document demonstrates that, as early as late May of 1763, Wilkes's legal advisors were considering a comprehensive stratagem in which Wilkes's lawsuits would serve as the vehicle for political attacks against the Grenville ministry and as deliberate appeals to the public on the political questions raised in the lawsuits. It is uncertain whether Wilkes's political ideology influenced the attorneys involved or they arrived at this plan on their own. What we can say with some certainty, however, is that by the summer of 1763, when the first of these cases reached the courts, the lawyers representing the various Wilkite plaintiffs, including Wilkes himself, had adopted a coherent, consistent, and comprehensive strategy to be employed in the courts of law.

5. The First Blow against Ministerial Despotism: the Case of the 'Journeymen Printers'

Based upon the mistaken belief that Dryden Leach was the printer of No. 45, Leach and twenty-one of his assistants, known to posterity as 'the journeymen printers', were taken up on 29 April 1763.[50] After about six hours confinement, the journeymen were released while Leach was held for four days. The lawsuits commenced on behalf of the journeymen printers' came on to be heard in the Court of Common Pleas on 6 July 1763. There is no published report of this trial probably because, in the scheme of things, the journeymen printers were small fish in a very large pond. As a consequence, historians have paid little attention to the case.[51] However, the British Library holds copies of the draft brief and the final brief of the Wilkite attorneys in this case as well as the arguments of counsel. In the draft brief, plaintiffs' case is summed up as "Invectives against proceedings of arbitrary ministers and appeals to the passions of the jury", casting the lawsuit in blatantly political terms. The draft proposes as a trial tactic that counsel ignore the fact that the messengers were government officials, leaving it to defense counsel to raise the embarrassing fact that these "unconstitutional and illegal" arrests were committed by the king's own servants. Plaintiffs' counsel fully expected to argue about the illegality of general warrants "which name nobody" and "consequently the liberty of every man [is] endangered by it." According to the plaintiffs' lawyers, the warrant also failed constitutional scrutiny because, "It commands the seizure of papers to fish for evidence in support of a mere misdemeanor."[52]

The first of the journeymen printers to have his case tried was William Huckle.[53] The final brief prepared by his counsel described Huckle's arrest as "insolent and capricious" and a "flagrant violence of the Constitution".[54] The warrant invaded the province of the jury since an arrest and confinement without a charge meant the messengers were making decisions as to guilt and innocence.[55] And the case deserved the full attention of the jury because, "This trial is a matter of great expectation, every Englishman must consider himself interested in the event and the jury will treat with becoming Dignity a cause in which government itself appears as a Defendant."[56] The brief made it clear that this was a political trial of great importance:

The Manner of conducting the defense makes this cause a matter of general concern. The defendants are avowedly supported by Administration, Special Juries are appointed at a heavy expense in order to awe and distress the pl[aintiff]s who are poor men and unequal to such a combat and surely the respect due to government, whose cause this now is, and the regard that the jury ought to entertain for themselves in some measure demand a liberal verdict in favour of the plaintiff.[57]

This was a simple case of false arrest. Either Huckle was involved in the printing of *The North Briton* No. 45 or he was not. That was the single factual issue upon which the case turned.

[47] PRO TS 11/878; B.L. Add. MSS 22131, fol. 129. Additional documents related to these actions are in B.L. Add. MSS 36206; B.L. Add. MSS 22131, fols. 133, 178.
[48] B.L. Add. MSS 30885, fols. 9–13.
[49] B.L. Add. MSS 30885, fols. 11–12.
[50] B.L. Add. MSS 36206, fols. 10–13.
[51] Fortunately, the government retained the services of a stenographer to take the trial minutes. B.L. Add. MSS 22131, fols. 133–170.
[52] Ibid., fols. 131–133.
[53] There are alternative spellings for his name as "Huckel", "Huckle" and "Huckell".
[54] B.L. Add. MSS 30885, fols. 15, 16.
[55] Ibid., fol. 15.
[56] Ibid., fol. 16.
[57] Ibid., fol. 20.

Nevertheless, counsel employed arguments about the motivations of government actors and accused the government of abuse of power to politicize a rather simple and straightforward case. Counsels' strategy aimed to inflame the jury against a potentially easy target, drive up the damages award, and obtain a jury verdict which reproached the government for its illegal practices.

The actual arguments made by plaintiff's counsel, Serjeant John Glynn, reveal quite clearly that he intended to make this case into a political trial. In his opening statement to the jury Glynn masterfully painted the picture of anonymous agents of an undisclosed principal who invaded the security of the plaintiff's workplace and, without demonstrating any authority for their actions, or even disclosing to the plaintiff the nature of his offense, hauled the plaintiff off to confinement. Such conduct, argued Glynn, "reflect[ed] upon the policy of the government and therefore, gentlemen, it will not be without some marks of your indignation…." [58] Although Glynn never named names, he made constant references to "higher powers", answering the anticipated defense of the messengers that they were just following orders.[59] Glynn warned what might happen if the jury allowed the defendants to go unpunished:

If any person is invested with a power to restrain a man of his liberty without charging him with anything without any appearance of a complaint; or if it can be say'd in a Court of Justice we have reasons of state for doing it. If a man can say there are reasons in my own breast, if that excuse once obtain the sanction of a judicial determination. If that doctrine shou'd prevail English Liberty would be no better than in any other country whatsoever.[60]

The actions of the government, said Glynn, were "of the highest barbarity" and called for the "highest censure of the jury that professes… the warmest sentiments of affection for the English constitution and Liberty." [61] Glynn's strategy was clear: this case involved the security of the individual against the oppressive power of the state.

Glynn then invoked the acknowledged right of an English subject to seek redress of grievances in a court of law. Explicitly invoking Locke's 'appeal to law' Glynn argued, "we shall be in no danger so long as we can resort to the Courts of Justice: so long as jury's attend here and conduct themselves with the firmness and intrepidity they have hitherto done." [62] Glynn's point was clear: a jury impaneled by a court of competent jurisdiction was an essential barrier between a government's abuse of power and the liberties of the subject.[63] And, Glynn told the jury he had no doubt "but we shall have your verdict for [Huckle] as a condemnation of the most unconstitutional proceedings in attacking the most sacred of our rights and I hope it will have due weight in respect to the damages." [64]

The jury awarded plaintiff Ł300, a sizeable amount which bore no relation to the actual injury sustained. When the government attempted to obtain a new trial because the verdict was excessive, Chief Justice Pratt took up where Glynn left off.[65] In his decision, dated 26 November 1763, Pratt held, *inter alia*, that the jury was justified in reaching the conclusion it did because the case involved "the liberty of the whole Kingdom… and if that Liberty is struck at or taken away and is to be supported and warranted by law, there would be no living under such a power." [66] Pratt was of the view that the damage award was the jury's way of "striking at and discouraging acts of this kind" for the issuance of warrants of this nature would lead to the "publick invasion in general on the liberty of the people and no one knows or can aver where aggravations of this kind would stop." [67] The conduct of the government in this case, concluded Pratt, amounted to "invasions on Magna Charta and the fundamental principles of our Constitution." [68] The jury was within its rights to use the damages award to send a clear message to the government that it must abide by the dictates of the law.

The next two cases brought by the Wilkites focused on the government's conduct in seizing the private papers of an individual to obtain evidence against that person for use in a court of law. Such conduct, alleged the Wilkites, was tantamount to obtaining a coerced confession. This strategy became the starting point for an intense and widespread debate over the nature of a person's right to mount an effective legal defense against the oppression of government. This debate began in the courts and rapidly spread beyond Westminster Hall. At the same time, these lawsuits provided convincing evidence that lawful resistance to a 'tyrannical' government did not necessarily require a fundamental transformation of the political regime as long as the common law courts were available as an alternative forum for political action.[69]

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58 B.L. Add. MSS 22131, fol. 134.
59 Ibid., fols. 134–135.
60 Ibid., fols. 134–135.
61 Ibid., fols. 134–135.
62 Ibid., fol. 135.
63 Ibid., fols. 135–136.
64 Ibid., fols. 135–136.
65 Identical manuscript copies of the decision of the Court on the motion for a new trial can be found in Guildhall MSS 214, vol. 3, fols. 216–219 and B.L. Add. MSS 22131, fols. 178–181 (which is the copy referenced in the text and notes). The opinion that is printed in the English Reports, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763) is dramatically different from the manuscripts and the printed version's accuracy is open to serious question. This version contains several highly partisan and inflammatory statements, including several *ad hominem* attacks on Solicitor General Norton, but which do not appear in the manuscript versions. Accordingly, reliance is placed on the manuscript versions rather than the printed version in the English Reports.
66 Ibid., fols. 179–180.
67 Ibid., fol. 180.
68 Ibid., fol. 180.
69 Locke, *Two Treatises on Government*, Book II, chap. XIV, par. 168, p. 379.

6. Wilkes's 'Appeal to Law' in Action: the Campaign in the Courts against the Government's Seizure of Private Papers

In *Wilkes v. Wood* Wilkes sued Undersecretary of State Robert Wood for the 29 April 1763 unlawful entry into Wilkes's house and for the illegal seizure of his papers. The plaintiff's declaration alleged that the defendant entered into Wilkes's dwelling place, and 'broke open and despoiled' the doors, the closets, and the locks on the doors. Further Wilkes alleged that Wood seized and took away Wilkes's "private letters of correspondence, and other private papers relating to the private and domestick business and concerns" of Wilkes and that Wood "searched, pryed into, read over and perused" Wilkes's papers to "make [Wood] acquainted with the nature, purpose and contents thereof…." To add insult to injury, these "private and domestick concerns" were "wrongfully and injuriously divulged and publickly made known…." causing Wilkes direct injury.[70]

The plaintiff's brief in *Wilkes v. Wood* focused specifically on the issue of the seizure of papers since Wood played no role in the apprehension of Wilkes and was dispatched to Wilkes's house simply to facilitate the transportation of Wilkes's papers to the secretaries of state. At the outset, the brief argued that the purpose of the seizure of Wilkes's papers was to obtain evidence against him.[71] The brief writer then thought it essential that trial counsel explain the significance of the case to the jury in these terms: "If this general warrant is countenanced by a court of judicature, then juries are no longer the barriers of the liberties of the people of England. By directing the search and seizure of papers to fish for evidence in support of a mere misdemeanor savours strongly of an inquisitorial principle…."[72]

Emphasizing the political character of the cause, the writer further argued that the jury should be told that an award of punitive damages "may convince insolent ministers that the most sacred and inviolable rights of Englishmen are not to be infringed with impunity."[73] The brief contended that, "The entering a man's house and ransacking his most secret repositories with a view to seize his papers… was indefensible and highly illegal."[74] And the author pointed out that the seizure and disclosure of "a few private letters out of [Wilkes's] closet" is what led to criminal charges being filed against Wilkes for his authorship of the "blasphemous" *Essay on Woman*.[75]

The case came on for trial before Pratt on 6 December 1763, and lasted the entire day.[76] Wilkes's was represented by Glynn and the Recorder of London, James Eyre. In his opening statement to the jury, Glynn argued that "of all offences that of a seizure of papers [is] the least capable of reparation [and] that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made."[77] He emphasized that the case extended far beyond Wilkes's personal interests and that the practice of seizing papers "touched the liberty of every subject of this country, and, if found to be legal, would shake that most precious inheritance of *Englishmen* [emphasis in original]." Glynn continued: "In vain has our house been declared, by the law, our asylum and defense, if it is capable of being entered, upon any frivolous or no pretense at all, by a Secretary of State."[78]

Although he did not specifically use the term 'self--incrimination' *in haec verba* Glynn hinted at it by referring to the Inquisition and continental civil law. He contended that the government's practice of seizing papers smacked of inquisitorial justice and exceeded the powers exercised by the Inquisition itself.[79] Moreover, playing on the jury's fears, the Serjeant warned that the power to search and seize papers by government fiat might be abused: "That some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action."[80] Thus, according to Glynn, the practice of seizing papers dealt a fatal blow to the liberty of the subject which required that the jury express their resentment by an award of "large and exemplary damages."[81] He explained to the jury that exemplary damages would serve as a deterrent to the unlawful acts of the government, clearly a political claim. "Trifling damages," Glynn claimed, "would put no stop at all to such proceedings: which would plainly appear, when they would consider the persons concerned in the present prosecution, persons, who by their duty in office should have been the protectors of the Constitution, instead of the violators of it."[82]

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[70] PRO TS 11 878; see also Guildhall MSS 214, vol. 4, fols. 147, 147C–152. Other documents relating to the case can be found in B.L. Add. MSS 22131, fol. 125; fols. 222–227, and fol. 228.

[71] B.L. Add. MSS 30885, fols. 50–51.

[72] Ibid., fol. 53.

[73] Ibid., fol. 52.

[74] Ibid., fol. 53.

[75] Ibid., fol. 53. In the House of Lords, Wilkes was determined to be the author and publisher of the blasphemous *Essay on Woman*, in breach of the privilege of one of its members. *Journals of the House of Lords*, vol. 30, November 29, 1763. Wilkes fled the country to avoid being prosecuted for this and for authoring *The North Briton* No. 45. On 21 February 1764 Wilkes was separately tried *in absentia* in the Court of King's Bench for reprinting and publishing *The North Briton*, No. 45 and for printing and publishing the *Essay on Woman*. He was found guilty on both charges. Papers relevant to these proceedings are scattered about the archives. See, PRO TS 11/878; TS 11/879; B.L. Add. MSS 35887. Minutes of the trial on *The North Briton* are at B.L. Add. MSS 22132, fols. 120–142.

[76] T.B. Howell, ed., *A Complete Collection of State Trials* (London: T.C. Hansard, 1816), vol. 19, col. 1153. Hereinafter "State Trials". References will be to volume and columns.

[77] Ibid., 1154.

[78] Ibid., 1153–1154.

[79] Ibid., 1153.

[80] Ibid., 1154.

[81] Ibid.

[82] Ibid.

Mr. Recorder Eyre also emphasized the political character of the case and argued that it turned chiefly on "whether a Secretary of State has a power to force persons houses, break open the locks, seize their papers, etc., upon the bare suspicion of libel by a general warrant, without the name of the person charged."[83] Mr. Recorder admonished the jury:

Seventy years have now passed, since the revolution, without any occasion to inquire into this power of the Secretary of State, and he made no doubt that the jury would effectually prevent the question from being ever revived again. He therefore recommends it to them to embrace this opportunity (least another should not offer, in haste) of instructing those great officers in their duty, and that they (the jury) would now erect a great sea Mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.[84]

The government knew exactly what Glynn and Eyre were doing: these able and inventive lawyers were intent upon censuring the government for its policy of using general search warrants to seize private papers. Apparently having no credible argument to support the legality of the seizure of Wilkes's papers, Solicitor General Norton shifted the focus of his argument to what he considered were the improper attempts by Wilkes and his lawyers to transform a routine trespass action into a political trial:

Why should Mr. Wilkes commence separate actions against each person? Is Mr. Wilkes, at any event, entitled to treble damages? This was the first time he ever knew a private action represented as the cause of all the good people of England. The Constitution has, in any instance, been violated, the crown must be the prosecutor, as it is in all criminal cases.[85]

Serjeant Glynn replied by again focusing on the improper revelation of the contents of Wilkes's most private papers, for which the only remedy was an award of punitive damages.[86]

After all the evidence was in Chief Justice Pratt charged the jury, making it clear that he believed the seizure of the papers was illegal.[87] Pratt then encouraged the jury to award damages "for more than the injury received" because, "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment of the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[88]

After only a half hour's deliberation, the jury returned a verdict in Wilkes's favor against Wood in the amount of Ł1000.[89] A bill of exceptions was presented to the court which Pratt rejected as untimely."[90]

Four days later, Dryden Leach's lawsuit, often referred to as the "Case of the General Warrants", came on before Pratt. Leach was arrested in the general roundup that occurred on 29 April 1763, taken in the mistaken belief that he was the printer of No. 45. Leach sued for false imprisonment. His home was searched and he was detained four days before he was released.[91] Notwithstanding this, the brief prepared on his behalf argued that Leach's papers were seized, and "all his private concerns investigated."[92] The trial brief arraigned the secretaries of state arguing that English liberties, "do not lie at the mercy of an arbitrary Secretary of State" and "insolent ministers". Even though the messengers were the named parties, the brief asserted that the importance of the case was in "a cause in which the government itself appears [as defendant]."[93] And the case involved, "honest and freeborn Englishmen who are involved in a contest with power and have nothing but the truth and justice of their case to support them against the influence and authority and the Treasure of the Nation."[94] Emphasizing the length of Leach's detention, the author of the brief claimed that this was the epitome of the arrogance of power: "Will not every Englishman shudder at a Secretary of State saying he was too busy for four days together to attend to the consideration of a man whom he know to be illegally and unjustifiably imprisoned."[95] Finally, the brief raised the illegality of, "the entering of a mans house and ransacking his most secret repositorys with a view to seize his papers and pry into his most hidden secrets" which deserved the clear and unequivocal condemnation of the jury.[96]

Leach obtained a verdict against three of the messengers in the amount of Ł 400 plus costs.[97] A Bill of Exceptions was filed with the Court of King's Bench and arguments were heard on 18 June 1765 and again on 8 November 1765.[98] Worth highlighting is the argument made by Leach's attorney, John Dunning, who made an impassioned plea that the seizure of papers to obtain evidence against a suspect violated that person's natural rights:

To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to

[83] Ibid.
[84] Ibid., 1155.
[85] 19 State Trials 1159.
[86] Ibid., 1164–1165.
[87] Ibid., 1167.
[88] Ibid.
[89] PRO TS 11/879.
[90] 19 State Trials 1168. The Bill of Exceptions is filed in B.L. Add. MSS 22131, fols. 228 et seq.
[91] 19 State Trials 1003–1006.
[92] B.L. Add. MSS 30885, fol. 79.
[93] B.L. Add. MSS 30885, fol. 79; see also, fols. 81–82 which repeat many of the contentions first raised in the brief in *Huckle v. Money*.
[94] B.L. Add. MSS 30885, fols. 79–80, 81.
[95] B.L. Add. MSS 30885, fol. 80.
[96] B.L. Add. MSS 30885, fol. 80.
[97] *Leach v. Money*, 19 State Trials 1002 (K.B. 1765). The case is also reported in 3 Burrows Reports 1741; 97 Eng. Rep. 1050 and 1 Blackstone's Report of Cases, 1746–1779, 555. Archival materials on the case can be found in PRO TS 11/923/3237/part 1; B.L. Add. MSS 22131, fols. 131–132.
[98] 19 State Trials 1011, 1027. Papers relating to the Bill of Exceptions are to be found at PRO TS 11/923/3237/pt. 1.

natural justice, as well as the liberty of the subject…. To search a man's private papers… and even without accusation, is an infringement of the natural rights of mankind. And this is a warrant to "seize all a man's papers," without any particular relation even to the crime they would suppose him chargeable with.[99]

Dunning's argument was about more than the sanctity of property against seizure by the state. This was not simply an assertion that government had no right to seize a person's property because the property *belonged* to that person. Dunning claimed a broader right of the individual to be free from the prying eye of government based upon the natural rights of mankind. He asserted the uniquely private, personal and intimate interest of a person to decide when and where his secrets should be divulged. Dunning went further and claimed that under no circumstances should those secrets to be used against him.

Solicitor General de Grey, arguing on behalf of the messengers, could muster little in the way of a convincing argument to sustain the broad seizure of any and all papers as provided for in the warrant. He conceded that, "As to seizing papers – it is difficult to draw the exact line. But it is certainly necessary in some degree: and no instance is produced of such warrants having ever been abused as instruments of oppression."[100]

Lord Chief Justice Mansfield observed that the question of the seizure of papers was not in the case because, as to Leach, that aspect of the warrant had not been executed.[101] He concluded that Pratt's judgment should be affirmed because Leach was not a person named in the warrant, since there was no evidence that he had, in fact, authored, published or printed *The North Briton* No. 45. Therefore, as a matter of law, the arrest was illegal.[102] Mansfield's brothers on the King's Bench were less restrained in their views on the validity of the warrants. Justices Yates, Wilmot and Aston all concluded that, in their opinion, the warrants were illegal.[103] Thus, although the decision of the court was based upon a false imprisonment, the case has always been taken as a judicial determination by a superior crown court that general warrants, unless authorized by parliament, were illegal. Mansfield's ruling precluded Dunning's attempt to obtain a clear-cut pronouncement about the illegality of the government's seizure of private papers. It would now be up to *The Monitor* defendants.

7. The Wilkites Triumphant – Entick v. Carrington and Outlawing the Seizure of Private Papers

As noted above, *Entick v. Carrington* arose from the arrest of Reverend John Entick, Arthur Beardmore and others for their roles in authoring and publishing allegedly seditious libels in the *The Monitor*. In his declaration, Entick alleged that on 11 November 1762, four of the king's messengers "with force and arms broke into the dwelling house of [John Entick], the plaintiff… and continued there for four hours without his consent… broke open the doors to all of the rooms… searched and examined all the rooms… pried into and examined all the private papers, books & c of the plaintiff there found" and carried away said papers.[104] As in *Wilkes v. Wood*, the plaintiff's declaration specifically alleged that the taking of the papers led to "the secret affairs, etc. of the plaintiff [being] wrongfully discovered and made public."[105] For this trespass Entick brought suit against the messengers in the Court of Common Pleas seeking damages in the amount of Ł2000.[106]

The messengers defended on familiar grounds – they had acted properly pursuant to a warrant issued by a secretary of state. This was not a general arrest warrant for it specifically named Entick, but it did not specify the items to be seized. Instead, it directed the messengers to apprehend Entick and to bring him, "together with his books and papers", before Lord Halifax for examination on the charge of seditious libel.[107]

After the trial a jury rendered a special verdict awarding the plaintiff Ł 300 in damages but left the legality of the search to the court.[108] The presiding judge at the trial was again Pratt, now Lord Camden. The government sought a review of the special verdict and the case was argued twice. At the first argument Serjeant Leigh represented Entick and Serjeant Burland represented the government. On the second argument it was Glynn for Entick and Serjeant Nares for the messengers.[109]

Serjeant Leigh framed the issue as whether, under *any* circumstance, it was consistent with English common or statutory law to allow the pre-conviction search and seizure of a suspect's private papers and possessions. Leigh first pointed out that the warrant was issued based purely upon speculation and surmise, rather than evidentiary proof, rendering it invalid.[110] He then asserted that the warrant was overbroad and clearly

[99] 19 State Trials 1024; PRO TS 11/923/3237: "Money and Leech. Some Few Notes on Mr. Dunning's Argum't in this Cause in the King's Bench, the 18th June 1765."
[100] *Leach v. Money*, 19 State Trials 1025; PRO TS 11/923/3237: "Money and Leech. Mr. Sol. Gen'ls Reply on the Argumt of this Case in the King's Bench, 18th June 1765."
[101] Ibid., 1026.
[102] Ibid., 1027.
[103] Ibid., 1026–1027. Minutes of the comments of the judges can be found at PRO TS 11/923/3237/part 1.
[104] *Entick v. Carrington*, 19 State Trials 1029, 1034 (C.P. 1765).
[105] Ibid., 1034.
[106] Ibid., 1029.
[107] 19 State Trials 1034.
[108] To my knowledge no manuscript of the trial minutes exists. The trial verdict was reported in the newspapers: *Public Advertiser* (London), 14 July 1764; *London Evening Post*, 19 July 1764; *London Chronicle*, 19 July 1764; *St. James's Chronicle or the British Evening Post* (London), 19 July 1764.
[109] 19 State Trials 1036–1044.
[110] Ibid., 1038.

amounted to a fishing expedition against Entick because, "the warrant is to seize all the plaintiffs books and papers without exception, and carry them before Lord Halifax."[111] Leigh asked with a rhetorical flourish, "What? Has the Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! And if it were lawful, no man could endure to live in this country… However frequently these warrants have been granted since the revolution that will not make them lawful."[112]

But Leigh was not done:

It is the publishing of a libel which is the crime and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts.[113]

Leigh concluded by characterizing the seizure of papers as "this monster of oppression," and he thundered that the Court should "tear into rags this remnant of Star-chamber tyranny."[114] As in the prior cases, Serjeant Leigh put the government on trial. His intent was to transform the court into a political platform from which he could excoriate the government for its policy of confiscating a suspect's papers, whether or not they were criminal in and of themselves, and to convince the jury to punish the government for employing this illegal practice.

Serjeant Leigh's reference to the Court Star Chamber merits comment. By the time of the English Civil War this prerogative court had developed a distinct criminal jurisdiction and was often portrayed as a tool of the crown used for unpopular and vindictive political prosecutions.[115] The Long Parliament ultimately abolished it in 1641.[116] By the middle of the eighteenth century, mention of Star Chamber conjured up images of tyranny, despotism and arbitrary government and became a shorthand reference for the abuse of the English system of justice by the executive.[117]

In justifying the seizure Burland equated the crime of seditious libel to that of treason and in doing so simply conceded the political character of the crime.[118] He argued that the power to search and seize the papers of a suspected defendant was an important power concomitant to the power to commit.[119] Leigh acknowledged that a secretary of state had the power to commit for treason and other offenses against the state. But, argued the Serjeant, "that is not the present case, which is breaking into the house of the subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs."[120] He rejected the attempt by defense counsel to equate the power to commit in cases of treason with the power to commit in cases of seditious libel. Leigh responded that "this is a false consequence, and it might as well be said he has the power to torture."[121]

On the second day of argument, 20 November 1765, Glynn and Nares were mostly occupied with the question of the nature and extent of the power of the secretary of state to issue warrants.[122] Interestingly, Glynn used the absence of any similar proceedings in the Court Star Chamber to demonstrate that the secretary of state lacked the power to issue warrants to seize papers.[123]

When he announced his decision, Pratt addressed several issues regarding the propriety of the warrant. Pratt concluded, *inter alia*, that a secretary of state was not authorized by law to issue warrants and that the custom and practice of the office of the secretary of state could not create a power to issue warrants where none otherwise existed.[124] Since Pratt decided that a secretary of state lacked the power to issue a warrant of search and seizure, he could have stopped there since the unjustified seizure of the papers was clearly a trespass for which damages could be awarded. However, the Chief Justice went further and articulated a rationale for the illegality of the seizure that transcended what was necessary for a decision in the case.

Pratt turned to "the great question… whether the warrant to seize and carry away the plaintiff's papers is lawful."[125] He emphasized the importance of the issue:

If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to

[111] Ibid., 1038–1039.
[112] Ibid., 1039.
[113] Ibid., 1038.
[114] Ibid., 1039.
[115] On the Court Star Chamber, see, J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990), 136; Geoffrey R. Elton, *Star Chamber Stories* (London: Methuen, 1958); Elton, *Policy and police: the Enforcement of the Reformation in the age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1985); John Alexander Guy, *The Cardinal's Court: the Impact of Thomas Wolsey in Star Chamber* (Harvester Press, 1977); Elton, *The Court of Star Chamber and its records to the reign of Elizabeth I* (H.M.S.O., 1985). A. F. Pollard, "Council, Star Chamber, and Privy Council under the Tudors: II. The Star Chamber," *English Historical Review* 37, no. 148 (October 1, 1922): 516–539.
[116] 16 Charles I, chap. 20.
[117] See, e.g., *Lloyds Evening Post* (London), 20–23 May 1763; *Lloyds Evening Post* (London), 3–6 June 1763; *Lloyd's Evening Post* (London), 23–25 November 1763; *St. James's Chronicle or the British Evening Post* (London), 2 June 1764; *Lloyds Evening Post* (London), 1 June 1764.
[118] 19 State Trials 1040.
[119] Ibid., 1040.
[120] Ibid., 1041.
[121] Ibid., 1041.
[122] Ibid., 1041–1042; see also, Guildhall MSS 214, vol. 4, fols. 46–67.
[123] Guildhall MSS 214, vol. 4, fol. 47.
[124] 19 State Trials 1043–1063.
[125] Ibid., 1045.

charge, or even to suspect, a person to be the author, printer or publisher.[126]

Pratt analyzed the broad powers implicit in a warrant issued by a secretary of state that sought the production of *all* a party's papers, whether relevant to the criminal charges or not.[127] No other magistrate in England claimed such a broad and all--encompassing power.[128] He stressed that the entire process of executing the warrant was shrouded in secrecy while English legal proceedings were always open to the light of day.[129] Pratt pointed out that such a warrant was overbroad and was not limited in the amount or kinds of papers that might be seized.[130] In short, there were no procedural safeguards in place to protect a person from injury arising from the seizure of his papers. Pratt further concluded that the wholesale seizure of papers in advance of a conviction constituted a form of impermissible self-incrimination:

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.[131]

Pratt stressed that the special character of private papers justified a blanket prohibition against their seizure in advance of trial to obtain evidence against a potential defendant:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though an eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that regard. Where is the written law that gives any magistrate such a Power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.[132]

Pratt emphasized the *nature* of the papers – embodying the innermost thoughts and private affairs of the person – as fundamental to his decision. A person had the right to have his secrets maintained, secure from invasion by the government. The right of the individual to keep his own counsel, and to prevent the unauthorized disclosure of the intimate secrets of his life, superseded the power of the state to coerce a person to divulge that which he did not wish to reveal. There were limits to state power, even in its enforcement of the criminal law. And by his decision – that the individual had a right to erect a barrier around his private thoughts, opinions, ideas, and beliefs, even if critical of government – Pratt legitimated the claims of the Wilkites. The government was out to suppress dissent by extending the long arm of state power into the very private sphere of a person's intimate concerns. That, Pratt concluded, government could not do.

The use of words such as "torture", "the rack", "inquisitorial" and "Spanish Inquisition" by the Wilkite lawyers' equated intrusions into a person's private thoughts, memorialized in the written word, with coerced confessions achieved through the application of physical force. The invocation of these words in the context of legal proceedings emphasized the arbitrary and despotic nature of the government's actions in its wholesale seizure of a person's private papers.[133]

The Wilkite lawyers contended, and Pratt ultimately agreed, that English subjects should be at liberty to think for themselves without worrying whether their unspoken thoughts reduced to writing would ultimately be used against them. A person's papers were the 'secret cabinets' where his innermost thoughts, beliefs, values and opinions were preserved. These confidences deserved the protection of the law and were no different than the secrets residing in the recesses of a person's mind. This protection was derived, not from the content of the writings, but from their character as secrets, which possessed a value placed upon them by the individual that superseded any claimed value placed on them by society or the state.[134]

Emphasis on the claim that a person's intimate secrets deserved as much legal protection as his body might have reflected the influence of Locke as well. In his *An Essay Concerning Human Understanding* Locke defined personal identity in terms of reason, reflection, consciousness and self awareness of the continuity of consciousness extending over time.[135] Locke argued that the essence of human liberty was the ability of the autonomous individual to think, examine, reason and reflect without exogenous interference.[136] Indeed, he asserted that:

So far as a man has power to think or not to think, to move or not to move, according to the preference or direction of his own mind, so far is a man free. Wherever any performance or

[126] Ibid., 1063.
[127] Ibid., 1063–1064.
[128] Ibid., 1064.
[129] Ibid., 1064.
[130] Ibid., 1066.
[131] Ibid., 1073.
[132] Ibid., 1066.
[133] In Johnson's dictionary, three of the four definitions for the word 'inquisition' involve judicial matters. Samuel Johnson, *A Dictionary of the English Language*, 3d ed., vol. 1 (London: W. Strahan, 1765), entry for "Inquisition". See also, entry for "Inquisitor". Such words as "rack" and "to rack" evoked images of torture. Ibid., vol. 2, entries for "Rack" and "To rack". The first definition for torture is, likewise, "Torments judicially inflicted; pain by which guilt is punished, or confession extorted." Ibid., entry for "Torture". The dictionary is not paginated.
[134] Dr. Johnson recognized the equivalence of privacy and secrecy in his dictionary. Johnson, *A Dictionary of the English Language*, 3d ed., vol. 2, entries for "Private", "Secret", "Secrecy" and "Secretly". The definitions are the same in Johnson's 1756 and 1777 editions.
[135] John Locke, *An Essay Concerning Human Understanding,* ed. Kenneth P. Winkler, (Indianapolis: Hackett Publishing Company, Ltd., 1996), Book II, chap. XXVII, pars. 9–29, pp. 138–150.
[136] Ibid., Book II, chap. XXI, par. 53, p. 109.

forbearance are not equally in a man's power; wherever doing or not doing will not equally follow upon the preference of his mind directing it, there he is not free.... [T]he idea of liberty is the idea of a power in any agent to do or forbear any particular action, according to the determination or thought of the mind, whereby either of them is preferred to the other....[137]

According to Locke, liberty was limited when a person's ability to think, reason and reflect were impeded by external distractions. On three separate occasions in the *Essay* Locke used physical torture as an example of a situation when a person was deprived of his liberty to think freely because of the all--consuming distraction of the mind caused by physical pain.[138] Although no direct link can be established between Locke's theory of personal identity and the arguments advanced by the lawyers that concern us here, it is hard to believe that English politicians, lawyers and judges were unaware of Locke's claims.

8. Conclusion

The Wilkite strategy to politicize the courts involved, *inter alia*, the commencement of retaliatory lawsuits assailing the legality of the seizure of a person's papers to be used as evidence against a potential criminal defendant. Their efforts prompted a widespread public debate over the nature of a person's right to defend himself against the oppression of government. At the same time, these lawsuits legitimized the contention, almost certainly taken from Locke, that lawful resistance to a tyrannical government did not necessarily require Locke's drastic 'appeal to heaven'. As long as the common law courts provided an accessible forum in which to air public grievances against real or imagined threats to the liberty of the subject, legitimate resistance to government policies could be mounted in the courts, an apparently neutral forum where a professional judiciary could apply the common law to resolve disputes. The reward for their efforts was a series of judicial determinations that favored the security of the individual over the security claims of the state.

While the Wilkite movement is often considered as achieving little of lasting effect, the general principle of law established in *Entick v. Carrington*, which upholds the sanctity of an individual's private papers against the intrusive eye of government, has been consistently invoked in parliament whenever proposed legislation expanding the government's power of search and seizure has been a subject of debate.[139]

The passage of time, and modern judicial and political assessments of the probative value of evidence obtained from private papers versus the prejudicial effect of their admission into evidence has eroded the absolute prohibition against the seizure of private papers established by *Entick*. Nevertheless, *Entick* still serves as a powerful restraint on the ability of the government to intrude into the private lives of individuals. Whether one calls it a right of privacy, or a right to defend oneself against the invasion of government into personal affairs, or a right of individual autonomy, or a right of self-defense – no matter what the nicety of its articulation – *Entick* erected a barrier between the English subject and the government that has withstood the test of time, the vagaries of politics, and the contingencies of history. It remains to this day an essential pillar of English liberty and is powerful evidence of the lasting legacy of the efforts of the Wilkites and their lawyers.

[137] Ibid., Book II, chap. XXI, par. 8, p. 95.

[138] Ibid., Book II, chap. XXI, par. 53, p. 109; par. 57, p. 111; par. 12 accessed on September 21, 2015 at https://ebooks.adelaide.edu.au/l/locke/john/l81u/B2.21. html.

[139] See, *Hansard's Parlimentary Debates*, vol. 37, 923, 11 March 1818['*Hansard's*']; *Hansard's*, vol. 76, 300, 4 July 1844; *Hansard's*, vol. 293, 530–531, 2 November 1934; *Hansard's*, vol. 573, 1043, 27 June 1996; *Hansard's*, vol. 577, 395, 406, 20 January 1997; *Hansard's*, vol. 648, 913, 21 May 2003; *Hansard's*, *vol.* 670, 116–191, March 2005.

Marxism in the West Thought Interpretation of Law in Postwar Period

*Jiří Bílý**

Abstract

Until now, all of the diverse and valuable contributions to the Marxist theory of law have been scattered across the academic landscape. The article is a most timely overview of the theory of law. It brings together a vision of the classical tradition before attending to a comprehensive survey of recent contributions to what has become an increasingly diversified field. It lays the basis for a fruitful engagement between these different strands. The author hopes that this article can contribute to building a truly interdisciplinary approach to the analysis of law in its varied manifestations by having clarified, and thereby uncovered the value of, the disciplinary contours of law.

Key words: *social solidarity; legal profession; values of law; enforcement of law; jurisprudence.*

1. Introduction

A useful way to bridge the approaches in the sociology of law that were developed in the period before World War II and the more recent currents that lasted until the latter decades of the twentieth century is to consider the centrality of the work of Parsons and the theoretical debates that were ignited by the functionalist approach. To be sure, this discussion cannot be limited to the direct influence of Parsons' theories in the theory of law, for, as explained in Chapter 5, that influence was relatively unpronounced. But it is important to stress the relevance of Parsonian theorizing in law theory as it affected many specialty fields, not least of all in terms of the critical reception of functionalist thought. The theories of modern jurisprudence, in other words, must be seen in light of the theoretical schools which they represent and react against in the course of their respective developments in order to uncover both the historical and systematic aspects of theoretical movement.

2. Law conflict theory

The conflict-theoretical tradition in modern law revolves around the notion that conflict must be studied as an essential component of society. Conflict theory, therefore, is not to be equated with the sociology of conflict. All sociologists agree that there is conflict and that it can and should be studied. However, whereas an order- oriented perspective conceives of society as essentially involving processes of stability and integration, conflict-theoretical perspectives conceive of conflict as essential to the unraveling of the conditions of society. By implication, whereas an order-oriented sociology engages in a systematic and detached study of society, conflict theory involves a practical or critical attitude that is oriented towards change and the betterment of social conditions. Both with respect to its notion of conflict and its conception of knowledge and praxis, conflict theory can theoretically rely on the work of Karl Marx. Although the work of Marx was traditionally not considered of much relevance to jurisprudence, this situation changed radically once critical or conflict-theoretical law gained in popularity. The modern manifestations of critical politology and sociology, however, are also more autonomous and diverse than a mere recapturing of Marx's social philosophy, especially in the sociology of law, an area to which Marx after all contributed very little.

Historically, the roots of Marxist and critical thought in sociology go far back in time.[1] Early efforts in sociology relying upon conflict- theoretical and/or Marxist insights can especially be found among certain European writers, such as Antonio Gramsci, Georg Lukács, Theodor Adorno, Max Horkheimer, Herbert Marcuse, and other representatives of the Critical Theory perspective of the so-called Frankfurt School. However, many of these critically oriented works were not part of the mainstream enterprise of academic jurisprudence, especially not in the United States, until they were later introduced in modern variations of law theory, typically as part of criticisms against structural functionalism. Thus, for instance Lewis Coser, developed a theory of conflict, in response to the functionalist understanding thereof, on the basis of a reception of the treatment of conflict in the writings of Georg Simmel.[2] Other sociologists, such as C. Wright Mills, Ralf Dahrendorf, and Tom Bottomore, made more concerted attempts to introduce

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1 On the origins and evolutions of critical sociology, including the development of Marxist sociology, see Collins, Randall. *1975.* Conflict Sociology: Toward an Explanatory Science. *New York: Academic Press.* idem. 1994. *Four Sociological Traditions.* New York: Oxford University Press.

2 Coser, Lewis A. 1956. *The Functions of Social Conflict.* Glencoe, IL: The Free Press.

the thought of Marx into the sociological enterprise. Until the 1950 s and 1960 s, there was talk only of Marx or Marxism, but from then on there was also talk of a Marxist theory, leading to a proliferation of works in this new theoretical approach. To explain the relevance of the conflict-theoretical development in the theory of law, a closer look at the work of C. Wright Mills is useful because it responded directly against the dominance of structural functionalism in sociology.

The sociology of Mills is theoretically based on a reconstruction of Marx's thought infused with Weberian notions of power. In a biting critique directly targeted at Parsons, Mills argues for lawyers to adopt a sociological imagination with which intimate connections between larger structural issues (public issues) and the daily problems that confront individuals (personal troubles) can be established.[3] It is the central shortcoming of Parsonian and other forms of mainstream sociology, according to Mills, that they are unable and unwilling to cultivate such as sociological imagination. The "grand theory" of Parsons, as Mills labeled the functionalist approach, is not only overly abstract, it also assumes, rather than demonstrates, and advocates, rather than merely observes, social harmony and stability.

Substantively, Mills critiques functionalism for not paying attention to the power structures of society. In an important study of the so-called power elite in American society argues that a key feature of twentieth-century American social life has been the concentration and centralization of power among a few elite groups.[4] Power in American society has gradually been centralized around corporate, military, and political interests. The economic elite is dominant and controls the military and political elites, while the political elite is controlled by both the economic and military elites. Although the elites are relatively independent of one another, their respective memberships overlap. Members of the elites also possess similar social characteristics and backgrounds, for instance in terms of family, education, and cultural interests. Because of the elites' power to make consequential decisions and their capacity to shield from criticisms, Mills considered the power elite structure a major threat to American democracy.

Mills's multidimensional concept of power is clearly influenced by Weber, but he rejects Weber's notion of value-freedom. Instead, Mills argues, with Marx, for an activist scholarship on the basis of a role of the sociologist as an intellectual "craftsman" who can unite public issues with private troubles. Yet, rather than being driven by concerns over the appropriate sociological role or puzzles of a theoretical nature, Mills was in the development of his work driven by the conditions of American society and a quest to use knowledge to advance social change. In this connection, it is not insignificant to note the historical times when conflict theory emerged in sociology. From the late 1950 s onwards, the optimism of the immediate post-World War II era in much of the Western world had begun to wane in view of the escalation of the Cold War and the nuclear arms race, the continuance of warfare and international violence, such as with the Korean and Vietnam wars, the growing sense of global injustices surrounding the uneven spread of capitalism and the disintegration of colonial powers, and the social ills that persist in many Western nations despite their relative wealth.

3. Towards a critical interpretation of law

Several researchers of law have applied insights from conflict--theoretical sociology, including Marxist thought, to analyses of their specialty area. Yet, as compared to the influence of conflict and Marxian thinking in law science at large, these developments were in the sociology of law somewhat slower in coming. Among the historical origins of a conflict-theoretical theory of law, the contributions by William Chambliss, Austin Turk, and Alan Hunt stand out because of their foundational status and lasting influence.

In one of the most influential papers, William Chambliss offers a study of vagrancy laws in terms of a historical study of the socio-economic contexts in which such laws had emerged and were applied.[5] Chambliss differentiates four phases in the development of vagrancy laws as they were adopted in the United Kingdom and the United States. The first vagrancy law was passed in England in 1349. It made it a crime to give alms to anybody who was unemployed while being of sound body and mind. Under threat of prison, vagrants were forced to engage in labor. The passing of this law resulted from a need to secure cheap labor after the Black Death of 1348 had killed half the population and decimated the labor force. In a subsequent phase, the vagrancy law remained on the books but was not applied, because, Chambliss argues, feudal society was transforming into an industrial one. In a next phase, from 1530 onwards, attention again shifted to criminality, and the severity of punishment for violations against the vagrancy law increased because industry had expanded. The newly targeted crimes consequently concerned stealing and the robbing of merchants transporting goods. In 1743, finally, the categories of vagrancy further expanded to include all persons wandering, such as vagabonds. Thus, the function of the vagrancy law was extended beyond the control of labor to the preservation of order and the prevention of crime.

The focus of Chambliss's analysis of vagrancy laws is resolutely empirical, but its general theoretical indebtedness to a Marxist-structural perspective is clear as well. Chambliss's study was theoretically situated in response to programmatic statements that had called for a new direction in the sociology of law. Among these early formulations, Chambliss mentions papers by Arnold Rose[6] and Gilbert Geis[7]. Geis urged for the use of insights on law for criminology that could come from a greater collaboration between sociology and legal scholarship, while Rose formulated the objectives of the sociology of law,

[3] Mills, C. Wright. 1959. *The Sociological Imagination.* New York: Oxford University Press.
[4] idem. 1956. *The Power Elite.* New York: Oxford University Press.
[5] Chambliss, William J. 1964. „A Sociological Analysis of the Law of Vagrancy." *Social Problems* 12(1): 67–77.
[6] Rose, Arnold M. 1962. „Some Suggestions for Research in the Sociology of Law." *Social Problems* 9: 281–284.
[7] Geis, Gilbert. 1959. "Sociology, Criminology, and Criminal Law." *Social Problems* 7(1): 40–47.

beyond a juridical understanding of law, in terms of questions about the social, political, and cultural dimensions of law. Yet, while such programmatic statements had distinct theoretical significance, they remained somewhat isolated and did not directly inspire many further developments in the theory of law, at least not until Chambliss and others began to push the sociology of law in a conflict- theoretical direction.

Chambliss took on a more elaborate study of law as an instrument of power, first in a book-length treatise on law and power in the American context[8] and subsequently in many of his later writings[9]. Chambliss primarily developed a conflict--theoretical perspective on law in light of a practical need, in the turbulent times of the late 1960 s and early 1970 s, to develop a theory capable of asking questions pertaining to social processes of change and disintegration. Countering the notion of the legal order as reflecting principles of justice and right, Chambliss conceives of the law as a self-serving instrument to maintain power and privilege in the perpetual conflict of society. The legal order operates in such a way that it systematically discriminates against the poor and underprivileged while favoring the wealthy and powerful.

As late as 1971, sociologist Elliott Currie could observe the neglect of the influence of Marx's thought in the sociology and theory of law and the underdevelopment of conflict-theoretical perspectives that resulted in a failure to view law as an instrument of power and class rule.[10] Throughout the 1970 s, however, attempts to inject Marxian thought in the sociology of law escalated in number. To complete such a program, it was necessary to distill from Marx's writings those elements that might be useful for jurisprudence, an endeavor that was not insignificant given Marx's relative silence on law. The clarification and introduction of Marx's ideas on law in sociology was particularly discussed by several Anglo-Saxon sociologists.[11] In order to accommodate a more distinct focus on law, these discussions were sometimes conducted with the aid of a recapturing of earlier interpretations of Marx's theory, such as the writings of the Russian legal scholar Evgenii Pashukanis[12], and the reinterpretation of Marx's thought by contemporary writers such as Louis Althusser, Antonio Gramsci, and Nicos Poulantzas.

Although introductions to and interpretations of Marx's thought on law were conducted until well into the 1980 s and 1990s[13], researchers in law had by the 1970 s also begun to use Marx's theories in the sociology of law, in both empirical and theoretical efforts, with sometimes sharply different results. While some scholars began to rely on Marx to develop a new direction in sociology of law and conduct empirical research accordingly[14], other interpreters took on the view that a philosophy of law on the basis of Marx, given the basic ideas of historical materialism and Marx's reluctance to discuss law independently, was not possible unless such an enterprise was rooted in and remained part of a more general critique of capitalist society[15]. The latter perspective was also defended by some Marxist sociologists working in the areas of crime and deviance[16].

Criminological sociology proved a fertile soil for a reception of Marxian ideas because of the shift in this specialty area, especially during the 1960 s and 1970 s, to turn away from the study of crime and criminals towards the analysis of social control and criminal law as important aspects of criminalization[17]. Additionally, it is noteworthy that the Marxist orientation in the jurisprudence was more readily accomplished in the United Kingdom and countries of the European continent where scholarly traditions until this day tend to be more theoretical and more readily cross the boundaries of disciplines, such as from social philosophy to sociology and from Marxian thought to sociological theory. Excursions on the law programs developed by Austin Turk and Alan Hunt will show both the basic strategies of and the variability within the conflict- theoretical direction.

The American sociologist Austin Turk developed a theoretical program for a non-Marxist conflict-theoretical sociology of law.[18] Against the widespread notion in mainstream sociology to conceive of law in terms of conflict resolution, Turk outlines a perspective on law as a form of social power and a partisan weapon in social conflict. Law is a set of resources for which

[8] Chambliss, William J., Robert B. Seidman.1971. *Law, Order, and Power.* Reading, MA: Addison Wesley.

[9] idem. 1973. "Elites and the Creation of Criminal Law." Pp. 430–444 in *Sociological Readings in the Conflict Perspective,* ed. W.J. Chambliss. Reading, MA: Addison-Wesley; idem. 1999. *Power, Politics, and Crime.* Boulder, CO: Westview Press.

[10] Currie, Elliott. 1971. „Sociology of Law: The Unasked Questions." Review Essay. *The Yale Law Journal* 81: 134–147.

[11] Cain, Maureen. 1974. „The Main Themes of Marx' and Engels' Sociology of Law." *British Journal of Law and Society* 1(2): 136–148; Cain, Maureen, Alan Hunt, eds. 1979. *Marx and Engels on Law.* New York: Academic Press; Hirst, Paul Q. 1972. „Marx and Engels on Law, Crime, and Morality." *Economy and Society* 1(1): 28–56.

[12] Pashukanis, Evgenii B. (1924) 1980. *Selected Writings on Marxism and Law.* New York: Academic Press. Online: home.law.uiuc.edu/~%20 pmaggs/pashukanis.htm.

[13] Melossi, Dario. 1986. „Marxist Sociology of Law." *Legal Studies Forum* 10 (3): 341–346; Spitzer, Steven. 1983. "Marxist Perspectives in the Sociology of Law." *Annual Review of Sociology* 9: 103–124; Vincent, Andrew. 1993. "Marx and Law." *Journal of Law and Society* 20 (4): 371–397.

[14] Beirne, Piers. 1979. „Empiricism and the Critique of Marxism on Law and Crime." *Social Problems* 26 (4): 373–385; Hagan, John, Jeffrey Leon. 1977. "Rediscovering Delinquency: Social History, Political Ideology and the Sociology of Law." *American Sociological Review* 42(4): 587–598; Lauderdale, Pat, Gerald Larson. 1978. "Marxist and 'Organizational' Approaches to Delinquency and the Sociology of Law: Crucial Problems in "Testing" the Perspectives." *American Sociological Review* 43(6): 922–925.

[15] Beirne, Piers. 1975. „Marxism and the Sociology of Law: Theory or Practice?" *British Journal of Law and Society* 2 (1): 78–81; Hirst, Paul Q. 1972. "Marx and Engels on Law, Crime, and Morality." *Economy and Society* 1(1): 28–56.

[16] Quinney, Richard. 1973. *Critique of Legal Order: Crime Control in Capita-list Society.* Boston: Little, Brown; idem. 1978. "The Production of a Marxist Criminology." *Contemporary Crises* 2(3): 277–292.

[17] Hopkins, Andrew. 1975. „On the Sociology of Criminal Law." *Social Problems* 22(5): 608–619.

[18] Turk, Austin T. 1969. *Criminality and Legal Order.* Chicago: Rand McNally; idem. 1976. "Law as a Weapon in Social Conflict." *Social Problems* 23(3): 276–291; idem. 1976. "Law, Conflict, and Order: From Theorizing toward Theories. "*Canadian Review of Sociology and Anthropology* 13(3): 282–294.

people contend in order to promote their ideas and interests or exercise power over and against one another. Turk specifies five kinds of resource control in law: (1) police power over the means of physical violence and the agents of control; (2) economic power over the material rewards and costs associated with law; (3) political power in the legal decision-making process; (4) ideological power of law as culture to control what is conceived as legal and just; and (5) diversionary power over the amount of attention and time invested in law. Turk encourages lawyers to investigate how the legal order operates in any given situation alongside of these dimensions in order to study whether and how law regulates or, on the contrary, generates social conflict.

A more distinctly Marxist version of a critical theory of law can be found in the work of sociologist Alan Hunt, who since the late 1970 s has consistently worked to develop a comprehensive vision of a Marxist perspective on law.[19] Hunt's approach is rooted in a critique of the evolution of the sociological movement in law from sociological jurisprudence to the (functionalist) theory of law as social control. Downplaying the significance of this transition, Hunt describes both theoretical movements as bourgeois perspectives that fail to question the extent to which major legal ideals have not been realized in capitalist societies. Hunt also questions the dichotomy between consensus and conflict perspectives as it has traditionally been phrased. Both perspectives typically hold on to the notion of theories as models that are used to account for empirical variation. This requirement, however, Hunt argues to be incongruent with a radical theory based on Marx. Rather than attempting to be empirically correct, a Marxist theory asks questions and uses concepts on matters that are judged to be significant. A Marxist theory of law, in particular, should be developed on the basis of a concept of law that does not take as its starting-point the immediate form in which law appears, but rather has to conceptualize law in the context of a Marxian theory of society.

Hunt argues that law is to be viewed in terms of the reproduction of the social order, involving a continuous process whereby the dominant structures of society are shaped and reshaped within specific socio-historical circumstances. Among the social institutions and practices involved in this process, law functions as a means of domination. Seeking to overcome the dichotomy between consensus and conflict perspectives, Hunt argues that domination through law takes on the form of repressive and ideological domination. Repressive (or coercive) domination refers to the dimensions of law that function to advance and protect the interests of the ruling classes. In this repressive orientation, law stands in a special relation with state power as the state has control over the legitimate means of coercion. Legal violence is applied through the specialized agencies of the law-state complex, including the police and the courts. Repressive domination is a necessary condition for the development of ideological domination.

4. Conclusion

Linking the coercive and consensual aspects of law, ideological domination refers to the activities and processes of law whereby the assent of a society's members is mobilized. Assent does not merely refer to the legitimacy of law, but conveys the notion that the ideas people hold about the law are constituted in the context of their social existence and, in turn, will affect the reproduction of society. Thus, the ideology of law contributes to legitimize the legal as well as broader social order to establish a condition of hegemony.

[19] Hunt, Alan J. 1976. „Perspectives in the Sociology of Law." Pp. 22–A4 in *The Sociology of Law*, ed. P. Carlen. Keele, UK: University of Keele; idem. 1980. "The Radical Critique of Law: An Assessment." *International Journal of the Sociology of Law* 8(1): 33–46.

Myth of the Truth in the Heterogeneous Society

*Jacek Zieliński**

Abstract

In this paper we trying to draw attention to the problem of the concept oh "truth". Nowadays, however, bothers us deep skepticism abaout the possibility of its recognition. Philosophers for centuries tried to formulate various definitions and conceptions truths and truthfulness. These conceptions and definitions, rooted in own epistemology, lose the solid theory of cognition, more and more are escaping into problems of the meaning, sense, the nature of the judgment, and also language. It isn't possible to say that we have the truth, but also this state of affairs doesn't mean that we have the licence of creating the truth for instance for needs of sociotechnical steering the society. Immersed in the intuitions of truth, the focus is now only on its usefulness. Is this a good way?

Key words: *Truth; Heterogeneous Society; discover the truth.*

1. Truth in the prospect of the heterogeneous society; heterogeneity in the prospect of the truth or myth of it

Before about the truth it is possible to say something in the context of its functioning in the heterogeneous society, at first we should carry out effective and critical analysis of the notion and functioning of the heterogeneous society. Also scientific truth, in such world which we are creating for ourselves, seems to be a myth. Indeed?

Many questions are waiting for the response, and so we are creating theories, less or more systemically justified, to rule effectively. The prospect of functioning of the European Union, earlier or later, must to touch the need to define comprehending the truth. Replacement or avoiding of this task, for instance through the escape into concise comprehending the heterogeneity, perhaps consistently to break the Brussels power. Justification of applying of the pragmatic conception of the power by drifting to the insolvability of the truth in the context of the heterogeneity is a bad omen for the future. Such people, which are talking about the lack of one truth, alone are producing some current truth. Applying effective recipes for their governments, they destroy the meaning of thinking of the entire society. They deprecate a democracy of public activities, and lean towards the dictatorship of the law legislated by them. Ideally to be Pilate washing his hands and with an ironic smile of the half-educated to announce the freedom which is missing.

2. „What is the truth?"

We are meeting a lot of attempts of the reply to this basic question[1]. Philosophers for centuries tried to formulate various definitions and conceptions truths and truthfulness, in our times locating problem in the area of the philosophical discipline, which from times of publishing the Eduard Reinhold's works in 1832–1835 years – was defined as epistemology. In contemporary philosophy we have many conceptions of truths, where every of necessities must define the truth, its object, methods of formulating of true judgments, and also criterion of truth of courts and their formal truthfulness. These definitions in contemporary philosophy aren't letting to determine the one most general definition. These conceptions and definitions, rooted in own epistemology, lose the solid theory of cognition, more and more are escaping into problems of the meaning, sense, the nature of the judgment, and also language. It breeds a sense of many truths and many directions of philosophy completely inconsistent with oneself[2]. Conceptions of truths are divided into:

1. a *classic* conception. The first conception as the essential motif of the truth assumes the unanimity of the judgment, opinion, thoughts or beliefs – with reality. An essence of the truth is

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1 I. Dec, *Around The Philosophy Of Karol Wojtyła Cardinal*, Wrocław 1998, p. 8.

2 J. Jaskóła, A. Olejarczyk, *Truth and Method. Apory of the Contemporary Thought*, Wrocław 2003, p. 381 and 382.

an unanimity, or a suitability, a reference; hence the definition is named as correspondence definition. It was formulated by a Jewish philosopher Isaac ben Solomon, however to read about it is possible already in letters of the Aristotle[3].

2. a *coherential* conception. Coherence means the cohesion, the logical uniformity. According to this assumption the truth is expressed by thoughts which are fitting together, are "playing" with oneself, are constituting the harmonious and cohesive whole. This conception was originated on basis of direction of science philosophy called conventionality. It has roots in Poincaré and Quine[4].

3. a *pragmatic* conception. According to assumptions of this conception the truth of the thought consists in its usefulness in action, on the fact that he is with appropriate tool of efficient, effective action. So the cognition is being used like the object. The criterion of truth is constituted by practice. The pragmatic conception has two versions. Article of Charles Sanders Peirce „How to Make Our Ideas Clear"[5] from 1878 initiated a different way of analysing the problem of the relation the man to world, in it to the truth. Peirce „having shown at first that beliefs in fact are rules of action, he stated, that for showing the meaning of the any thought, we need only to determine, for what kind of behaviours it is fitting: entire meaning thinks these are these behaviours". William James (1842–1910) became the continuator of the Peirce thoughts. Already in *Pragmatism* (1907) James consistently developed the thought of the predecessor and made the definition of the truth. „The thought is true then and only then, when taken action on its base turns out to be effective". The lucid thought is building directives of action. Action based on them is effective and then the thought is true. The human is an actor, who creates world, he isn't its passive recipient. Depending on action the thought is either real or false. James, differently from Peirce, inserts seeing of acting into the predecessor conception as action of the individual

[3] W. Chudy, *Philosophy Of The Lie. The Lie As The Phenomenon Of The Evil In World Of Persons And Societies*, Warszawa 2003, p. 23. Saint Tomasz in the commentary to the Aristotle repeated in the Latin: *Veritas est adaequatio intellectus et rei, secundum quod intellectus dicit esse, quod non est:* The truth is a correspondence of the mind and the thing, according to it the mind states existing as well as it is stating and what is missing. The truth, according to mentioned above, is outside the human, we are reaching it, but we aren't creating, it isn't also "an image" of "existence of outside the soul". Much more late correspondence theory of "copy" told about accidentally connection of truth with the existence. Consistently of it Akvinat said, that " intellect makes, that we admit the thing as general" and the mind has no inborn forms. In the course of experience we acquire the image and determine in available notions. The attitude of the epistemological realist results from the conviction, that definition of the truth should done according to the agreement of truth with reality. The truth appears in the moment of making aware oneself of facts given us from the outside. Conception truths reaches the aspect of the being. „Something is" and when the mind states it, the truth is occurring. The falsehood differently is appearing then, when something exists, and the mind states the non-existance, or there is no something, and the mind is stating that it is. Such definitio, because of the aspect of the being, is called the existential definition of the truth. Kazimierz Ajdukiewicz formulated the definition of the truth as follows: *The thought M is real then and only when the thought M states the that is this way and only this way, and still is this way exactly.* However Antoni B. Stępień states: *The truth is equaling (content) is thinking with it, what it refers to.* The intellect must equal reality, to read it, to admit as it is. The active mind isn't constructing reality, but it is stating it. A truth is an agreement. The truth has its internal characteristics: the truth is a feature of the judgment or the sentence. There is no real notion. It can copy, to be a good copy. The truth is a feature of the statement – the judgment should have a logical value: to be real or false. The truth is also a relational feature. The relation exists between reality and the thought, between the thing and the sentence. Reducing the meaning of the truth to one of correlates isn't threatening this conception of this relation. Objective reality is appointing the truth, and the human subject is responsible for reading it. The third feature of the truth for it aspectnesess. The sentence always express only a certain half-truth about the given object, the phenomenon or the thing. We aren't able in one real sentence to embrace of entire reality of some existence. Considering on certain aspect of the thing, we are able to recognize the truth. The shown theory gives the guarantee of avoiding the deformation in getting to know reality.

[4] A scientific theory is real, when explain a reality in proper way: is cohesive, is logical, statements and notions are connected and give the clear, sensible whole. Whereas it is false, when there are gaps in it, when explain in improper way. Which of theories is true? It is hard to decide it, in coherence of conception truths, if both well facts are interpreting data, because a tendency of adopting scientific systems for the complementary character exists in this conception. So it is not only one truth. If two theories are explaining phenomenon in the consistent way given, than both are real. There is a fact, that this way the formed conception is sitting an examination in detailed sciences of the natural history. However in philosophy and in reception of reality the human, it is rather incorrect, because he is implementing the relativism. Social experience is pointing, that eloquent are not having to be right. It is expression of the weakness of the cognitive coherence power of comprehending the truth. Consistent system of arguments introduced to us with the great rhetorical artistry (on the basis of the eristics), wrapping justifying us with logic would seem not to replying, however is falling down under the weight of one common-sense truth. However it is the truth being a word of the accuracy of the thinking and reality, not formal feature of the system of the thought. For coherence conception the truth is enough logical cohesion; must not take the verification or the falsification through the reality. And what's more is a fundamental lack for it.

[5] Charles Sanders Peirce (1839–1914), *The Fixation of Belief*, 1877 *How to Make Our Ideas Clear*, 1878 – translated into Polish by H. Buczyńska-Garewicz, *Peirce*, Series Thoughts and People – http://www.peirce.org/writings/p107.html. Human reactions to surrounding world, manifest itself by acting. The human makes something based on worked rules. Thoughts have its hidden value through its usefulness directed for some behaviour. The human accommodates himself to environmental conditions, transforming them in the agreement with its expectations and achieving the maximum of satisfaction. This way James made a pragmatism (utilitarian?). "A truth isn't an abstract existence – how it is propagated by the rationalism – but ability of accurate predicting effects of action. A truth isn't also a copy of reality – how it is propagated by the the empiricism – but set of comprehending practical consequences or the theory". Pragmatic theory of the truth connects two conceptions of C.S. Peirce (pragmatistic) and W. James, J. Dewey and F.C.S. Schiller (instrumentalistic). The changeability of living conditions of the man is implying also a changeability of views, and actually – this total rejecting the current view is about the existence of the relation between the thought and reality. *"These ideas are real which we are able to acquire, to justify, to confirm and to verify. Which we aren't able, they are false".* In such configuration the truth is not connected with the object, but with the subject. Peirce's point of view shows that world around the human exists in reality, and more enough to notice relations in it occurring and to work out rights adapted for them which serve the molding habits of action. Views are located in views of the realism and the anti-psychologism. For pragmatic deciding is not necessary explore recesses of the thing, but its usefulness; there is avoiding disputes about the nature of the truth "the thought is sensible then and only then, when some directives of action result from it". Wittgenstein used this element of making clearer the thought later.

subject; Peirce treated them as objective rights of the humane behaviour. Elements of the cognitive relativism manifest itself in the thought of James[6]. Such already formed conception was adopted by John Dewey (1859–1952)[7].

4. a *sociological* conception. According to conception, the truth is decided by the majority view; the truth is only this thing, which is accepted by the majority. Not necessarily it is the truth connected with the social usefulness. Not always therefore something is true, that it is comfortable or it is paying people. Quite apart from the motives, it is assumed that something is true, when is accepted by majority; because the majority thinks this way, in this way rather than differently. Costs of this conception are large. Because it is establishing the social relativism, i.e. the position assuming that there is no one truth for everyone. This conception is also a historical relativism – that is view that in the various life periods of societies there are applied the various truths. Finally there is a great danger of conformism of individual being under pressure of such „majority" social truth[8].

Two of them appear in philosophy using only rational factors at explaining notions or facts, therefore are called as lucid rational. Another two allow in explaining some irrational motifs, which means unthinking[9].

The post-Cartesian correspondence conception meets accusations, that included in it the notion of correspondence is flawed. The core of this conception is that "sentence (the thought, the view) is true then and only then, when corresponds with the certain state of affairs and this state is occurring". Notion „correspondence" was presented in two ways: or as „correspondence-as-correlation" – admitted by J.L. Austin, or as „ correspondence-as-unanimity" – admitted by B. Russell.

Among critics of the correspondence conception is David Lewis. He showed that a coincidence of these theories with deflationary or minimalist theories existed, and metaphysical issues aren't reaching the level of finding the philosophical problem of the truth. Deep scepticism paralyses searchers of the wisdom in reaching comprehending the truth. The scepticism has always been present in the philosophical thought, but in our times he is reaching his apogee and he became the way for public becoming known of its proponents. The accusation from S. Kripky or Wittgenstein sides leads to undermining the possibility of stating anything about the truth. Simply nonchalant disbelief of sceptics in abilities of discovering it, consistently leads for creating of comfortable truths, being based on a half-truth which is already useful. There are defined the truths torn from perceptible reality, imposed by membership so enough educated that have feeling of power and possibilities of media and financial factors (look: EU discussions of the definition of vodka and wine).

The truth is well-thought-out as the unanimity of the thinking to the existence[10]. The Aristotle very well expressed it in the introduction to *Metaphysics:* „every thing to a certain extent is an existence, in such extent is contained also the truth". This way the cause is more real than the effect, because it is more being; what is more than sensual is more real than it, what is sensual, because it is more being[11]. To mention of real cognition, we learn, what kind of method can lead to such a recognition[12].

Descartes also treats these truths as eternal and timeless, however it doesn't have no different existence outside of our mind. The truth here is comprehended as the conformity of the thinking to his own laws, being liable to a logical necessity[13]. Descartes makes the mind as the base of the cognition, rejecting senses and imagination. It isn't possible, in his view, from the imperfection of the human to derive impossibilities of finding the truth. However the mind can correct mistakes of the will,

[6] http://www.des.emory.edu/mfp/truth.html; http://www.des.emory.edu/mfp/jpluralism.html.

[7] His: *How We Think* 1910, *Democracy and Education* 1916, *Human Nature and Conduct* 1922, *The Quest for Certainty* 1929 – http://www.worldwideschool.org/library/books/socl/education/ DemocracyandEducation/toc.html. He emphasized that they would find reality, according to views of predecessors, the human shapes by removing obstacles of effective action, and therefore naming his views as instrumentalism, or experimental. Therefore consistently defended the view, that ethical, being subordinate to social negotiations value, are relativised by served by them purposes. Meaning of articulated views is located in it for the contemporary democracy. James said that in the practical life accepted "by the faith" certain statements as real: some superstitions, reflexes and beliefs. They are real for us only because are acting as the fetish, they are defending us against something or they are delivering senses to the certainty. Psychologically it is possible to justify, however it is hard to tell about the objective meaning of the truth. In Poland a behaviouristic variety of this version was well-known in version of Zdzisław Cackowski. He said, that human for oneself hews the image of world in the practical life. He makes it trough the tests, mistakes, successes and defeats, satisfaction and distress. Also is functioning a collectivist version. We know it from past doctrine of the Marxism; a public practice decides about the truth. Only a realization of the given conception in the public practice verifies the truth of the theory. There are also exhibiting this version some sociologisms treating social options as the criterion of truth. Usefulness of the truth – effectiveness of action shoul be cognitioned. However value of this cognition is being verified not through the usefulness, but through the attitude to reality, i.e. the observation follows in the framework of the classic conception truths. It isn't conception of understanding the truth, but of practicing. And what's more depicts the lack of the consequence of this theory.

[8] Chudy, *Philosophy*, p. 27. It is also essence of problems with the democracy which is based on the sociological truth, recognizing the straight primacy of the majority. Not always after all he happens, that in the voting a real truth is winning; sometimes the majority of voices is appointing some "truth". Politicians are appointing such truths such are needed by social tastes. Recognizing of the real truth is opposing to sociological. First, before he becomes the truth of one sort or another bond, he must be recognised by the individual. The sociological conception is always a truth of mass, power of statistics. There is a problem of the democracy: wanting be authentic, must be based not on the truth of the majority, but on the real truth read out by the majority of individual subject.

[9] Chudy, *Philosophy*, p. 22.

[10] H. Deef, J. G. Georg – Lauer, C. Hackensch, M. Lemck, *Philosophical Lexicon for Young*, Warszawa 1996, p. 229 and 230.

[11] G. Reale, *History of Contemporary Philosophy*, Lublin 2002, p. 192.

[12] J. Jaskóła, A. Olejarczyk, *Truth and Method. Apory of the Contemporary Thought*, Wrocław 2003, p. 372.

[13] Deef, Georg – Lauer, Hackensch, Lemck, *Lexicon…*, p. 230.

thus human has the ability to improve, to go from the ignorance to the knowledge, from the mistake to the truth[14].

The truth is an effect of the developmental process, achieving the wisdom through recognizing the sense, what in the track of transformations was born as different. According to Hegel everyone can comprehend the truth, because everyone, participating in the versatility of the mind, can get to its meaning[15]. Everything, what is in accordance with the model of the logos, we named, like Hegel, as the truth. Everything, what is at variance with the ideal of the spirit, is untrue, is a falsehood. The truth in the theory of cognition is a feature of the judgment. We feel the true judgement, when what we are saying, agrees with reality. The metaphysical transformation of comprehending the truth at Hegel says that the truth has character of the existence. Everything is real or false – for example it is possible to tell about the truth and the falsehood. Bird with one wing is false, because he doesn't realize the model of the logos of the bird. The homosexual in this notion is an false human, because he doesn't realize the model of being a fertile human. A totalitarian system is a false existence, because he doesn't realize the truth of the society, because he is opposing to the freedom of the individual. All false existences disturb in the world to aspire to the full. It is a meaning of the objective or ontological truth of Hegel[16]. If we don't respect requirements of the whole, we realize the falsehood, we make the lie. We cheat oneself and entire world. The plenitude of the sense is simultaneously a logical, metaphysical and ethical criterion at Hegel[17].

Immanuel Kant in his critical concept recognised, that we don't admit the thing so they are; according to Kant comprehending the truth is only an unanimity thinks with norms of the thinking[18]. Value of truth needs the special duty. However Kant distinguishes the right to the truth from the law to the truthfulness. The first he rejects as *„ein Wort ohne Sinn"* („senseless word"), because the right to the truth would mean the authorizing of every human to decide of value of the truth – and it is an absurdity. Right to the truthfulness *(Wahrhaftigkeit, veracitas)* is a subjective entitlement, but based on the general moral rule, creating for every person possibility of expectation of the real statements from the others[19]. A truthfulness is a duty being a base of all agreements connected with fulfilling duties. An exception in this rule makes ineffective all agreements, ranging from the sales contract to on the marital contract. This formal duty has the main role in order of law-economic societies; however has also fundamental moral meaning. Because the order of the truthfulness being an order of the intellect – states a philosopher from Kaliningrad – is *„saint, unconditionally prescriptive and unrestricted with no conventions".* The duty of the truthfulness obliges both servants, and the king. At every statement *„should be truthful, loyal, sincere, right and keep the good belief"*[20].

Kierkegaard and Nietzsche have the different position. The truth contains, in their opinion, only in the sphere of the subjectivity; there are no universal truths. Nietzsche emphasizes this dimension of the truth above all, and which is biologically useful, serves living. For him the truth is not an absolute, because he always gets meaning only in the relation to the prospect of who it formulates. Nietzsche thinks that what is recognised as the truth, should always serve preserving the life and to be compliant for aspirations of the ones which at the moment are ruling, so the truth is an ancillary in view of the willpower. For people a perfect value of the truth is not only notion, they need it to live and to survive[21].

Michel Montaigne, is breaking ranks of doctrinal formulas. In his views the truth is apparent as a social value. He writes in *Attempts: „The first sign of infected customs is the exiling of truths. Our today's truth isn't what is, but what is persuaded".* For Montaigne the truth is an element of the good manners[22].

In the Christian understanding, veritas rei (truth of the thing), which is something constitutive for every created reality and see a God as *Ipsa Veritas* (Nothing But Truth), as the ultimate rightness for the objective dimension of the truth[23]. Task of recognizing, how should in exact action realize the truth, so to become good, is connected with the conscience[24]. The conscience is a place, in which the human is connected with a truth get to know by oneself[25]. This conscience has the cognitive and prescriptive function and therefore is a norm of deeds, because it screens them with the light of the recognised truth about good: *„Obligation is an experimental form of the dependence on the truth to which the freedom of the person is subordinated. The proper and complete function of the conscience isn't only solely cognitive, doesn't rely on the designation. The proper and complete function of the conscience consists in making the deed conditional on the truth"*[26]. Wojtyła says in this context about *„artistic works of the conscience".* It relies on the fact that the conscience imparts this only and unique form on norms, which are exactly in the person, in

[14] M. Kuziak, *Dictionary.* Słownik myśli filozoficznej, Bielsko-Biała 2004, p. 150.
[15] Chudy, *Philosophy*, p. 231.
[16] Chudy, *Philosophy,* p. 232.
[17] Ibid, p. 233.
[18] Deef, Georg – Lauer, Hackensch, Lemck, *Lexicon…*, p. 230.
[19] Chudy, *Philosophy*, p. 217.
[20] Ibid, p. 218.
[21] Deef, Georg – Lauer, Hackensch, Lemck, Lexicon…, p. 230. Nietzsche writes about the truth, that "movable army of metaphors, the metonymy to anthropomorphisms, in short, with are sum of the human relationships, which in poetic and rhetorical heightening, he is adorning himself and he is passing on, and which after the long use seem canonical and tying to people: truths are illusions, about which they forgot that they were them, coins, on which wiped pressing off oneself and which metal, rather than coins it is possible now to use in the role" (Werke, v. III, p. 1033).
[22] Chudy, *Philosophy*, p. 177 and 178.
[23] *Encyclopedia of the Christianity. History and the Present. 2000 years of Hope*, Kielce 2000, p. 591.
[24] K. Wojtyła, *Person and Act*, p. 197.
[25] A. Szostak, *Veritatis splendor, Text and commentaries*, Lublin 1995, p. 217.
[26] Wojtyła, *Person*, p. 199.

experience and fulfilling. We prefer to live in the conformism, muffling our conscience, than in the effort of the truth. And even if we accept it, we are in it unstable. So we must care for the certainty of our conscience[27]. Not much important is the freedom of saying, if the said word isn't free. If it is bound by the egocentrism, by the trick, even by hate or the contempt to others. Not much important will be a benefit from telling and writing, if the word is being used not in order to search for the truth, to express the truth and to share it, but only for winning discussion and defending fallacious position[28]. John Paul II, in his teaching, concentrated a lot of attention for problem of the truth. *„The human cannot be forced to accept the truth"* – he taught. He is only forced by his nature, i.e. only by freedom for frankly searching for the truth, and when he finds, then let last, with both conviction and behaviour[29].

Right of the human and the citizen to the truth, manifesting itself among others in the right to the information and the freedom of speech, belongs besides the rights of the freedom and the justice to essential human rights. These three rights are a condition of the development of different rights, all different social laws are came from them. The right to the truth is a condition of the cognition and the possible change of reality. James Stuart Mill, author of words: *„To have the right to something means to have something of what having should be defended by the society."* If the society not defends the rights of its members, these rights will become illusory.

Modern notion of the truth, in the comparison with the first is narrower, above all are associated with reflections of logics and linguisticses : concerns the correctness of the judgment. In consequence, as a result of long searches also on the logical plain, researchers reached for distinguishing the object language from its metalanguage. Searches of A. Tarski allowed for the contemporary explicating definition of the truth at applying the condition of the substantive accuracy. Language of empirical sciences is very similar to the natural language, however the standard formalised languages (for instance language of mathematics) are examined under the aspect of language of the predicate calculus, typical of logical semantics. Therefore the definitions of the truth assume the various form; for formalised languages assume the form of the so-called recursive definition. There is talking about the approximate truth with expressing in it the notion of the absolute truth[30] (or partial), opposing to notion of the absolute truth.

By Habermas and Apla the comprehending the truth seeks truthfulness not in the conformity to some thing, but with in accordance with scientists, who determined view, argumented and having the local and temporal importance. For avoiding this last limitation, the process of finding the truth is left compliant for thesis that all judicious subjects must agree every single time on the specific inspection of some state of affairs[31].

3. European, and of not only European, difficulties with the truth

It is difficult to talk about any possibility of classifying views concerning the nature of the truth and its definitions[32]. The multitude of the theory and its variantness overwhelms and doesn't let to hold the current divisions. Among others theories of John McDowell, Jennifer Hornsby, Wolfgang Künn and William Alston are different variants of identify of theory of the truth. The similar problem concerns varieties of minimalist view of the truth of Crispin Wright (pluralistic minimalism[33]) and of Michael P. Lynch (functional-supervenient aletic plural-

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[27] K. Wojtyła, *Ethical primer*, Lublin 1999, p. 12 and 13.

[28] *Truth In The Public And Personal Life*, Olsztyn 6 VI 1991.

[29] John Paul II: *To Cross The Verge Of Hope.*

[30] Tarski presented the semantic theory of the truth in *Comprehending the truth in languages of deductive sciences* in 1933. „Named certain false statements are relative truths. It concerns such general statements here as a rule, which treated as universal, valid laws always and everywhere, turn out to be false sentences, however formulated with appropriate temporary-spatial limitations (closely or aproximatical) are real. On the other, sentences are also being called relative truths (closely) real, especially such sentences constituting the scientific theories. The last a truth is only being assigned relative, since they are never using the whole of real sentences up in the given field of reality. A huge majority of scientific theories is incomplete theories: in their language to form are giving real, but not being their statements sentences" – Marian Przełęcki, Truth, p. 7–9.

[31] Deef, Georg – Lauer, Hackensch, Lemck: *Lexicon…*, p. 231.

[32] M. Witek, „Introduction" to thema *Truth*, *Philosophy of Sciences* 2006 No 2, p. 23–26. Described classification seems incomplete, but necessary is:
Substantialist
Coherence – The truth consists in the agreement (cohesions) of elements of the given system (of the statement, sentences, the conception). Representatives: Spinoza, Leibniz, G.W.F. Hegel, F.H. Bradley, Otto Neurath, Carl Hempel.
Constructivistic – The truth is a social, having the historical and cultural specificity, resulting from influences occurring in the given human group product. Representatives: Giambattista Vico, Hegel, Garns, Marks.
Of social contract – Representatives: T. Hobbes, Karl-Otto The appeal and their critics Jürgen Habermas, Nicholas Rescher.
Pragmatic – What can be verified and confirmed in practice is a truth. Representatives: Charles Peirce, William James, John Dewey.
Minimalistic: Truth („truth") is an expression or an endless sequence of expressions (deflationary theories), which excistence is possible to establish, but which isn't subject to more further analysis.
Preformatical The truth consists in making speech acts (*speech act*) being a word of the harmony with definite sentences, posts, opinions. Representative: P. F. Strawson.
Redundancial Stating that the sentence is true is completely tantamout to confirmation of the sentence (is changing nothing). Representatives: Frank P. Ramsey, Dorothy Grover, Joseph Camp, Nuel Belnap.
Semantic – Representatives: Alfred Tarski, Donald Davidson, Bertrand Russell, Kirke.
Classic (essential, substantialist) Aristotle, Platon, Tomasz from Aquin, scholastics, Kant, Hegel, Kierkegaard, Nietzsche, Heidegger, A. N. Whitehead, Nishida, Niels Bohr, Fromm, Foucault, Baudrillard.
Correspondence The truth is the conformity of the opinion and sentences to the current state of events. F. H. Bradley.

[33] There is no truth comprehended as the common ownership of all judgments or real sentences.

ism[34]). To the problem mentioned above should be brought the problem of the nature of factors of conditions to the truths in statements. Deepening frustration of searching the replies concerning the truth is an existence of competing conceptions: the literal conditions of the truth (H. Paul Grice) against to the conception of contextually appointed conditions of the truth (Kent Bach, Robyn Carlton). In object literature is emphasized, that "functioning of semantic comprehending the truth is only possible to understand in the context of the appropriate pragmatic theory".

The analytical philosophy with its limiting research possibilities to linguistic layer is not very helpful to clear up the problems of the truth and its functioning. Putnam already noticed it, pointing to lacks in fulfilling our needs offered by scientism and materialist metaphysics, metamathematics or semantic definition of the truth. Putnam in the essay *Models and reality (Modele i rzeczywistość)* (1980), showed that semantic models of scientific theories closely are rationed with intentions of users of these theories. Finally all operationalizing of notions came to "decisions" or of "convention". The sense of linguistic phrases isn't specified with conditions of the truthfulness, but with verification procedures of the meaning of these phrases. The Putnam's view is an coherent realism (internal). The semantic theory of the truth, in which the semantics of the object language included in the metalanguage are fulfilling the essential role, seems to be a weak model of the truth. It happens this way even therefore, because it narrows the last linguistic layer and isn't able to go beyond farther. Therefore this theory, on account of so-called weak comprehending of correspondence, encloses the theoretic-model comprehending of the correspondence. However it doesn't clarify the so-called problem of the transcendence or "the bridge", it means it doesn't contents the issue of transition from the thought to the reality of the thing[35].

To the current contemporary mental directions referring to issues of the truth is rank an anti-realism of Michael Dummett. He stated among others, that „To understand the sentence means to know conditions of its correct statement *(correct assertability)*". Unlike the semantic realism (to understand the sentence means to know conditions of its truthfulness), Dummett says that comprehending of the truth exceeding abilities of its verification is incomprehensible. And conditions of right verification not necessarily must be empirical[36].

The top achievements of the present are Richard Rorty's views. Seeing the problems with presenting the truth, he is trying to get to it with different ways[37]. He rejects the absolute truth and the knowledge about it, and he inclines to adopt the views via conversation as a range of union. He points that he rejects the comprehending of mind reflecting reality and getting to the objective truth. It is the typical postmodernist paradigm[38], trying to undermine the classical (correspondence) theory of the truth. Rorty pays attention to social, common character of the truth, about big meaning for bond, for the liberal and democratic society[39]. Now it is clear, that in such notion of the truth it is getting to it on the base of "the conversation, hermeneutic interpretation of views and positions of participants of debate". So, it isn't the theory of the truth, but the consensual agreement on the truth, and author says: „ the pragmatist isn't a propagator of the theory of the truth, much less the relativist theory. As he is a supporter of the solidarity, his view of meaning of cooperating of people in the research process has the only ethical, rather than epistemological or metaphysical base. Having no epistemology, and fortiori doesn't have relativist epistemology"[40]. In such a conception the truth arises on the principle of agreement, communication[41] between participants of the discourse, rather than the confrontation with reality. This conception determines also a radical change of the approach to the problem of the truth. More easily it allows to make out the source of creating of the conception deliberation of Jűrgen Habermas, taken to analyses above European integration and used for establishing the consensual method in works of the Convention on the future of Europe[42].

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[34] The truth is treated as the logical feature; it isn't determined on the basis of content of sentence, but is formed by the function of the predicate of the truth.

[35] J. Dębowski, Bezpośredniość poznania, Lublin 2000.

[36] M. Dummett, Logical base of metaphysics, PWN 1998.

[37] „At one time, when more than now we thought about the eternity, and less about the futures, we described ourselves as servants of the truth. For some time we are less talking about the truth, and more about credibility, less about returning the power to the truth, more whereas about, how to provide with the honesty of the one second. I think that there is this healthy moving. The truth is eternal and unchanging, very much it is hard however to be sure that it is had. Credibility, similarly to the freedom, is something earthly, passing and brittle, however it is always possible to recognize, whether it is had, whether not" – for: M. Hetmański, Why the postmodernism rejects the truth, Annales Universitatis Mariae Curie-Skłodowska, Lublin 2000 Vol. XXV, S. I, s. 296.

[38] He is talking about it in: Philosophy but the mirror of the nature.

[39] M. Hetmański, Why the postmodernism is rejecting the truth, Annales Universitatis Mariae Curie-Skłodowska, Lublin 2000 Vol. XXV, S. I, s. 297.

[40] as above, p. 296. „The metaphysical-epistemological ideal of the knowledge and the absolute truth is destroying the spirit of intellectual bond, for which the responsible conversation, coming to an agreement, comparing views, the participation in the symbolic universe are a being, not whereas seeking the heart of the matter. The problem of the truth about by beings to the conversation, the dialogue, the narration and agreeing on differing opinions, with word, for collective cognitive action for the sake of the respect of principles for the democracy and the tolerance, is a quite attractive ideal both philosophically, and politically" – as above, p. 299.

[41] „The process of the communication contains two components: (1) stage of the confrontation, i.e. allowing for both agreeing on subjective positions and the opinion, and (2) stage of the intercommunication, consisting on getting the certain objective cognitive consensus, from its being not entirely are simple to agree. This fact is counting in addition for comprehending the truth as the cognitive result created in the process of the communication. Agreeing on subjective views is supposed to make it way towards the intersubjective agreement" – as above, p. 300.

[42] K. Bachmann, Convention for futures of Europe. Deliberative democracy as the method of the legitimization of the power in the multilevel political system, Wrocław 2004.

Archbishop Życiński accuses Rorty of the devaluation differences between the objectivity and the subjectivity. The blend of Rorty views uses thoughts of Thomas Kuhn[43]. „Instead of the objective truth we receive the unaffected agreement"[44]. According to description of Clark Glymour it is a "new gale". Archbishop Życiński says: „Rorty seems to repeat behind Davidson, that "as notion as 'state of affairs' or 'world' (and, *a fortiori,* the truth defined as 'conformity to reality') cannot explain nothing, because every of them is an empty, determining something completely undefined and impossible to determine notion". The rationality in suggested discourse is replaced by persuasion[45]. Reliable, substantive discussion is in this moment impossible. Author refers to Michael Novak: "If the human mind isn't able to hold of moral order, power decides. We experienced it in the 20th century. People in cafés debated about the nihilism, and Lenin, Mussolini, Hitler put their views into force with all consequences. If there is no morality, there are no obstacles for them, who won, for using the power… At such assumptions arguments are ending and remain an only naked power". Rorty's light-heartedness in this regard is significant for contemporary times.

Behind Rorty's contemplations comes P. Singer, which on the plane of ethical deliberations proposes a radically simple deciding in situations ethically conflictual. Subiektywność ocen pozwalałaby w zakresie eugeniki na obiór takiego działania, które choćby jednorazowo były jakoś usprawiedliwione sytuacyjnie. P. Singer in addition makes use of Dworkin and Wittgenstein, proposes not to seek relating in situations of conflict of public interests to ethical general rules, but to the convention and anecdotes. The simulation and the illusion in world of appearances makes pointless to settle the problems of the truth.

4. For what we need truth, if we have so many truths?

The truth determines the certain kind of social relations. It leads to the discourse or makes it impossible. It decides about the fact that somebody enters to the discourse from the position having the knowledge (even plausibility) or having the power to mould the notions used in the discourse (sometimes randomly passed). So we say, „to learn the truth", „to search for the truth", „ to get the truth", „to determine the truth" or „ to create the truth". How it is indeed, do we find, do we discover the truth, or, the other way round, maybe we create the truth, do we it? Unkind is a time for these notions which are listed at the beginning. Contemporary mental trends denying reputedly the searching for the truth with our participation; we should talk about creating or (version soft) molding.

We walk still in world among less or more of verifiable intuitions. It isn't possible to say that we have the truth, but also this state of affairs doesn't mean that we have the licence of creating the truth for instance for needs of sociotechnical steering the society.

For current thought accompanies the stressing of irrational elements which effectively have an influence on people thinking by herd instinct. Demagogues in the gutted intellectually society easily find the respect. The lack of the philosophical thought of the own life provoke for shallow trusting of smooth theories and definitions. Trivial theories about the unknown provenance, the changed definitions so far generally being in effect, find simple admirers and lead into world of losing. Between with the ones, which in the self-admiration of the own output propagate subjective and nonverification theories, build edifices of new, partially taking hold of reality definitions, is created a relational space. The one, who says, has an influence of listener. The ability of transmission, the evocative style, meeting the need of listener, even for some moment can disturb the own rational view of things. Credibility of demagogues, by the great level of the emotionalism of listeners, isn't being checked. It is not possible to count also, that every speaker has the considerable set of the good faith. Sometimes, but not often, speakers are influenced by their reflections devoid of the objectivity. *„The truthfulness is an evidence of the freedom, and the bondage is recognised by the lie"* – said Miłosz.

Lack of freedom from oneself, of one's chimeras, of poorly proven theories or, what is worse, consciously led misrepresentations and definitions, every of it is situated in categories of the lie. It happens all the more, when for the sake of political steering, having the power lead in their premeditation to molding the new range of its mental abilities without any responsibility and perspective seeing effects of its action. Especially this last aspect is essential and painful, because the majority of politicians of contemporary world is being chosen on democratic principles, and then they appropriate the entitlements and the human thinking by the legal apparatus for manipulating electors. That time they disturb the relations between electors and them, chosen! Philosophical conceptions of Levinas and Tischner somehow or other are corresponding with the general lack of exposing oneself. Functioning in disturbed conditions, completely honest, sincere and ethically improved people are shutting themselves away in their world of masks. They play in the theatre assigned to them and through the consent and the resignation from the honesty, they build the world of lies. Accustoming to the political correctness, for using only correct forms and expressions being in effect today, even dressing according to the fashion, only to be in an appropriate group of significant, unemotional assenting to heard media gossip without the possibility of checking, confirm the social anomy. Philosophy of the dialogue or philosophy of the face correspond to demand for reflection of lost value of the truth in the social and individual life.

World of the lie, been on poles of the truth, it is a space of consciously and utilitarian implemented illusion. There is talking about the democracy and building totalitarian forms of

[43] Rorty, Structure of scientific revolutions.

[44] J. Życiński, Pragmatyzm jako substytut aksjologii w ujęciu Richarda Rorty'ego, Keryks VI(2005)1, p. 25–41.

[45] „There is a treat of falling into the cultural imperialism, in which as the result of the representative consensus we will admit the set of opinions dominating in our cultural environment and ignore the extremely different opinions dominating in different cultures" – Życiński, p. 33.

enslaving minds. There is imparting the new meanings of definitions or making for everyone something completely different. There is profaning the defined norms of deducing, to achieve unrecognized purposes by being subordinate to an authority, etc. These efforts demolish the social relations, and don't let citizens function in real world. The lie is a deceitful effort having its purpose. This is the deliberate misleading, not only an occasional affliction. Passing the manipulated truth very well know that it is untrue expressed in the attribute of the truth. And only then it has its meaning. An entire process of creating the lie exists, the truth is not have to defend oneself. It appears as the certain obviousness. Something is something, and it isn't something different. The clean, free, not spoiled by phobias of frauds is straightforward mind. But the falsified mind must search for evasive attempts to show, to create the theatre; a Tischner's book entitled "*People from hiding places*" tells about it. Rich narration accompanying convincing to the manipulated truth, it certain system of excuses of conscious falsifying of the truth. Lyotard was sure of it and said that especialy this occurrence is visible in the philosophical and political thought, for which he is a task to convince the others to dominate the second man.

If the truth is supposed to serve the usefulness, as contemporary representatives of cherishing the knowledge want it, it should incline to the variant of acquiring the knowledge which will consolidate acquiring of the truth for itself. If the truth get with a hard effort is supposed to be useful truth, it is already quick jump for selective applying. The knowledge of the truth won't hamper falsifying it in the worst case, but for changing the adapted definitions to immediate needs – in the best case. And cherishing the aspiration to the knowledge and searching for the truth, lead for finding diversities of truths participating in the first truth, not-daubed with individual perceiving. Love is freeing the observer of the truth from his own overbearing nature in the attitude to it, the knowledge meanwhile is falsifying the "real" truth. The disability of the knowledge consists after all in its temporariness, all the way to better of discerning it and on its fragmentary nature. It happens this way because the specialists from one fragment of reality make the whole image of it, making falsifications based on *pars pro toto* rule. It is hard also to require searching for the truth about the absolute aftertaste from politicians, if they are aspiring to the power. Than they support the choice of this truth which would serve nimble steering; the lability of truths is a certain program of action in that case. So, love and the cognition, as methods of getting the truth, are out of the question, a conventionality stays and comparatively free, with legal tools, indication of the truth.

Very often in our times it is pointed that some truth doesn't exist, but a multitude of truths correspond with every reality. It is coming to the situation, that everyone has equal rights for passing one's seeing the truth with the protection, he isn't allowed to forbid to tell the truth or also to undermine his truth. Danger of such attitudes consists mainly in the fact that not every human has full rights to talk about the truth, but has the right to say in what way he can see the truth. However an ability of discussion is killed off with shout for freedoms of the individual truth. Lost or destroyed authorities correlate with the convenience to build by everyone the own unquestionable authority (e.g. ethical solipsism).

There is a big problem to get rid of the impression, that there is not the human ineptitude in achieving the truth is an obstacle of determining it. More expected is that contemporary mental trends aim in direction of utilitarian molding. Connecting with the policy (no matter how it sounds) and, as a result, the liquidation of philosophy as the separate, independent branch of the knowledge causes making shallow and objectifying of the research tools accessible to the human. Not truth is danger for the democracy, but badly comprehended democracy isn't supporting the appointing of the truth. Not existence of many truths of human experience, but selective treating (pars pro toto) aspects of the truth make the feeling of being lost and the chaos. Not a humility of people seeking the truth causes that they say that it isn't possible to reach it or to determine it, but vainglory, concealed desire for swaggering determining the definitions according to temporary needs of lobbyists.

Multitude of truths, multitude of the definition of the truth, an aspectualness of the truth are notions, which are expressing of certain kind of intuition of cognitive abilities of the human. And, coming back to the beginnings of deliberations about the truth, should be proper to return to the straight noting that the sceptical disbelief in abilities of noticing the reality surrounding the human allows in the almost ironic way to build the notions, linguistic expressions as if kind of separation from the universally perceptible truth. And the truth is, or there is no it. The simple farmer can sometimes more say about truth, than the speculating scientist making the theories. However the problem exists when the scientist with his effort supports the political orgies, and underpins the notional chaos. The elements of a jigsaw puzzle form spontaneously: the incomplete truth about the heterogeneity of societies of Europe should be crammed into the space of the social awareness, and then to point the lack of some general truth, and then can talk about the consensual chosen truth, and then to rule according to own guidelines. Perhaps there is a clever effort, but whether is accepted by the European intelligence?

Fenyvesi Csaba

A kriminalisztika tendenciái. A bűnügyi nyomozás múltja, jelene, jövője

[Tendencies in Criminalistics: The Past, Present and Future of Criminal Investigation]

Budapest/Pécs: Dialóg Campus, 2014, 304 pp., ISBN 978-615-5376-38-2

We can say this monograph is unique among the ones ever published in Hungary; there has not been one that would have drawn an overall picture of the development of criminalistics, its tendencies in the past and its possible future.

First of all the author starts his work with comparing systems of criminalistics. According to him it seems right to divide criminalistics into general and special part. General part consists of crime-solving techniques and tactics, theory and logistics as well as crime-solving strategy, which focuses mainly on objectives defined by politics, being of a criminological nature. As opposed to all this, crime-solving methodology makes up the special part of criminalistics.

Meanwhile we can also understand the difference between the models of the continental and Anglo-Saxon countries. In accordance with the continental conception, criminalistics may be divided into three parts, while the Anglo-Saxon model focuses on the crime-solving methodology, i.e. criminal investigation. It does not deal with the efficient investigation of crime in general but instead it concentrates directly and specifically on the exploration and proof of individual categories of crime and tactical recommendations relating to them.

The dissertation also mentions the related branches of science. *Fenyvesi* sorts these disciplines according to how close contact there exists to criminology.

The first group is that of sciences having the closest contact with criminalistics, which comprises criminal sciences dealing primarily with criminal activity, criminal offences and perpetrators of crime (criminal law, procedural law, criminology, victimology, law of penal enforcement, forensic psychology and medicine). The second is made up of technical and natural sciences (biology, chemistry, physics, mathematics etc.), while the third group consists of social sciences (like philosophy, logics, psychology, sociology, pedagogy, statistics etc.).

Reading the monograph we can also get a picture about the history of criminalistics. *Fenyvesi* starts at the ancient times, in Egypt and in the Middle-East, and guides us through the steps of the medieval epoch leading right to the modern tendencies. It also makes an effort to introduce the milestones of criminalistics, which – not by accident – are basically linked to the old continent. These 5 steps – reflecting to the development of other natural sciences – show the stages of the development of criminalistics itself. These are: 1. identification by finger prints and finger marks (1900–1910), 2. identification of blood (1920s–30s), 3. the neutron activation analysis (1930s–40s), 4. identification based on DNA structure (1953–) and 5. digital data (from 1990s).

According to *Fenyvesi* DNA profiling does not simply constitute the fourth milestone, but is also plays a pioneering role as second generation evidence enquiring a different type of expert, instrument, method and approach.

Next we can learn the elaboration of criminalistics and the science of criminal procedure in monographs. Starting from 1959, the dissertation introduces the monographs of the last century written by Hungarian authors, focusing on the „black points" (non-elaborated topics) relating to the building blocks of both: crime-solving techniques and tactics, as well as crime-solving methodology. *Fenyvesi* emphasizes the fact that it is possible to observe a growing tendency of European outlook in Hungarian works on criminalistics and those on the law of criminal procedure; it is welcomed since nowadays the internalization of criminal law significantly grows.

The most touching innovation of the monograph is the (conceptual) pyramid model of criminalistics.

According to the author the first level of the pyramid is made up by the list of seven basic questions (WHAT, WHERE, WHEN, HOW, WHO, WITH WHOM, WHY), the level of basic principles, as it may be declared a principle that the person who knows the exact answers to the question relating to the incriminated offence also knows the past events and is capable of deducing the right legal conclusions from the facts. The opposite of this is also close to the truth; namely that the person who does not know the clear answers to these questions does not know and cannot reconstruct the past, nor can establish the facts of the case and consequently, cannot qualify them either. So in other words: no one can get to the top of the pyramid (IDENTIFICATION) without finding the right answers to these questions at Level I. of the pyramid.

But how can one reach the apex from the founding stones? What are the methods and means of identification? The answers may be read out from the middle blocks of the pyramid, making up the second level: the instruments of criminalistics (ways and

paths). They can also be called „mediators". These possible paths and instruments (mediators) may be classified into four main groups as traces (clues), material remains, testimonies and documents. Using these mediators we can get to the top of the pyramid: the level of identification.

We can also be introduced to the basic principles of criminalistics. According to *Fenyvesi* these are as follows: 1. The seven questions of criminalistics in order to get to know and reconstruct the past. 2. The past is cognizable with the help of traces and material remains. 3. Every crime leaves a trace, which is to be collected systematically. 4. Each criminalist is worth as many data he or she has got. 5. The importance of the "first strike". 6. *Natura non facit saltum*, which means "Nature does not repeat itself."

Fenyvesi also draws the attention to the possible mistakes and their consequences in criminalistics. Every human activity carries a possible error. The criminal procedure in modern legal systems proclaim that the criminal process of holding someone accountable for an offence should consist of several stages, declaring that possible errors could appear. These errors are clearly classified and explained in the monograph so can help people to prevent them.

At the end of the monograph, *Fenyvesi* mentions the possible future tendencies. He leads us to a stupendous world with full of science fictional methods of crime-solving, just as the brain scanner generating legal and bioethical problems; or devices monitoring the trueness of testimonies.

I offer this fascinating work to everyone, because it can help to find a solution for a problem or an answer to a question coming up in every day work of those who are part of the criminal investigation and law enforcement: law agents, advocates, prosecutors, judges and members of departments of investigation as well.

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Iole Fargnoli/Stefan Rebenich (Hrsg.)

Theodor Mommsen und die Bedeutung des Römischen Rechts
Abt. A: Abhandlungen zum Römischen Recht und zur Antiken Rechtsgeschichte
(Freiburger Rechtsgeschichtliche Abhandlungen, N. F. Bd. 69)

Berlin: Duncker & Humblodt, 2013, 184 S., ISBN 978-3-4281-4050-3, 79,90 € (D)

2012 fand in der eidgenössischen Hauptstadt Bern eine Tagung statt. Diese hatte sich zum Ziel gesetzt, eine fächerübergreifende Forschung zu Theodor Mommsens juristischem Werk in einem Werk zusammenzufassen. Dem Herausgeberduo Iole Fargnoli und Stefan Rebenich ist ein gutes und übersichtliches Werk gelungen.

Nach der Einführung, in der die Hintergründe des Buchs erwähnt, die kurze Themenstellung und Zusammenfassungen der Beiträge angerissen wurden, will der Autor Wolfgang Ernst, Mommsen in den Kontext der Juristerei seiner Zeit einordnen. Dabei unterstreicht Ernst, dass Mommsen an der Geschichte des Römischen Rechts interessiert war, es aber nicht in der Gegenwart anwenden wollte.

Ein weiterer Autor, in persona Joseph Georg Wolf, befasst sich mit der Beurteilung des Rechtsgeschichtlers Hermann U. Kantorowicz und dessen Argumentationen, die Edition der Digesten Justinians aus der Feder Mommsens betreffend.

Karl-Joachim Hölkeskamp gelingt es, die Erfolge und Grenzen von Mommsens „Staatsrecht" aufzudecken. Dabei sollte man, will man die römische Republik begreifen lernen, die staatsrechtlich-verfassungshistorischen Aspekte für sich analysieren und die gesellschaftlichen Komponenten intensiviert akzentuieren.

Carla Masi Doria ordnet das Werk Mommsens „Römisches Strafrecht" in die Zeit ein, in der Mommsen lehrte. Dazu ist es dienlich, die rein entwicklungsgeschichtlichen Blickwinkel des Buches und die Quellen zu betrachten und einer sachlichen Kritik zu unterziehen.

Boudewijn Sirks schafft es, Mommsens Edition des Codex Theodosianus genau zu beleuchten. Das gelingt dem Autor dank einer handschriftlichen Überlieferung und unzählbarer Nebenquellen. So kommt Sirks zur Ansicht, dass Mommsens Edition keinesfalls den Bezug zum Heute verloren habe und nach wie vor Gegenwartsbezogenheit genieße.

Philippe Blaudeau beschäftigt sich auch mit dem Codex Theodosianus. Hier fließen jedoch die Impulse Mommsens für die Untersuchung der Spätantike mit ein.

Ansprechend ist der Beitrag von Gisela Hillner, die die 1843 in Kiel in lateinischer Sprache vorgelegte Dissertation Mommsens mit ihren Ansichten ins Deutsche übersetzte, die Originalfassung abdruckt und in groben Umrissen den Verlauf der Dissertation beschreibt.

Das Werk ist mit nahezu 80 € sehr teuer, aber trotzdem sind die Aufsätze von ausnahmslos hoher Qualität und sorgfältiger Recherche. Das Buch darf sich berechtigter Weise einen guten Platz in der bisherigen Mommsen-Forschung und in der Untersuchung der Rechtshistorie der Antike aussuchen; es hat es sich verdient. Ohne Vorbehalt kann der Rezensent anführen, dass das avisierte Ziel der Berner Tagung erreicht worden ist.

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Martin Löhnig (Hrsg.)

Zwischenzeit. Rechtsgeschichte der Besatzungsjahre

(Rechtskultur Wissenschaft, Bd. 2)

Regenstauf: H. Gietl Verlag, 2011, ISBN 978-3-8664-6403-2, € 39,00

In der Semantik des Sportjournalismus wird die Zwischenzeit als die für das Zurücklegen einer Teilstrecke gemessene Zeit angesehen. Als Synonyme für Zwischenzeit können Übergangsstadium, Übergangszeit, Zeitraum und Zeitspanne betrachtet werden. Ganz früher in der Geschichte sprach man von einem Interregnum.

Doch die vierjährige Übergangszeit zwischen 1945 und 1949, der bedingungslosen Kapitulation des Deutschen Reiches und der Gründung der Bundesrepublik Deutschland, kann nicht als Interregnum oder als Zeitraum per se definiert werden. In diesen vier Jahren erfolgten maßgebliche, ja entscheidende Weichenstellungen für die Entwicklung von Deutschland und Europa in der zweiten Hälfte des 20. Jahrhunderts. Die erste Hälfte war durch Imperialismus, Wett- und Hochrüsten sowie durch die beiden schrecklichen Weltkriege gekennzeichnet. Sucht man rechtshistorische Studien, dann muss man sich meistens mit der Zeit des Nationalsozialismus von 1933 bis 1945 und mit der Zeit ab 1949 zufriedengeben. Herausgeber Martin Löhnig, Professor für Bürgerliches Recht, Deutsche und Europäische Rechtsgeschichte und Kirchenrecht an der Universität Regensburg, gelang gemeinsam mit zehn anderen Autoren der Vorstoß in einen neuen Bereich, über den es in Zukunft hoffentlich noch viel mehr zu berichten geben wird. Löhnig und seinem Autorenteam gelingt es vorbildhaft, ein Bild dieser kurzen „Zwischenzeit" zu zeichnen und die Bedeutung der Besatzungszeit als wichtige Vorgeschichte der Gründung der Bundesrepublik zu unterstreichen. Just jene vier Jahre gehören zu den tragenden Fundamenten der deutschen Gesellschaft und ihrer Geschichte. Martin Löhnig hat im Rahmen einer 2010 in Regensburg stattgefundenen Ringvorlesung deren Beiträge gesammelt und 2011 in Buchform präsentiert. Einige Abhandlungen daraus werden im Folgenden beschrieben.

Den Anfang macht Neuzeithistoriker Thomas Schlemmer. Unter dem Titel „Ein gelungener Fehlschlag? Die Geschichte der Entnazifizierung nach 1945" stellt er die unterschiedlichen Meinungen der alliierten Siegermächte dar. Die drei Phasen der Entnazifizierung sind dabei wesentlich, doch ungleiche Rechtsbestimmungen und -ordnungen ließen die Gratwanderung zwischen reibungsloser Administration und Versorgung zu einem schmalen Unterfangen des Ausgleichs finden.

Udo Wengst, stellvertretender Direktor des Instituts für Zeitgeschichte in München und Honorarprofessor der Universität Regensburg, widmet sich in seinem Aufsatz „Deutsche Sozialgeschichte der Jahre 1945 bis 1949" den „Bevölkerungsverschiebungen und Konfliktlinien der Zusammenbruchgesellschaft", die Evakuierte, ausländische Zwangsarbeiter, Kriegsopfer, verfolgte Opfer der Nationalsozialisten und verdrängte Beamte erfasste. Schlagworte, wie Ernährungskrise, Kriminalität, Arbeitslosigkeit und Mangel an Facharbeitern, sind dabei keine leeren Phrasen. Wengst schafft es, auch einen Fokus auf die ökonomischen Rahmenbedingungen in West und Ost zu legen. Diese waren sehr voneinander verschieden und trugen wesentlich dazu bei, dass ganz unterschiedliche Mentalitäten hervorgebracht wurden.

Der Neuzeithistoriker Hartmut Soell von der Universität Heidelberg schreibt über „Konrad Adenauer und Kurt Schumacher – Gegensätze und Übereinstimmungen in der Gründerzeit der Bundesrepublik". So ungleich sich deren Lebensläufe auch gestalteten, so gleich waren doch ihre Bemühungen um und ihre Vorstellungen über den Neu- und Wiederaufbau Deutschlands. Das wiedergewonnene Ansehen sowie die Erlangung der (Teil-)Souveränität und Gleichberechtigung konnte nur sowohl im Zusammen- als auch im Wechselspiel zwischen Bundeskanzler Adenauer und Oppositionsführer Schumacher erlangt werden.

Ekkehard Schumann, emeritierter Professor für Prozessrecht und Bürgerliches Recht, widmet sich der Thematik „Bayern als Vorreiter umfassender Verfassungsgerichtsbarkeit. Die Entstehung des bayerischen Verfassungsgerichtshofs." Dabei übersieht der Autor nicht die Bedeutsamkeit der anfänglichen Regionalisierung, welche den divergierenden Interessenlagen der Besatzungsmächte in der „Zwischenzeit" geschuldet war. Schenkt man Schumann Glauben, so ließ die US-amerikanische Militärregierung dem bayerischen Verfassungs- und Gesetzgeber zwar weitgehend freie Hand, nahm im Gegensatz dazu jedoch auf Gesetzesbestimmungen und die Verfassungsgerichtsbarkeit auch Einfluss. Dennoch ist der Autor der festen Überzeugung, dass das bayerische Gesetz eine Vorbildrolle in Bezug auf die Entstehung der Regelungen des Bundesverfassungsgerichts gehabt habe.

Der Herausgeber selbst widmet sich in seinem Aufsatz dem „Familienbild und Familienrecht nach 1945: eine Rechtssprechungsanalyse am Beispiel der Zerrüttungsscheidung“. Was sehr komplex klingt, ist eigentlich ganz einfach: Es geht um die Anwendung des Begriffs des „Wesens der Ehe“. Hierbei gelingt es Martin Löhnig, mit eigenen Wertungen zu punkten und beispielsweise durch die Kapitel „Die Richter als orientierungslose Gesetzgeber“ oder „Der Kampf um die Deutungshoheit“ etwas Licht in dieses keineswegs einfache Thema zu bringen.

Das Schlusskapitel von Dieter Schwab, emeritiertem Professor für Bürgerliches Recht, Deutsche Rechtsgeschichte und Kirchenrecht, beschäftigt sich mit dem „Naturrecht als Norm nach dem Zusammenbruch des ‚Dritten Reiches‘“. Hierbei werden historische Wegmarkierungen des Naturrechts sowie die wichtigsten Autoren der Nachkriegsgeschichte behandelt.

Alles in allem zeigt der Sammelband auf informative Weise, dass er kein reines Handbuch ist. Zahlreiche Dokumente, eine ordentliche Prise Sekundärliteratur sowie Register und Bibliografie runden dieses wirklich gelungene Werk ab. Die ursprünglichen Referate wurden dabei in ihrer angenehmen Vortragsform belassen. So liegt es am Leser selbst, die Thesen und Standpunkte der elf Autoren zu vertiefen, ihnen nachzugehen und über diese „Zwischenzeit“ eigene Gedankenstränge zu entwickeln. Diese sind wichtig, um die Geschichte im Allgemeinen und die Sozial-, Wirtschafts- und Rechtsgeschichte im Besonderen besser zu verstehen und zu interpretieren, sodass weitere Forschungslücken in der Zeit zwischen 1945 und 1949 in geraumer Zeit auch für die Nachwelt sinnvoll aufgearbeitet und geschlossen werden können.

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Gerald Mund (Hrsg.)

Deutschland und das Protektorat Böhmen und Mähren. Aus den deutschen diplomatischen Akten von 1939 bis 1945

(= Veröffentlichungen des Collegium Carolinum, Bd. 127)

Göttingen: Vandenhoeck & Ruprecht, 2014, 689 S., ISBN 978-3-525-37305-7, 79.99 € (D)

Bereits zu Beginn des dritten Jahrtausends stellte sich der Herausgeber die Aufgabe, ein Werk über die im Archiv des deutschen Außenministeriums recherchierten Quellen zu verfassen und zu publizieren. Das Werk sollte eine Quellenedition werden. Diese wurde nun verwirklicht und verdankt ihr Dasein neben dem Herausgeber noch Frank-Lothar Kroll, Manfred Dauses und Milena Horalkova. Der 1967 geborene Herausgeber hatte schon früh Kontakt zu Quellen des Außenministeriums. Nach seinem Studium der Politikwissenschaft, Geschichte und Literaturwissenschaft promovierte er 2001 über das Thema „Ostasien im Spiegel der deutschen Diplomatie. Die privatdienstliche Korrespondenz des Diplomaten Herbert von Dirksen von 1933 bis 1938“. Schon kurz nach dem Erscheinen der Quellenedition hatte diese einen großen Interessentenkreis gefunden. Der Anspruch, ein wissenschaftlich ertragreiches Werk zu schaffen, welches zudem leicht zu lesen und auch für Nichtfachkollegen nützlich ist, erfordert eine ausführliche Einleitung. Diese liefert der Herausgeber. An sie schließt sich das 446 Nummern umfassende Quellenverzeichnis an. Berücksichtigt sind sämtliche Dokumente aus dem Zeitraum vom 16. März 1939 bis zum 18. Juli 1944. Daran schließt sich die Edition an. Am Ende befinden sich ein Personen- und ein Ortsregister, die es erlauben, die einzelnen Quellen in den zeitgenössischen Kontext zu rücken. Leider fehlt ein Sachregister, welches die beiden vorhandenen Register hätte ergänzen können. Zum Hintergrund des Buches: Nachdem sich in Deutschland der Nationalsozialismus 1933 endgültig etablieren konnte und in der Folgezeit eine aggressive Außenpolitik angestrebt wurde, proklamierte das Deutsche Reich 1939 die als autonom geltende Verwaltungseinheit „Protektorat Böhmen und Mähren“. Die Gebiete galten fortan als unmittelbares Reichsgebiet und waren politisch wie gesellschaftlich in das Großdeutsche Reich eingebunden. Nachdem das Sudetenland an Deutschland abgetreten wurde, umfasste das Autonomiegebiet das übriggebliebene Staatsgebiet der tschechoslowakischen Republik. Im Vorfeld wurden neben der Abtretung des Sudetenlandes die Abtretung des Olsagebiets an Polen und die Abtretung einiger slowakischer Gebiete an Ungarn beschlossen. Hinzu kam die Abtrennung der Slowakei im März 1938. Die tschechische Protektoratsregierung verfügte zwar über eine Selbstverwaltungsfunktion, konnte diese aber nur bedingt ausführen und war so gut wie vollständig von der deutschen Herrschaft abhängig.

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Susanne Lösch

Die coniunctio in testamentarischen Verfügungen des klassischen römischen Rechts

Tübingen: Mohr Siebeck, 2014, XII-157, ISBN 978-3-16-152689-3

1. La breve monografia di Susanne Lösch *Die coniunctio in testamentarischen Verfügungen des klassischen römischen Rechts* (Susanne Lösch, *Die coniunctio in testamentarischen Verfügungen des klassischen römischen Rechts,* Ius Romanum. *Beiträge zu Methode und Geschichte des römischen Rechts*, Mohr Siebeck-Tübingen, 2014, XII-157, ISBN 978-3-16-152689-3) continua, dopo l'esordio nello stesso anno con la ricerca della Seelentag, la promettente collana *Ius Romanum*, per i tipi della Mohr Siebeck.

Essa è dedicata ad uno dei temi maggiormente complicati del diritto privato romano: la determinazione del concetto di *coniunctio* (se si vuole della struttura della stessa) e degli effetti, delle conseguenze giuridiche, da essa prodotta.

Su questo doppio crinale, di struttura ed effetti, si articola la ricerca, la cui brevità (ma si rammenti il criterio editoriale che non ammette pagine vuote nel testo e il carattere tipografico fitto in cui le analisi si trovano versate), la cui brevità, si diceva, non si traduce certo in superficialità, ma, all'esatto opposto, in una lodevole compendiosità, che sarebbe stata molto apprezzata, è lecito presumere, dagli stessi uomini di pensiero romani, cultori come a tutti noto della *brevitas*.

2. Lo studio si articola in sei capitoli, consistenti in un'Introduzione (1–10) seguita da una brevissima rassegna del significato che al sostantivo *coniunctio* assegnano gli attuali dizionari bilingui (latino-lingua moderna, dalla Studiosa citati nelle edizioni latino--tedesco nonché latino-inglese) e i lessici giuridici – di cui l'A. assume l'Heumann-Seckel a paradigma, anche qui sicuramente per ragioni linguistiche –, relativamente ai quali Ella nota il carattere maggiormente composito e problematico assunto dal termine *coniunctio* nelle fonti di diritto ereditario romano, ciò che la porta a evitare consapevolmente ogni traduzione del termine nella ricerca in esame (11–12). Il capitolo 3 (13–117) rappresenta il cuore dello studio, articolato come è su una ragionata rassegna, ordinata secondo la successione cronologica – discendente – dei giuristi romani che, seppure nel filtro costituito dalle esigenze delle scuole di diritto tardo-romane e dalla mediazione giustinianea, ricorrono al concetto della *coniunctio* (l'A. aveva già precisato in proposito – 9 nt. 34 – che avrebbero costituito oggetto di esegesi solamente i frammenti recanti inhaltlichen Aufschluss über den Begriff *coniunctio* in erbrechtlichen Verfügungen). Nel capitolo 5 (126–138) la Lösch esamina l'impiego linguistico del termine *coniunctio* nelle fonti greche (l'A. assume il lemma *sýndesmos* a omologo del latino *coniunctio*) e nelle testimonianze letterarie latine, rispetto alle quali l'accezione giuridica, sebbene nata dalla lingua comune, seguirebbe poi sviluppi autonomi (v. oltre punto 3). Il capitolo 6 (139–146) prosegue nell'adempimento del lodevole criterio imposto dai curatori della collana – i professori Avenarius, Baldus, Dajczak, Miglietta, Rodríguez Martín e il notaio Böhr –, quello cioè di chiudere il lavoro con un riassunto in lingua italiana dello stesso (curato da Tommaso Beggio), che non è propriamente una *versio* parallela dell'Ergebnis – Die *coniunctio* im Wandel der Zeit, contenuto nel capitolo 4 (118–125), sebbene il lettore possa in buona parte sovrapporli (nell'Ergebnis si esclude comunque che le diverse visioni sul fenomeno della *coniunctio* che albergano fra i giuristi romani siano frutto di una contrapposizione delle scuole, ciò a cui non si fa cenno nel Riassunto). Chiudono il lavoro i consueti indici, in senso ascendente, analitico (156 s.), delle fonti (155) e bibliografico (147–154), al posto di quello degli Autori citati.

3. L'A. rammenta in primo luogo, sulla scorta dell'imprescindibile manuale di diritto ereditario di Voci (il quale, insieme alla notevole recente monografia di Sebastian Lohsse sul *ius adcrescendi* in materia di legati, costituisce giustamente il maggiore riferimento dottrinale con cui Ella si confronta), rammenta in primo luogo, si diceva, i presupposti di applicazione dell'accrescimento in materia ereditaria. Quest'ultimo richiede essenzialmente una pluralità di eredi o di legatari – nella singola disposizione a titolo particolare, ovviamente –, e fornisce il regime qualora uno di questi non possa o non voglia adire la devoluzione universale o particolare. La prima fattispecie – non potere adire – richiama sostanzialmente il caso di premorienza, e si applica allora sia alla delazione testamentaria sia a quella legittima e soprattutto anche nell'evenienza in cui il delato sia un *suus*, come tale automaticamente erede. La seconda – non volere adire – presuppone il diritto di rifiuto, come tale l'istituzione di un *heres extraneus* e la vocazione testamentaria, anche a titolo particolare (in quest'ultima ipotesi pure a favore di un *suus*, naturalmente). In tutte queste fattispecie, l'effetto che si produce, *ipso iure*, è l'espansione dei soggetti istituiti congiuntamente, rimanendo per il momento su un piano molto generale. Espansione automatica, salva una diversa volontà del testatore (il quale disponga una sostituzione), che obbedisce a due princìpi, sostanzialmente concorrenti: quello secondo cui la chiamata è potenzialmente fatta per l'intero, contiene un'intrinseca forza espansiva, e quello per cui il diritto romano non ammette la concorrenza delle delazioni testamentaria e legittima nella successione universale di una persona, per motivi che non può lo studio qui recensito approfondire.

Poste queste premesse, l'A. precisa che la ricerca non potrà partire – al contrario di quanto spesso si è fatto – dalla trattazione di Paolo nel sesto libro di commento alla *lex Iulia et Papia*, come tramandata in D. 50.16.142 e D. 32.89, brani che secondo Lenel si succedevano senza soluzione di continuità nel perduto originale paolino. Da un lato, perché qui il giurista severiano si occupa della *lex Iulia et Papia*, e dunque nell'accrescimento nel diverso settore dei *caduca*, dall'altro, poiché Paolo si pone al termine dell'apice dell'autonomo e creativo dibattitto giurisprudenziale romano, che, seppure necessariamente in parte, l'antologia giustinianea consente di ricostruire. Ragione per cui, occorre verificare se la dottrina paolina della *coniunctio* costituisca l'esito di uno sviluppo monolitico del pensiero giuridico in materia, oppure se il percorso giurisprudenziale si snodi lungo sentieri meno diritti nell'arrivare allo sbocco rappresentato dal giurista severiano.

È quanto la Studiosa si propone di fare nel nucleo del Suo lavoro, seguendo come ricordato lo sviluppo cronologico delle testimonianze giurisprudenziali romane.

Al fine di potere partire da Sabino, l'Autrice suppone (con Voci e Astolfi, e già Schulz) che nel commentario *ad Sabinum* ulpianeo, per la parte tràdita da D. 7.2.1 pr., la frase *quotiens usus fructus legatus est*, *ita inter fructuarios est ius adcrescendi*, *si coniunctim sit usus fructus relictus*, esponga il pensiero del giurista classico di epoca tiberiana. Frase fondamentalmente ripetuta nel passo parallelo Vat. Fr. 75, ma ivi con l'aggiunta che essa va riferita unicamente al legato *per vindicationem*. Il secondo periodo, come dimostrerebbe l'uso in funzione avversativa dell'introduttivo *ceterum*, restituirebbe invece la concezione ulpianea. Ancora (sempre seguendo Voci) che in Gai. 2.199 il giurista tardo-classico, in quanto sabiniano, esporrebbe il pensiero del capo scuola nello scrivere che *coniunctim autem ita legatur TITIO ET SEIO HOMINEM STICHUM DO LEGO*; *disiunctim ita LUCIO TITIO HOMINEM STICHUM DO LEGO. SEIO EUNDEM HOMINEM DO LEGO*. Sabino configurerebbe pertanto la *coniunctio* quale indefettibilmente legata all'uso della congiunzione copulativa *et*. Tale congiunzione costituirebbe l'elemento essenziale perché possa operare l'accrescimento, nei suoi requisiti generali dell'istituzione soggettivamente plurima nello stesso oggetto (in caso di legato) o nella stessa eredità o in una sua parte (sulla *coniunctio* in una specifica quota v. oltre punto 4): si tratta di quella che Paolo chiamerà poi *coniunctio re et verbis*. Nella disposizione a titolo particolare, comunque, Sabino configurava l'accrescimento, alle condizioni viste, unicamente nel legato *per vindicationem*. In quello *per damnationem*, invece, la *coniunctio* avrebbe comportato l'onere per l'erede di dividere l'oggetto legato fra i legatari; in caso di *disiunctio*, tuttavia, l'obbligazione avrebbe dovuto essere adempiuta verso il primo legatario, dovendosi pagare al secondo (e agli eventuali ulteriori) l'*aestimatio rei*.

Giavoleno e Giuliano, nella prima metà del II secolo, rimarrebbero sulla nozione di *coniunctio* del capostipite Sabino, ma non la farebbero più coincidere indefettibilmente con l'effetto dell'accrescimento. In altri termini, l'accrescimento in materia *mortis causa* opererebbe pure in assenza di *coniunctio*, nell'ipotesi cioè di chiamata unitaria all'asse (o ad una sua parte) o in un bene particolare, seppure senza impiego della congiunzione copulativa *et*. Una tesi, questa, seguita da Gaio e Pomponio, mentre sono soprattutto i giuristi severiani Papiniano e Ulpiano a valorizzare uno spunto che vi era, seppure soltanto *in nuce*, già in Giuliano, vale a dire quello di applicare la nozione di *coniunctio* pure in assenza di impiego della congiunzione copulativa (v. D. 28.5.15 pr. Ulp. 7 *ad Sab*.).

Quest'ultima teoria, niente più che abbozzata in Giuliano, è invece palesata in tutta la sua portata dall'originale ed innovativo Celso, il quale nei suoi Digesti (D. 32.80 Cels. 35 *Dig*.) riteneva che *coniunctim heredes institui aut coniunctim legari hoc est*: *totam hereditatem et tota legata singulis data esse*, *partes autem concursu fiunt*. Ad avviso della Studiosa qui il giurista classico afferma che la *coniunctio* esige solamente un'istituzione plurima, a titolo universale (eventualmente in una quota determinata, altrimenti per l'intero) o particolare, senza necessità dell'impiego della congiunzione copulativa a raccordare i soggetti vocati. La comunione così creata, peraltro, è indubitabilmente quella per quote della società romana classica. Di qui l'A. ricava la conclusione che l'accrescimento ereditario avrebbe fondamento non nel *consortium ercto non cito* (come invece ritengono molti Autori), bensì nella comunione divisibile e in cui il concetto giuridico di quota superava gli ostacoli al sicuro traffico giuridico che la comunione a mani riunite frapponeva.

La dottrina celsina si trova pienamente accolta, e sistematizzata, nel commentario alla *lex Papia* di Paolo, qui nel libro sesto, nella parte che i compilatori inseriscono rispettivamente, in ordine palingenetico (ad avviso di Lenel), in D. 50.16.142 e D. 32.89, brani commentati analiticamente dall'A., separandoli nelle loro parti precedentemente individuate in letteratura rispettivamente da Voci e dall'allievo Astolfi. La *coniunctio* sarebbe tale, perciò, non soltanto se *re et verbis*, ma pure se semplicemente *re*; a ciò Paolo aggiunge la nozione di *coniunctio verbis*, alquanto ostica, nella struttura (da quale formulazione lessicale la si sarebbe identificata?) e negli effetti (accrescimento o meno?). Prima di tutto, osserva la Studiosa, dai brani del giurista severiano si evince che egli identifica la congiunzione non soltanto in quella copulativa, bensì, in accordo con il gergo grammaticale, pure nella coordinazione per asindeto o tramite particelle diverse da *et* (a parte la sinonimica *que*, *cum*), e tuttavia, nell'ambito giuridico, segnatamente testamentario, l'unica congiunzione che continuerebbe a rilevare come *coniunctio* (*verbis*, nella classificazione paolina) sarebbe quella copulativa (estesa al limite al *cum*). Quale esempio, tràdito, di *coniunctio verbis* nella dottrina paolina, sta la disposizione *Titio et Seio fundum aequis partibus do lego*, che, quale effetto giuridico, produrrebbe, al contrario di quanto ritenuto dagli altri giuristi romani, l'effetto dell'accrescimento a favori dei soggetti così congiunti. L'Autrice passa in rassegna le tesi dottrinali formulate sul rompicapo rappresentato dalla *coniunctio verbis* paolina, aderendo, se ho ben capito, alla recente tesi di Lohsse, che vede nell'asserto un portato dell'allargamento della nozione di accrescimento dovuto alla legislazione caducaria – che il giurista severiano stava commentando –, il quale si sarebbe riverberato al diritto comune delle successioni.

Appunto al concomitante settore della legislazione caducaria augustea, e all'accrescimento a favore dell'istituito o beneficiato *coniunctim*, il quale, a fronte del coerede o collegatario estraneo premorto o che rifiutasse la chiamata o la disposizione, non scontasse

le incapacità giuridiche speciali stabilite dalla legge (prima della generale attribuzione al fisco in epoca tardo classica), la Studiosa non poteva non rivolgersi, dato l'oggetto del Suo studio, ciò che Ella fa commentando i brani paolini in merito.

Allo stesso modo, dell'onere o della condizione imposta a un coerede o collegatario, e della sorte dell'elemento accidentale della disposizione qualora il soggetto che ne era stato gravato non potesse o non volesse venire alla successione – problema il quale, al contrario dei *caduca*, è rimasto vivo nella storia del diritto europeo, fino alla relative norme dei codici europei (nel codice civile italiano, si veda l'art. 676, comma 2) –, l'Autrice si occupa commentando i brani di Paolo dedicati al tema.

La Studiosa sostiene infine che il concetto di *coniunctio* sarebbe stato mutuato dalla grammatica latina, e dal dominio di quel sapere tecnico, per seguire tuttavia percorsi semantici autonomi nell'ambito del settore giuridico.

La consapevolezza delle radici grammaticali del problema sarebbero testimoniate dalla discussione di Paolo, per la parte conservata in D. 50.16.142 sopra ricordata, circa le congiunzioni copulative *et* e *que*, a cui si assocerebbe quella, di valore lato identico, di *cum*, come aveva già sostenuto Pomponio nel suo commentario *ad Sabinum* (qui D. 30.36.2), e dal ricordo della problematica relativa alla congiunzione non per polisindeto bensì per asindeto.

Gli sviluppi autonomi sarebbero comunque suffragati dal fatto che la *coniunctio* giuridicamente rilevante in materia ereditaria era la *species* copulativa (con l'estensione a *cum*), che i giuristi romani trattavano tuttavia come *genus*, nonché il riferimento alla *coniunctio re*, grammaticalmente inesistente. Ancora, e infine, da un impiego della *coniunctio disiunctiva* diverso, quanto a struttura ed effetti, dalla *disiunctio* grammaticale. Quanto alla struttura, perché quella grammaticale si invera nell'uso della particella *aut*, mentre i giuristi (v. Gai. 2.199) la considerano tale quando difetta una congiunzione copulativa; quanto agli effetti, perché la particella *aut* presuppone un qualcosa (trasponendo il discorso in materia ereditaria, l'istituzione di erede o la concessione del legato) esclusivamente in capo a uno o all'altro, mentre ciò non accade nella materia giuridica (v. appunto Gai. 2.199).

4. Le fonti studiate dall'Autrice con i risultati che si sono sopra sommariamente esposti non possono essere ripercorse in questa sede: la loro complessità e importanza per lo sviluppo del diritto europeo richiederebbe una trattazione a parte, impensabile in sede di recensione.

Qui si può semplicemente ricordare il problema della istituzione congiunta in una quota, che pone il problema della soluzione da fornire nel caso in cui uno degli istituiti *coniunctim* non possa o non voglia venire alla successione: l'accrescimento si verifica a favore di tutti o solamente dell'istituito *coniunctim* (secondo la soluzione oggi adottata)? Pienamente condivisile la lettura delle fonti in merito, in particolare di Iav. 1 *ex Cass*. D. 28.5.64 e Ulp. 7 *ad Sab*. D. 28.5.17.1 proposta dalla Studiosa, in scia a Lohsse. Giavoleno opta per l'accrescimento al solo istituito *coniunctim*, mentre, nel caso in cui sia uno dei concorrentemente istituiti *separatim* a non potere o volere venire alla successione, opera l'accrescimento a favore di tutti (v. pure 7 *Epist*. D. 31.41 pr., seppure in un contesto molto più problematico, relativo ad una complessa disposizione di legato, intesa dal giurista come completa attribuzione *separatim*, con predeterminazione di quote, per cui la parte del soggetto mancante si sarebbe accresciuta agli altri: residua il dubbio che la fattispecie vada però intesa come una sostituzione, non vista da Giavoleno). Giavoleno precisa che non vi era stata alcuna predeterminazione di quote, di modo che si deve pensare ad una *heredis institutio* del tipo: *Titius et Caius heredes sunto*; *Sempronius heres esto*; *Maevius heres esto*. Se Tizio non può o non vuole venire alla successione, la sua parte si accresce al solo Caio; se è invece Sempronio a non adire l'eredità, la sua parte si accresce a Tizio, Caio (*pro capite*, non considerandoli cioè un unico soggetto) e Mevio. Ulpiano si occupa invece del caso di un'istituzione congiuntiva *pro quota* (11/12) e di una concorrente disgiuntiva a favore di due soggetti, senza espressa determinazione di parti, sostenendo che in caso uno degli istituiti senza parti non possa o non voglia venire alla successione, è discussa la soluzione giuridica circa la sorte della sua quota. Il giurista severiano approva la soluzione di Servio, a lui nota probabilmente tramite l'adesione già espressa da Celso, circa l'accrescimento a favore di tutti, come aveva già sostenuto Giavoleno quando mancasse *in toto* una predeterminazione di parti. Ulpiano non precisa la diversa soluzione prospettata in letteratura, ma è evidente, come pure nell'ipotesi considerata da Giavoleno, che l'alternativa fosse quella dell'accrescimento unicamente a favore dell'istituito *separatim* (secondo la soluzione offerta in caso di istituzione, invece, *coniunctim*). Giavoleno e Ulpiano sostengono pertanto la medesima soluzione in caso di premorienza o rinuncia dell'istituito *separatim*: la sua parte si accresce a favore di tutti gli altri istituiti, vi fosse stata o meno predeterminazione di quote. La contrapposizione fra i due giuristi che hanno voluto ravvisare Albertario, Robbe e Manthe si fonda su un'erronea comprensione dei requisiti della fattispecie. La quota dell'istituito *coniunctim* si accresce invece unicamente a favore dell'altro, e Pomponio (1 *ad Q.M*. D. 28.5.67) non profila la soluzione opposta (accrescimento a favore di tutti) perché ha ivi cura di precisare che si trattava di un'istituzione soltanto apparentemente congiuntiva nella quota, perché la congiunzione copulativa *et* a raccordare i due istituiti (appunto *pro quota*), fu utilizzata dal testatore impropriamente, per fare prima (*celerius*).

Dove invece non seguo pienamente l'A. è nella sua spiegazione dell'accrescimento nei legati, nella trattazione generale di Gai. 2.199, 205. Mi pare che la Studiosa non veda e non sciolga la tensione che restituisce il pensiero di Gaio, quando l'oggetto del legato sia indivisibile, e dunque non si possa ricorrere alla soluzione della divisione in *partes* postulata da Gaio. È vero che il problema è fuori dal campo d'indagine della Lösch, ma precisare che in un caso simile si sarebbe applicata la regola della disposizione disgiuntiva (la *res* ad uno, l'*aestimatio* all'altro) avrebbe facilitato il lettore. Quale sia poi la motivazione che, in caso di rinuncia o premorienza di un collegatario nel legato *per damnationem*, porta i giuristi romani ad escludere l'accrescimento, nonostante qualunque *coniunctio*, non sono riuscito a comprenderlo dalla trattazione dell'Autrice, che parla in proposito di impossibilità logica. Si può sicuramente trattare di un limite soggettivo del recensore, e tuttavia l'esposizione della Studiosa mi è parsa sul punto piuttosto sbrigativa.

Ancora tutti i dubbi circa la *coniunctio verbis* vista da Paolo mi pare permangano anche dopo lo studio qui recensito, che, nonostante la diligenza nel riportare le tesi dottrinali in merito, non mi è parso apporti un autonomo contributo, auspicabilmente incisivo, sul punto.

5. La ricerca di Susanne Lösch concerne uno dei campi maggiormente dibattuti del diritto privato romano e, soprattutto, uno di quei temi che sono stati sostanzialmente affrontati dalle migliori menti giuridiche dello scorso millennio, dalle cui elaborazioni in merito sono nate le relative norme codicistiche europee.

E anche completata con il BGB la stagione delle codificazioni, in una rinnovata Quellenforschung sono state dedicate all'argomento indagini finissime – quale quella di Voci – e importanti, anche recentemente, quale quella di Lohsse.

In un simile quadro l'Autrice doveva evitare due pericoli insiti nella scelta di un tale argomento d'indagine: da un canto, quella di proporre alla comunità scientifica una ricerca meramente ripetitiva di autorevolissime tesi altrui; dall'altro, allo scopo di scansare il primo pericolo, di condurre un'analisi improntata a quella perniciosa *cupido rerum novarum* già magistralmente stigmatizzata dal compianto Maestro Mario Talamanca.

Si può senz'altro affermare che la Studiosa è riuscita abilmente a restare lontana da questi due pericoli, affrontando il campo d'analisi con una prospettiva originale, la quale giustifica e rende apprezzabile il Suo studio. Si tratta, in specie, della scelta della giovane ricercatrice di Heidelberg di compiere l'indagine in una prospettiva diacronica, quell'ottica, nello studio delle fonti giurisprudenziali romane, già magistralmente condotta, con esiti fecondi, da un Maestro come Ferdinando Bona. Non che la prospettiva del *ius controversum*, dei dissensi dottrinali, sia estranea alla romanistica della seconda metà del XX secolo, e non sia perciò messa in risalto nelle elevate indagini di Voci (a carattere maggiormente generale) e di Lohsse (di natura più specifica), ma se ivi i dissensi sono presentati su un piano orizzontale, qui il lettore è condotto per mano a constatare lo sviluppo, non sul crinale di una banale e antistorica linea di continuità, della nozione di *coniunctio*. *Coniunctio* che già quelle indagini (specialmente in quella di Lohsse) avevano messo in evidenza come non vada identificata con l'effetto dell'accrescimento, che può derivare in materia ereditaria anche da altri presupposti di applicazione, almeno per chi non avesse la visione di Celso, portata alle estreme conseguenze da Paolo, o, in senso speculare, di Sabino.

Particolarmente apprezzabile, poi, quanto meno alla sensibilità del recensore, è il capitolo finale sulle radici grammaticali del termine *coniunctio* e l'uso che ne veniva fatto nel campo delle *artes grammaticae* e della retorica: a parte il problema, spesso enfatizzato, della consuetudine, se il diritto si manifesta tramite enunciati, orali o scritti, a carattere generale o particolare, provenienti da privati o soggetti investiti di un potere autoritativo, esso prende vita unicamente tramite l'impiego di parole. È allora evidente che queste parole devono essere comprese, per quanto possibile, in tutta la loro portata. La via maestra si rivela sempre – come uno storico del diritto dovrebbe ben essere conscio – l'origine e il campo semantico primigenio del lemma, da cui partire per scandagliare le eventuali evoluzioni, con conseguenti polisemie (o polisemanticità, come l'Autrice preferisce dire).

Sulla monografia di esordio della Studiosa di Heidelberg non si può pertanto che formulare un giudizio di pieno apprezzamento.

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Anna Margarete Seelentag

Ius pontificium cum iure civili coniunctum. Das Recht der Arrogation in klassischer Zeit

Tübingen: Mohr Siebeck, 2014, XX-444, ISBN 978-3-16-152870-5

1. La poderosa monografia di Anna Seelentag, *Ius pontificium cum iure civili coniunctum*, inaugura la collana *Ius romanum*, per i tipi della Mohr Siebeck (Anna Margarete Seelentag, Ius pontificium cum iure civili coniunctum. *Das Recht der Arrogation in klassischer Zeit*, Ius Romanum. *Beiträge zu Methode und Geschichte des römischen Rechts*, 1, Mohr Siebeck-Tübingen, 2014, XX-444, ISBN 978-3-16-152870-5).

Come chiariscono nella loro prefazione, i curatori di questa nuova collana – i Professori Martin Avenarius (Colonia), Christian Baldus (Heidelberg), Wojciech Dajczak (Poznań), Massimo Miglietta (Trento), José-Domingo Rodríguez Martín (Madrid) e il notaio Richard Böhr (Colonia) – intendono accogliere in essa lavori che si contraddistinguano per il carattere interdisciplinare. Struttura interdisciplinare che definirei a carattere orizzontale e verticale, o, più aulicamente, sincronico e diacronico, in via congiunta o alternativa.

Interdisciplinarità orizzontale, o sincronica, perché capaci di schiudere orizzonti sulla storia, filologia e filosofia, s'intende antica, interdisciplinarità verticale o diacronica perché idonei a porre problematiche ai cultori del diritto vigente. Quale esempi di opere

che la collana potrà accettare, i curatori menzionano ricerche sulla metodologia dei singoli giuristi o circa lo sviluppo dei concetti o dell'ordinamento giuridico romano.

La metodologia dei lavori – chiariscono infine i curatori – dovrà essere improntata alla metodologia della giusromanistica europea, e attribuire pertanto particolare peso alla discussione dottrinale del tema affrontato dall'autrice o dall'autore.

Incentrata su un argomento oggi non sconosciuto alla legislazione (si veda l'adozione delle persone maggiori d'età disciplinata nel titolo VIII del libro primo del codice civile vigente in Italia), ma di applicazione pratica non pari a quella dell'adozione dei minori, la ricerca della Seelentag è improntata pertanto ad un'interdisciplinarità orizzontale.

Interdisciplinarità effettivamente coltivata dall'A., perché la sua ricerca colloca sullo stesso piano le testimonianze giuridiche e quelle letterarie – senza prevenzioni verso queste ultime, soltanto perché non provenienti da giuristi – per la ricostruzione del regime dell'*adrogatio* in epoca classica, indagato dall'A. con esiti di notevole complessità. Inoltre lo studio pone continuamente in luce le esigenze sociali che l'*adrogatio* soddisfaceva, anch'esse soggette a modifiche nel corso della società romana, dando prova di come una ricerca rigorosamente informata ai caratteri della ricostruzione giuridica si risolva in una introspezione sui mutevoli caratteri della società romana, senza che per aspirare a questo obiettivo (spesso fallito) si debbano presentare alla comunità scientifica indagini descrittive e atecniche.

2. L'indice della ricerca presenta un quadro sinottico del carattere articolato della stessa, la quale, dopo la premessa dell'Autrice, si sviluppa in un'Introduzione (1-3), alla quale seguono, in senso stretto, dieci capitoli, chiusi da Conclusioni che riassumono i risultati del lavoro, anch'esse numerate quale capitoli (undicesimo e dodicesimo), nella lingua dell'opera (406-411) e in una traduzione italiana (412-417) di Salvatore Marino. Apprezzabile la scelta di tradurre le conclusioni in italiano, perché riconosce la centralità dell'altro contesto geografico propulsivo degli studi di diritto romano in Europa e nel mondo intero, vale a dire l'Italia. Si rintuzza così un tentativo – per vero niente più che abbozzato qualche anno or sono – di emarginare quest'ultimo Paese (e, seppure in parte, lo stesso mondo germanofono) dagli studi di settore, conato senz'altro per ragioni linguistiche, quelle che, nel campo degli studi storici, hanno portato all'emarginazione della dottrina antichistica italiana (ma volendo pure di quella tedesca), a fronte di una produzione scientifica sulla storia antica che ha oramai assunto l'inglese quale lingua franca.

I dieci capitoli di cui si diceva si articolano in un primo sulle fonti e il metodo seguito (5-67), a cui segue uno sull'origine dell'*adrogatio* (68-76). Il terzo concerne il procedimento dell'*adrogatio* (77-158). A categorie di soggetti dell'*adrogatio* sono poi dedicati i capitoli quattro (l'*adrogatio* dei liberti: 159-215), cinque (l'*adrogatio* delle donne: 216-237), sei (l'*adrogatio* dei pupilli: 238-299) e sette (l'*adrogatio* dei minori di venticinque anni: 300-315). L'ottavo e il nono indagano due fondamentali requisiti dell'*adrogatio*, vale a dire l'età dei due partecipanti all'atto (316-377), e la capacità di generare dell'arrogante (378-390). Il capitolo dieci (391-405) è infine dedicato all'indagine sullo scopo che l'*adrogatio* si prefiggeva di raggiungere.

Chiudono il ponderoso volume – scritto fittamente, senza pagine vuote nel corpo del testo di 417 pagine – gli indici.

Il conclusivo indice analitico (439-444) è preceduto da un corposo indice bibliografico (421-437), che dà conto sinotticamente della consultazione minuziosa e aggiornata della dottrina compiuta dall'A., sempre incentrata, comunque, sul tema d'indagine, senza fuorvianti incursioni in analisi inconferenti per la ricerca condotta dalla Studiosa. Ciò spiega perché Ella abbia giustamente omesso di fare menzione della monografia sugli aspetti giuridici del pontificato di Publio Licinio Crasso di Lorenzo Franchini, dove manca qualunque riferimento all'*adrogatio* e, più in generale, una disamina dei rapporti fra *ius pontificium* e *ius civile*, sulle cui relazioni è invece incentrato lo studio dell'A.

Infine, colpisce, in negativo, l'assenza di un indice delle fonti, sostituito da un mero elenco di quelle utilizzate (419 s., con una minima estensione a pagina 421), che comprende la menzione della loro edizione moderna, spesso nella loro traduzione in lingua (tedesca o inglese). I passi del Digesto e delle Istituzioni impiegati dall'Autrice rifluiscono pertanto in una generica menzione del *Corpus Iuris Civilis* nell'edizione Mommsen-Krüger oggi comunemente utilizzata. Pur dando conto dell'estensione circoscritta delle fonti su cui la Studiosa ha condotto la sua ricerca, agevolmente rintracciabili, perciò, nel corpo del testo, si deve ribadire il carattere imprescindibile che, nello specifico settore scientifico disciplinare del diritto romano, riveste l'indice delle fonti (di tutte, poi, non soltanto di quelle principalmente utilizzate). Né questo potrebbe essere un criterio editoriale della collana *Ius Romanum*, come dimostra il secondo lavoro ivi accolto (recensito sempre in questa Rivista), dove, per l'appunto nel solco della metodologia europea del nostro campo di studi, compare l'indice delle fonti. In tale metodologia può invece rientrare la compilazione di un registro bibliografico piuttosto che di un indice degli autori citati (sebbene, per quanto possa rilevare, il recensore – forse eccessivamente tradizionalista – preferisca quest'ultimo). A giudicare poi dalla data della premessa stesa dall'Autrice (luglio 2013) e dell'effettiva stampa del volume (2014), non sussistevano nemmeno particolari ragioni di urgenza nella fase della composizione editoriale del volume, le quali potessero attenuare le perplessità derivanti dall'assenza dell'indice delle fonti, che pertanto rimangono.

3. Scopo dell'indagine è l'approfondimento del regime di un atto peculiare del diritto romano, l'*adrogatio*, l'unico nel quale un effetto privatistico (il cambiamento di *status* del soggetto passivo di esso) si raggiunge tramite un atto pubblicistico, vale a dire la delibera di approvazione emessa dal comizio curiato, non senza che alla realizzazione di esso concorra una valutazione pontificale. Un atto complesso, pertanto, nel quale ricorrono elementi di *ius civile*, *ius publicum* e *ius sacrum*, le cui modalità di concorso la Studiosa intende analizzare, confortata dall'assenza in letteratura di un'indagine monografica sul punto. Se si vuole, l'indagine può avere la stella polare nell'affermazione di Cic., *Brut*. 156, circa il *ius pontificium*, *qua ex parte cum iure civili coniunctum esset*, che Bruto avrebbe voluto apprendere da Servio Sulpicio Rufo.

Fonti dell'indagine sono i passi del Digesto, soprattutto quelli contenuti in D. 1.7 concernente anche l'adozione.

Poi l'orazione ciceroniana del 57 *De domo sua*, pronunciata davanti ai Pontefici, nella quale Cicerone perorava personalmente la causa volta alla restituzione della sua casa consacrata a tempio, dopo la confisca a seguito della *lex Clodia de exilio Ciceronis* dell'anno precedente, consacrazione che non rendeva applicabile la restituzione dei beni disposta dalla legge di quell'anno che autorizzava il ritorno dell'Arpinate, con reintegrazione nel suo patrimonio. Il Senato aveva delegato al collegio pontificale la questione di *ius sacrum* circa la possibilità di sconsacrazione del bene, risolta dal collegio sancendo che tale possibilità sussisteva qualora nella *lex Clodia* non si rinvenisse una specifica autorizzazione alla consacrazione della casa di Cicerone, questione interpretativa che il collegio rimette al Senato. Fra gli argomenti addotti da Cicerone per riprendere la titolarità del bene, ma non considerati dal collegio, vi era l'invalidità ai sensi del *ius pontificium* (*fas*) dell'*adrogatio* di Claudio (Clodio) da parte del cliente Fonteio, più giovane di lui, la quale aveva portato pure ad un'impropria commistione dei *sacra*, valida tuttavia secondo il *ius civile*. Di contro alla dottrina che bolla queste ultime argomentazioni di Cicerone come meramente morali (Bonfante, Archi, Longo) o, peggio, retoriche di stampo antigiuridico (Schulz) oppure ancora espressione di una prima emersione del principio poi recepito nelle Istituzioni giustinianee, per cui *adoptio natura imitatur*, a cui l'*adrogatio* dovrebbe pertanto conformarsi (Russo Ruggeri), l'A. segue Karlowa e Dalla nel sostenere l'attendibilità delle asserzioni, per quanto interessate, di Cicerone, che Ella, valorizzando spunti di Castello e Kaser, interpreta come espressive della contrarietà dell'*adrogatio* ai criteri di *ius pontificium*, ferma tuttavia – e questo è un apporto originale dell'Autrice – la validità civilistica dell'atto. Validità che si desume dall'affermazione che Claudio (Clodio) *factus est eius filius*, dalla quale emerge che l'effetto giuridico dell'*adrogatio* si era prodotto, seppure *contra fas*, appunto contro il *ius sacrum*.

Gell., *N.A.* 5.19, è poi fonte che restituisce plurimi aspetti dell'*adrogatio*, presi in esame nel seguito dell'analisi. Eccettuati i due ultimi paragrafi (giuridicamente meno rilevanti), il capitolo si basa su diverse fonti giurisprudenziali, in particolare almeno due, consistenti l'una in uno scritto giuridico anteriore a Cicerone, l'altra nei *libri tres iuris civilis* di Masurio Sabino. Il regime descritto è perciò, al più tardi, quello in auge in epoca tiberiana, il che giustifica perché Gellio, lungi dal tradire la sua asserita ignoranza giuridica, mosso invece dai suoi tipici intenti antiquari, non dia conto delle *epistulae* di Antonino Pio che consentirono di *adrogare* la donna e il pupillo. Le Notti Attiche sarebbero state infatti scritte intorno al 180 (sebbene in seguito, affrontando in dettaglio i profili dell'*adrogatio* involti dalla fonte gelliana, l'Autrice si mostri più possibilista circa una datazione anteriore, intorno alla metà del secolo).

Infine l'A. contrassegna dichiaratamente sotto la comune etichetta di „Schulschriften" le Istituzioni gaiane (1.97-107) e il *liber singularis regularum* ulpianeo (8.1-8a), dei cui testi – largamente sovrapponibili – offre una tavola sinottica. A proposito di quest'ultimo, la Studiosa segue il maestro Avenarius nel ritenere che si tratti di un'opera apocrifa di età tarda. Se ho ben capito la visione d'insieme, che mi è risultata piuttosto ostica, le due opere troverebbero un comune modello ispiratore nell'opera di Servio Sulpicio Rufo, archetipo che sarebbe stato poi diviso nell'ambito del circolo sabiniano più probabilmente che in quello proculiano, per seguire percorsi autonomi fino ad arrivare alla genesi gaiana, da un lato, e tarda, per l'operetta apocrifa. Di qui la genuina opera gaiana, di cui l'A. segue la datazione intorno al 180. La pseudo opera ulpianea, sebbene fissata più tardi, restituirebbe tuttavia un regime dell'*adrogatio* maggiormente risalente rispetto a quello delle Istituzioni gaiane, le quali soffrono già, invece, di una certa commistione fra *adoptio* e *adrogatio*, tendendo a considerare come *genus* piuttosto che *species* la prima; l'*adrogatio* sarebbe l'*adoptio per populum*.

Chiarito che la ricerca seguirà il metodo induttivo, l'A. presenta uno stato del *ius privatum*, del *ius publicum* e del *ius divinum* in epoca tardo-repubblicana, ribadendo che l'*adrogatio* interseca i tre sistemi giuridici, le cui modalità di concorso (alternativo? cumulativo?) lo studio si propone di indagare. La Studiosa si sofferma in particolare sul *ius pontificium*, dandone la non semplice definizione e valorizzando la ricordata affermazione di Cic., *Brut.* 56, per cui esso era, almeno in parte, congiunto con il diritto civile, ciò che pone la necessità di approfondire i rapporti fra i due sistemi, costituendo l'*adrogatio* un osservatorio privilegiato sul punto. In epoca tardo-repubblicana, infine, fino a Giulio Cesare, il *ius pontificium* sarebbe stata materia propria dei pontefici, da essi gelosamente custodita, mentre soltanto in età augustea i giuristi laici avrebbero cominciato ad occuparsene (in particolare, Labeone e Capitone, per essere poi seguiti da Sabino), affermazione invero un po' stridente rispetto all'insegnamento del *ius pontificium* da parte di Servio.

L'*adrogatio* sarebbe uno dei più antichi atti giuridici della società romana, sorto con la stessa formazione del comizio curiato, coevo alla più antica struttura della neo nata *civitas*. L'A. ne situa perciò la genesi nel corso del VII secolo a.C. Ella riprende la teoria (fra gli altri, di Albanese), basata su *N.A.* 15. 27. 3, per cui il testamento, *calatis comitiis*, avveniva al contrario *in contione*. Vale a dire in un'assemblea informale del popolo, non ordinato né irreggimentato nelle curie, perché esso non doveva esprimere alcun parere in ordine all'atto che avveniva davanti a sé (il negozio testamentario).

Nel lungo capitolo sul procedimento che regolava l'*adrogatio*, l'A. espone la tesi conduttrice di fondo del lavoro.

Nata con l'origine della *civitas*, quando era assente ogni distinzione fra *ius publicum* e *ius privatum* – nemmeno concettualizzati –, l'*adrogatio* aveva un rilievo eminentemente politico, come prova il fatto che essa poteva concludersi nonostante un sopravvenuto contrario dissenso fra i due partecipanti all'atto, se essa fosse stata ciò non di meno approvata dalle curie. Le sue radici vanno ricercate nei rapporti gentilizi, nell'ambito delle famiglie che assicuravano la guida della comunità, e negli spostamenti degli equilibri che si sarebbero creati con l'estinzione di una famiglia e la sua inclusione-sottoposizione ad un'altra, quali che fossero i motivi concreti che portassero a ciò. Già prima della fine dell'epoca repubblicana, tuttavia, l'ordinamento curiato ha perso gran parte di importanza – come quello gentilizio, del resto –, tanto che sul finire dell'evo repubblicano molti cittadini nemmeno sanno a quale curia appartengono, sostituiti come sono, nell'assemblea, dai trenta littori che le rappresentano. Se pertanto in età monarchica e in buona parte di quella repubblicana il controllo pubblico, della comunità, costituiva un efficace freno contro l'abuso dell'*adrogatio*,

persosi quest'ultimo furono non i giuristi laici bensì i pontefici ad elaborare criteri volti a prevenire usi impropri dell'*adrogatio*. *Adrogatio* che, sul finire dell'età repubblicana, si presenta, piuttosto che quale strumento politico dei rapporti interni alla classe dirigente, come mezzo per assicurare un erede, con tutto quello che ciò implicava nella società romana, a *patres familias* anziani e senza discendenti in potestà. L'idea fondamentale dell'A. è tuttavia quella che tali criteri giurisprudenziali, in quanto provenienti dai pontefici, facessero parte di un diverso sistema giuridico – quello del *ius pontificium* – non integrato nel *ius civile*, autonomo da esso, ragione per cui un'*adrogatio* approvata dalle curie fosse in ogni caso civilisticamente valida, anche se violava i criteri escogitati (a partire dalla seconda metà del II sec. a.C.?) dai pontefici per prevenire abusi (*in primis* quello, noto, di frodare i creditori dell'arrogato). Pontefici che avrebbero emesso un parere, obbligatorio ma non vincolante, in merito all'*adrogatio* proposta alle curie. Fra questi criteri, la Studiosa ne ricorda per ora due: il giuramento dell'arrogante di non *adrogare* allo scopo di insidiare i beni dell'arrogato (piuttosto che di assicurarsi un erede, data l'età ormai avanzata), introdotto non a caso da Quinto Mucio, che fu anche pontefice massimo; il discusso istituto della *detestatio sacrorum*, che l'A. non limita all'*adrogatio* – visto che altrimenti non si spiegherebbe la stesura di un'opera apposita in tema da parte di Servio Sulpicio Rufo –, ma che, nell'atto oggetto dello studio, realizzava la rinuncia ai *sacra* da parte dell'arrogato. Con l'*adrogatio*, infatti, i *sacra* della famiglia dell'arrogato non si estinguevano, bensì si trasferivano alla famiglia dell'arrogante. Ma, qualora l'arrogato avesse fratelli parimenti *sui iuris*, costoro avrebbero assicurato la continuità dei *sacra* familiari. Cosicché si doveva evitare una *perturbatio* dei *sacra*, da non fare venerare da due famiglie diverse: a ciò provvedeva la rinuncia ai propri *sacra* da parte dell'arrogato, non già effetto naturale dell'atto, bensì dichiarazione da inserire quando i *sacra* fossero in capo ad altri familiari, onde evitarne il trapasso all'arrogante. Claudio Pulcro (Clodio) non emise tale rinuncia, avendo invece due fratelli che assicuravano i *sacra* della nobilissima famiglia, altro motivo addotto da Cicerone per contestare la contrarietà al *fas* dell'*adrogatio*, con conseguente rifrazione sulla *transitio ad plebem* (essendo stato arrogato da un *pater familias* plebeo), sull'elezione a tribuno della plebe e sui conseguenti atti quale tribuno, fra essi inclusa la consacrazione della casa di Cicerone.

In età imperiale, segnatamente durante i primi due secoli, la riduzione dei comizi curiati a vuoto simulacro e la scomparsa non soltanto dell'ordinamento gentilizio, ma anche dall'agone pubblico delle grandi famiglie aristocratiche repubblicane, completano la definitiva trasformazione dell'*adrogatio* in atto privatistico, privo degli elementi pubblicistico-legislativi dell'età monarchica e repubblicana, già *in nuce* nella prima metà del I sec. a.C. Lo scopo non è più quello del cambiamento nell'assetto familiare fra i ceti dirigenti, ma di costituire la *patria potestas* a fini ereditari, dal che sorgono questioni sulle persone da ammettere all'atto, precedentemente impensabili, dal momento che parti dell'atto potevano essere unicamente *patres familias* facenti parte delle curie, dunque con età minima di 17 anni.

Prima tuttavia di occuparsi ampiamente di tali soggetti, la Studiosa imposta le delicate questioni che l'*adrogatio* presenta per l'epoca imperiale. Dunque nota *in primis* come il collegio pontificale venga ora presieduto dal *Princeps*, come pontefice massimo, e che, a partire da Adriano, la burocratizzazione degli uffici coinvolge pure il collegio, sostanzialmente facente parte del *consilium principis*. In seconda battuta l'A. segue il concomitante procedimento di genesi, nel II secolo, dell'*adrogatio* tramite rescritto del *Princeps*, che Ella riconduce principalmente alla scomparsa definitiva del comizio curiato e all'estensione della cittadinanza, fino a giungere a quella generale del 212. Se in precedenza, allora, all'*adrogatio* fra *cives Romani* residenti negli enti territoriali costituiti dai municipi e delle colonie si poteva giungere con delibera dell'assemblea popolare *in loco*, e nelle province tramite decreto del governatore, con la diffusione universale della *civitas Romana* e la sparizione irreversibile delle curie, la richiesta di rescritto imperiale autorizzativo dell'*adrogatio*, non legata ad un ambito territoriale particolare, potrà sostituire le precedenti competenze territoriali.

Non è tuttavia alla tarda *adrogatio* per rescritto dedicata la monografia della Studiosa, bensì a quella di epoca classica (I e II secolo), ragione per cui si trova di fronte alla necessità di risolvere il conflitto fra *ius civile* e *ius pontificium* in questo periodo, dopo che per l'età tardo-repubblicana Ella ha sostenuto l'autonomia dei due ordinamenti, con sovraordinazione tuttavia del primo (*ius civile*) rispetto al secondo (*ius pontificium*), affermata la civilizzazione dell'atto, persisi i suoi elementi pubblicistici di natura legislativa.

L'approfondimento di tale complesso aspetto è condotto dall'Autrice occupandosi di categorie particolari di soggetti coinvolti nell'*adrogatio* classica (capitoli 4-7), dell'età dei partecipanti all'atto, in cui si riflette lo sviluppo dell'*adrogatio* dall'età repubblicana a quella del Principato (capitolo 8), e infine della capacità di generare dell'arrogante (capitolo 9).

L'*adrogatio* del liberto non pone alcun problema se effettuata dal suo patrono, mentre crea difficoltà quando sia compiuta da un terzo senza il consenso del patrono: come disciplinare il conflitto fra i diritti di patronato e il diritto dell'arrogante? L'Autrice se ne occupa distinguendo l'aspetto pubblicistico da quello privatistico. Sotto il primo profilo, occorre chiedersi se l'acquisto della condizione di ingenuo da parte del liberto arrogato – quale *filius familias* dell'arrogante – si riverberi su un'acquisita capacità di diritto pubblico (di aspirare a magistrature e sacerdozi), questione che in teoria dovrebbe porsi anche nell'evenienza dell'*adrogatio* da parte del patrono stesso, o con il consenso di quest'ultimo. La risposta che la Studiosa rinviene nelle fonti (almeno per l'ipotesi di *adrogatio per obreptionem*, senza cioè il consenso del patrono e normalmente all'insaputa di quest'ultimo) è che l'arrogato acquisisse lo *status* di ingenuo, senza che tuttavia ciò si riverberasse positivamente sulle prerogative pubblicistiche degli *iura ingenuitatis*. Per quel che concerne invece il profilo privatistico, l'A. sostiene che l'*adrogatio per obreptionem* sarebbe stata civilisticamente valida ed efficace, ma contraria al *ius pontificium*, alle direttive pontificali (i pontefici avrebbero pertanto espresso parere contrario all'atto) o, come Ella scrive contemporaneamente, a quelle della cancelleria imperiale. A livello di tutela del patrono, ciò si sarebbe tradotto, se non sbaglio, nella perdita dei diritti di natura non patrimoniale inerenti al patronato, mentre quelli patrimoniali – segnatamente la metà del patrimonio ereditario del liberto – sarebbero stati assicurati dal pretore con una *bonorum possessio contra tabulas*, *rescissa capitis deminutione* (con *restitutio in integrum*: *bonorum possessio sine tabulis*, in caso di mancanza di testamento?).

Anche l'*adrogatio* delle donne, attiva e passiva, presenta una situazione giuridica problematica. Non tanto per l'*adrogatio* attiva, bensì per quella passiva. L'incapacità di accedere alla *patria potestas*, ancor prima di fare parte delle curie, esclude in radice qualunque possibilità di *adrogare* taluno da parte delle donne, sebbene il problema fosse stato se non altro preso in considerazione – seppure per respingerlo – dai giuristi del II secolo (mentre in precedenza l'incapacità pubblicistica non faceva nemmeno porre la questione). Diverso invece il caso quando voglia essere *adrogata* una donna *sui iuris* (per quella *alieni iuris* si passa ovviamente nel diverso campo dell'*adoptio*). Qui, osserva l'Autrice, persiste il problema dell'incapacità femminile di fare parte delle curie, la quale non consente di eseguire l'atto (almeno a Roma). Tuttavia, la decadenza delle curie, ridotte a vuoto simulacro, fa sì che nel I secolo d.C. i giuristi si pongano il problema dell'ammissibilità dell'*adrogatio* di una donna, la quale, fiorente l'ordinamento curiale, sarebbe stata semplicemente inconcepibile. Persistendo tuttavia, quanto meno a Roma (l'ambito spaziale di applicazione del diritto romano privilegiato pressoché esclusivamente nell'indagine dei giuristi classici del I secolo), la procedura comiziale dell'*adrogatio*, è inevitabile che all'ammissione dell'arrogazione passiva delle donna si potrà giungere soltanto tramite rescritto imperiale (di Antonino Pio), che instaura il relativo procedimento, a superare la necessità della procedura comiziale.

I giovani *patres familias*, usando un'espressione volutamente atecnica idonea ad abbracciare gli impuberi, i puberi minori di diciassette anni – come tale non ammessi alle curie – e chi aveva sì compiuto diciassette anni, ma ne aveva meno di venticinque, costituiscono un altro banco di prova della tesi di fondo della Studiosa.

Aulo Gellio, che tramanda il regime maggiormente antico, dà conto di come non si potesse essere arrogati prima di 17 anni, prima di indossare cioè la *toga virilis* ed entrare così a fare parte delle curie. Un'arrogazione di un *pater familias* minore di 17 anni, come tale non membro delle curie, sarebbe stata inconcepibile in epoca repubblicana. Scomparso l'ordinamento curiato, ridotto al mero simulacro dei trenta littori, tramite l'opera del collegio pontificale, agli esordi del Principato, si ammise che la *lex curiata* potesse riguardare anche i puberi, maggiori di tredici anni ma minori di diciassette, i quali potevano perciò partecipare al procedimento, visto che le curie erano meramente rappresentate da trenta littori. Il che dimostra ancora una volta la privatizzazione dell'atto, che perde la sua natura legislativa pubblica. Al tempo stesso si pone allora il problema dei soggetti puberi, ma non sufficientemente maturi, vale a dire dei minori di 25 anni. A tale proposito sotto Claudio, dunque poco prima della metà del I secolo, si richiede il consenso all'atto del curatore del minore di venticinque anni, il che indica secondo l'A. un mutamento della prassi pontificale, senz'altro orientata dal *Princeps* stesso, quale pontefice massimo. In difetto di tale consenso dovrebbero operare i rimedi pretori per la mancata assistenza del curatore all'atto, a riprova della civilizzazione dell'*adrogatio*. Rimedi, a favore dei creditori del *pater familias* minore di 25 anni arrogato, a loro disposizione pure nell'ipotesi di *adrogationes* mosse da intento fraudolento ai loro danni (come reciprocamente secondo Ulpiano si sarebbe dovuto ascoltare, ai fini della concessione della *restitutio*, il minore arrogato che affermasse di essere stato raggirato, senza che il curatore avesse partecipato all'atto). Analogamente, è testimoniato il divieto del curatore (ma anche del tutore stesso) di arrogare il minore, onde dovere evitare di rendere il conto, e anche in tal caso dovrebbe operare la *restitutio in integrum* per annullare gli effetti dell'atto. Appunto la menzione del tutore consente di dire dell'*adrogatio* del pupillo, inconcepibile vigente l'ordinamento curiato. Venuto meno quest'ultimo, ammessa la partecipazione all'atto del *pater familias* maggiore d'età ma non ancora diciassettenne all'inizio del Principato, i giuristi classici discutono circa l'ammissibilità dell'*adrogatio* del pupillo. La ricostruzione del pensiero giurisprudenziale elaborata dall'Autrice mi è risultata alquanto impervia, e spero pertanto di non fraintenderLa: se ho ben capito, alcuni avrebbero sostenuto l'inammissibilità di una simile *adrogatio* perché il tutore non avrebbe potuto validamente esprimere il consenso a un simile atto (non potendo partecipare alla procedura soggetti diversi dagli interessati, quale atto personalissimo?) e perché in tal modo si sarebbe estinta la tutela, facendo venire meno le aspettative successorie del tutore. Altri l'avrebbero invece riconosciuta, quanto meno con il consenso del tutore (si rammenti l'analogo consenso prestato dal curatore del minore di 25 anni a partire dal Principato di Claudio). La questione fu risolta da un'epistola di Antonino Pio ai pontefici, con la quale si ammise, a certe condizioni, l'*adrogatio* del pupillo. L'enucleazione di tali requisiti, della giusta causa di cui parla in proposito Gai. 1.102, mi è risultata anch'essa di ardua comprensione. Vi era per l'appunto l'esigenza di contemperare un'eventuale volontà di terzi e del pupillo in tal senso con l'interesse del tutore di non vedere estinta la tutela, che nasce come noto per tutelare le aspettative successorie del *tutor legitimus*, agnato del pupillo. Se ho ben inteso, qui sarebbe dato riscontrare un dissenso fra Gaio e Ulpiano. Il primo riteneva tali requisiti, da verificare in concreto, come elementi di una fattispecie integralmente civilistica, con relativi rimedi in caso di mancanza degli stessi (la Studiosa nota infatti che la procedura si sarebbe comunque svolta davanti alle curie, non perciò per rescritto del Principe, steso in concreto dai pontefici inseriti nella cancelleria imperiale). Ulpiano, invece, manteneva ferma la distinzione fra i due ordinamenti giuridici, di *ius civile* e *ius sacrum* (il *ius pontificium*), ascrivendo a questi ultimi i fattori integrativi della giusta causa secondo l'*epistula* ai pontefici di Antonino Pio. L'*adrogatio* davanti alle curie che non ne avesse rispettato i requisiti sarebbe stata pertanto ciò nonostante civilisticamente efficace, producendo la *capitis deminutio* del pupillo, e a quel punto si sarebbe semmai trattato di tutelare tutore ed eventuali creditori in via pretoria con la *restitutio in integrum*. Se poi ho rettamente capito, l'A. applica il divieto per il tutore di arrogare il tutelato tràdito da Ulp. 26 *ad Sab*. D. 1. 7. 17 pr. alle altre forme di tutela, non a quella del pupillo, ragione per cui il tutore avrebbe potuto arrogare quest'ultimo. Riguardo all'*adrogatio* del pupillo, infine, si registra una prima significativa convergenza fra *adoptio* e *adrogatio*, la prima intesa come adozione del minore *alieni iuris*, la seconda quale quella del minore *sui iuris*.

La riflessione sull'età dei partecipanti all'atto doveva essere stata suggerita dalla contrarietà al *fas* asserita da Cicerone in un caso, che lo vedeva indirettamente coinvolto, in cui un soggetto aveva arrogato un altro più vecchio di lui: il riferimento corre – è ovvio – all'*adrogatio* da parte di Fonteio del suo patrono Claudio (Clodio), più anziano di lui di tredici anni (Fonteio aveva vent'anni;

Claudio trentatré). Ad avviso della Studiosa era la prima volta che ricorreva una simile evenienza, dal momento che anteriormente si dava per scontato che l'arrogante fosse più avanti in età dell'arrogato. La contrarietà al *fas* impugnata davanti ai pontefici dall'ex console mostra che il requisito in esame doveva essere ascritto al *ius sacrum*, al *ius pontificium*, non a quello civile. Di per sé, infatti, il procedimento davanti alle curie si riteneva pago dell'appartenenza all'ordinamento curiato dei due membri, senza che rilevasse la maggiore età dell'*adrogans* rispetto all'*adrogatus*. Svanita ancora una volta durante il Principato la natura pubblicistica dell'*adrogatio*, lo sviluppo di criteri giurisprudenziali in merito all'età dei partecipanti all'atto va collocata nella riflessione sul *ius pontificium*. Per vero quella sull'età minima dell'arrogante, che doveva avere superato i 60 anni (mentre in precedenza non doveva avere passato quest'età, in quanto altrimenti non avrebbe più fatto parte delle curie, verrebbe da dire), sarebbe stata generata dalla legislazione augustea, onde evitare la frode alla stessa procedendo entro i 60 anni all'*adrogatio* di uno o più soggetti – il divieto di *adrogatio* di più soggetti, salvo giusta causa, sorse anch'esso nell'ambito del *ius sacrum*, sconosciuto il limite in età repubblicana –, così aggirando le incapacità di succedere sancite a carico di chi non aveva figli entro i 60 anni. Nell'ambito dei criteri sorti nella prassi pontificale, invece, sarebbe sorto quello – che alligna nel diritto vigente – per cui l'arrogante doveva avere almeno diciotto anni in più dell'arrogato. A parte allora l'illiceità, per frode alla *lex Iulia et Papia*, dell'*adrogatio* da parte di un soggetto di età non superiore a sessant'anni – sussistendo tutti gli altri requisiti esigiti dalla legge augustea perché scattasse la sanzione (in particolare, l'assenza di discendenti propri) –, l'ulteriore requisito dell'intervallo di almeno diciott'anni fra arrogante e arrogato nacque nella prassi pontificale. In genere, il requisito dell'età dei partecipanti non inficia, ancora una volta, la validità civilistica dell'atto, almeno per Ulpiano – che lo indica semplicemente quale criterio ordinatore, direttiva da seguire nella prassi –, mentre Gaio mostra un pensiero differente, il quale, facendo uso delle categorie deontiche (*posse-non posse*), ingloba il requisito dell'età nei presupposti civilistici dell'atto, a pena di nullità dello stesso, è allora d'uopo concludere.

La *rogatio* legislativa presentata ai comizi curiati prevedeva una finzione, che l'arrogato fosse da considerare figlio naturale dell'arrogante nato dall'unione di quest'ultimo con la consorte, ragione per cui l'ordinamento repubblicano non contemplava la possibilità di *adrogare* da parte dei celibi e di chi era affetto da *impotentia generandi*. Ciò si giustifica con lo scopo originario dell'*adrogatio*, atto politico disciplinante i mutamenti di famiglia nell'ambito del ceto egemone, mentre, svanito l'ordinamento curiato e divenuto assorbente, già sul finire dell'età repubblicana, lo scopo di assicurare un erede ad una persona anziana senza discendenti, il diritto pontificale esprimerà ancora una volta un principio confliggente con il *ius civile*, tale per cui si ammetterà ad arrogare i celibi e le persone affette da *impotentia generandi*, se ho ben capito anche davanti allo stesso comizio curiato, una volta che la formula della *rogatio* era approvata da trenta littori invece che dal popolo ordinato in curie.

Scopo originario dell'*adrogatio* era allora, come ripetutamente detto, il mutamento di famiglia all'interno del gruppo dirigente, effettuato sotto il controllo popolare, dunque pubblico, mentre a partire dalla crisi della Repubblica esso persegue un obiettivo più prettamente individuale, perciò privatistico – al che corrisponde la sua inclusione nel *ius civile* –, consistente nella costituzione della patria potestà a favore di un soggetto idoneo, in quanto *sui iuris*, ma che non la esercitava per mancanza di un sottoposto. Costituzione non ovviamente fine a se stessa, ma volta ad assicurare un erede all'arrogante. L'atto tenderà ad avvicinarsi sempre più all'adozione di un *alieni iuris*, e a soddisfare le medesime esigenze individuali, venendo entrambi informati ai princìpi naturali della generazione (*adopio natura imitatur*), che rendono inconcepibile che l'adottando (arrogando) sia più anziano dell'adottante (arrogante).

4. Il libro qui recensito si lascia apprezzare quanto a forma, sostanza (contenuto) e metodo.

La forma è quella ricercata che deve connotare una trattazione scientifica. L'A. fa uso di tempi verbali raramente impiegati nella lingua tedesca (anche nello stesso linguaggio scritto), impiega all'occorrenza lemmi ricercati, utilizza sinonimi, usa spessissimo porre alla fine del periodo il prefisso di un verbo composto. Ella non concede insomma nulla al fastidioso gergo giornalistico-comune che ammorba non poche ricerche giuridiche e giusromanistiche (quanto meno italiane), e che viene talora ammantato da una malintesa volontà democratica di rendere la cultura accessibile a tutti. Volontà che si comprende nell'ottica di quanti scambiano il diritto romano per una disciplina puramente storica, la quale potrebbe perciò essere propagata al grande pubblico, quale storia generale, nella forma pertanto di un linguaggio divulgativo.

Dal punto di vista del contenuto, felicemente riuscita è la dimostrazione della privatizzazione dell'*adrogatio* fra I sec. a.C e II d.C., della sua perdita degli elementi pubblicistici per rientrare nel dominio del *ius civile*. L'A. è riuscita ad agganciare l'istituto giuridico ai mutamenti della società in cui esso prendeva forma per soddisfare esigenze dei consociati, e ha dimostrato altresì convincentemente la diversità fra lo scopo dell'*adrogatio* classica rispetto all'arcaica e preclassica (se vogliamo intendere così quella anteriore al I sec. a.C., ma la Studiosa offre una partizione diversa, più tradizionale, che fa rientrare nel diritto preclassico anche quello augusteo). Equilibrata, ferace e condivisibile la lettura delle fonti proposta in tal senso dalla giovane romanista tedesca nella sua monografia d'esordio.

Soprattutto nel metodo risiede a mio giudizio il pregio principale dell'opera. La Seelentag imbastisce un discorso su un istituto al confine fra *ius publicum*, *ius privatum* e *ius sacrum*, attento alle interazioni fra essi e alle mutevoli forme dell'*adrogatio* fra I sec. a.C. e II d.C., senza nulla concedere all'irritante descrittivismo in cui non pochi al suo posto sarebbero caduti, spesso tentando di nascondere la loro incapacità di problematizzare con l'asserita esigenza di non calare sovrastrutture sulla fonte antica, che dovrebbe parlare da sé. A quel punto, verrebbe da dire, lo stesso interprete odierno si rivelerebbe una sovrastruttura (perché tale è) rispetto alla fonte antica. Si condividano o meno i Suoi risultati, l'A. studia le fonti in materia con continuo approccio critico e onnipresente capacità costruttiva.

5. Ciò non toglie, naturalmente, che, ad un giudizio soggettivo, dunque del recensore, la stessa monografia della Seelentag presenti punti deboli, aspetti che avrebbero potuto essere emendati, proprio in quanto a forma, sostanza (contenuto) e metodo.

Per quanto riguarda i lati deboli della forma, va detto che la Studiosa incorre in un rischio dietro l'angolo quando, come doveroso, non si adotti un linguaggio comune, o peggio ancora colloquiale. Esso consiste cioè in una sintassi a volte – francamente non di rado – piuttosto involuta. Già la sintassi tedesca è complicata per coloro la cui lingua madre non sia quella di Goethe, ma l'Autrice a volte esagera nel complicarla, anche in snodi essenziali della trattazione. Basti confrontare come Ella espone un pensiero importante nell'economia del lavoro, visto che ivi dichiara l'obiettivo dell'indagine: „Ziel del vorliegenden Arbeit ist die Überprüfung der These, daß sich einige der von der Forschung bisher nicht zufriedenstellend gelösten Probleme des Arrogationstatbestandes im Recht der klassischen Zeit klären lassen, indem man die im römischen Recht einzigartige Struktur der Arrogation in den Vordergrund der Betrachtung stellt" (39). A tale proposito il recensore muove un appunto che vuole essere in primo luogo una critica a se stesso, il quale consiste nella necessità di ricordare il carattere europeo e se si vuole internazionale della nostra disciplina, il che porta auspicabilmente ad essere letti non soltanto da coloro la cui lingua madre sia quella in cui è vergata la ricerca. Se così è, o dovrebbe essere, è impellente la necessità di non propinare al lettore non lingua madre – e, va riconosciuto, che non abbia una conoscenza passiva ottimale della lingua di Goethe – uno stile caratterizzato da una sintassi troppo complessa e che affatica eccessivamente la lettura. Ciò *a fortiori* per il respiro consapevolmente europeo assunto dalla collana che la monografia qui recensita inaugura. In generale, poi, la ricerca avrebbe potuto, da un lato, giovarsi di un'esposizione maggiormente sintetica, dall'altro, avere una più accattivante impaginazione da parte dell'Autrice. Intendo dire che la Seelentag non usa quasi mai andare a capo, bensì esporre tutto di seguito il suo pensiero. La qualità del lavoro sarebbe però uscita rinsaldata da più frequenti stacchi nel testo, i quali avrebbero consentito di valorizzare meglio il pensiero della Studiosa, permettendo al lettore, specie non madre lingua, di, se si consente l'espressione, „tirare il fiato". Una maggiore sintesi sarebbe stata poi desiderabile, perché in certi punti l'A. riprende pensieri già varie volte espressi e perché a volte il lettore è in grado di prevedere già almeno cinque pagine prima il punto a cui la ricercatrice vorrà approdare. Per curiosità, poi, detto di come Ella denomini volutamente le Istituzioni gaiane e il *liber singularis regularum* per lei pseudo-ulpianeo quali „Schulschriften", avrebbe talora potuto fare uso di sinonimi per indicarli, evitando di ricorrere sempre alla monocorde espressione „beide Schulschriften".

Riguardo al contenuto, devo confessare che l'impostazione e la soluzione dei rapporti fra *ius civile* e *ius pontificium* data dall'A. non è riuscita a convincermi, pur riconoscendo l'acutezza con cui Ella la presenta alla comunità scientifica. Sono certo che la Studiosa giudicherà le mie, critiche convenzionali, di chi non ha il coraggio di dare interpretazioni più audaci e creative delle fonti in materia, ma faccio fatica a ravvisare nelle denunzie – sul punto interessate – di Cicerone una contrarietà al solo *ius pontificium* (quale espressamente attestata dall'ex console), ferma tuttavia la validità civilistica. Proprio per la *coniunctio* del *ius pontificium* con il *ius civile* valorizzata dalla Studiosa di Colonia, mi risulta arduo supporre che essi corressero su binari paralleli, volti a non incrociarsi mai. Peraltro l'Autrice non può trascurare la possibilità di annullare, o comunque considerare *tamquam non essent*, le *rogationes* contrarie al *ius* e al *fas*, introdotta sul finire dell'epoca repubblicana. Assunta condivisibilmente la natura pubblicistica dell'*adrogatio*, non si vede perché tale *lex*, in concreto quella relativa a Claudio (Clodio) non avrebbe potuto essere annullata o, *rectius*, mutato ora il vento politico, Cicerone non possa quanto meno ricordare la possibilità per il Senato di annullare la *lex* o di considerarla inesistente. Qualche dubbio che il discorso sia fatto incidentalmente, e retoricamente, perché, per tutt'altri motivi, l'ex console si trova davanti al collegio pontificale, continua a restare. Anche per i primi due secoli dell'Impero, ci si aspetterebbe che la piena privatizzazione porti a una completa regolamentazione *iure civili*, tralasciando i supposti di elementi di *ius sacrum*, i quali, si badi, non avrebbero nemmeno condizionato l'efficacia civilistica dell'atto. Lo stesso Gaio, come l'Autrice riconosce, mostra una concezione diversa, assata su una piena civilizzazione. La Studiosa ha ragione a ricordare il ruolo del collegio pontificale nel procedimento comiziale e l'obbligatorio parere che esso doveva rilasciare, così come la veste di pontefice massimo del Principe e il fatto che l'*epistula* sull'*adrogatio* dei pupilli sia indirizzata al collegio pontificale. Tuttavia mi domando se la completa burocratizzazione del collegio da Lei stessa ricordata non dovrebbe portare a una piena ricomprensione dei supposti elementi sacrali nel *ius civile*. Ancora, se viene introdotta una novità totale in materia di *adrogatio* – quale la possibilità di *adrogare*, ricorrendo uno giusta causa, i pupilli –, ad opera del *Princeps*, non sarebbe allora più consentaneo qualificare tale novità come profilo di *ius novum*, o, ricomprese nel II secolo le costituzioni imperiali nel novero delle fonti di *ius civile*, quale relativo aspetto? In quest'ultimo modo si supererebbe l'agevole obiezione che non avrebbe potuto certo essere il comizio curiato ad applicare il *ius novum* (quale tuttavia avrebbero potuto applicare le autorità imperiali mandate ad esercitare la giurisdizione nelle autonomie locali romane e il governatore provinciale, anche delle stesse province senatorie [non essendo egli tenuto ad applicare il processo legittimo]). Residua in altri termini la sensazione di interventi imperiali sul *ius civile*, che non integrano perciò elementi di *ius sacrum*. Nei criteri concernenti, infine, l'età dei partecipanti all'atto, affascina ma è piuttosto fragile l'argomento dell'A., secondo il quale Gaio (1.106), usando il verbo *posse*, alluderebbe a una disciplina civilistica improntata al permesso-divieto, mentre Ulpiano (26 *ad Sab*. D. 1. 7. 15.3), impiegando *debere*, indicherebbe direttive che dovrebbero guidare l'obbligatoria valutazione pontificale. A tale proposito vorrei inoltre osservare che la formula della *rogatio* comiziale rimanda ad una generazione naturale, al quale la legge dovrebbe conformarsi. Se così è, questo farebbe sorgere parecchi dubbi circa l'impianto complessivo degli elementi non pubblicistici ravvisati dalla Studiosa e farebbe anzi sorgere il dubbio che l'*adrogatio* comiziale repubblicana di un *pater familias* di età maggiore rispetto all'arrogante fosse invalida, nonostante qualunque approvazione collettiva della proposta. Dunque che l'*adrogatio* di Claudio (Clodio) fosse nulla *iure civili*.

Dal punto di vista metodologico, infine, l'A. ricorre talora all'esposizione compiuta nel testo delle opinioni in campo sull'argomento trattato, ma spesso le confina in nota, descrivendo nel corpo dell'indagine solamente il suo pensiero. Nell'ottica del recensore, ricordando altresì la chiusa della premessa dei curatori, sarebbe stato invece preferibile un dialogo più continuo e serrato con le varie opinioni degli Studiosi che, non a carattere monografico, si sono occupati dei punti trattati dalla Seelentag.

6. Le osservazioni di cui sopra (punto 5) non intendono togliere nulla al valore della ricerca di Anna Seelentag, bensì unicamente segnalare aspetti della stessa che, secondo la sensibilità giuridica del recensore, potrebbero essere forieri di un rinnovato dibattito dottrinale.

Resta fermo che la monografia della Studiosa di Colonia-Francoforte costituirà il punto fermo di qualunque futura ricerca sull'*adrogatio* nel diritto romano e che essa rappresenta uno studio circa i rapporti fra *ius pontificium* e *ius civile* con il quale qualsiasi indagine a venire in materia dovrà seriamente confrontarsi.

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Die Publikationen der Liechtensteinisch-Tschechischen Historikerkommission

Am 8. September 2009 haben das Fürstentum Liechtenstein und die Tschechische Republik diplomatische Beziehungen aufgenommen, die seit den tschechoslowakischen Konfiskationen von 1945 blockiert gewesen waren. Nachfolgend am 7. April 2010 setzten beide Regierungen eine Historikerkommission mit dem Auftrag ein, die Geschichte der gegenseitigen Beziehungen zu untersuchen. Die paritätische Historikerkommission[1] konstituierte sich im Dezember 2010 in Wien und führte 2011 bis 2013 elf Arbeitssitzungen und vier wissenschaftliche Tagungen[2] durch, ebenso initiierte sie zehn Forschungsaufträge. Zusammen wurden über 60 Vorträge gehalten, nicht nur von Mitgliedern der Historikerkommission, sondern auch von zahlreichen eingeladenen Fachleuten aus verschiedenen Wissenschaftsgebieten.

Die Historikerkommission hat (in deutscher und in tschechischer Mutation) vier Tagungsbänden, drei Forschungsbände mit zusammen sechs Forschungsarbeiten und den abschließenden Synthesebericht publiziert.

Alle deutschsprachigen Publikationen wurden im Verlag des Historischen Vereins für das Fürstentum Liechtenstein veröffentlicht und seit dem 30. Mai 2015 sind sie online zugänglich (zwar bei den Online-Publikationen der Liechtensteinischen Landesbibliothek unter www.eliechtensteinensia.li).

Viele Beiträge sind auch für die Rechtshistoriker vom Interesse (z. B. über Bodenreformen und Konfiskationen), vor allem das Tagungsband *Das Fürstenhaus, der Staat Liechtenstein und die Tschechoslowakei im 20. Jahrhundert* (2013).

Ondřej Horák*

[1] Für Liechtenstein: Dr. Peter Geiger als Co-Vorsitzender, Historiker (Schaan); Prof. Dr. Catherine Horel, Historikerin (Paris); Dr. Johann Kräftner, Direktor der Fürstlichen Sammlungen (Vaduz-Wien); Prof. Dr. Historiker (Wien). Für die Tschechische Republik: Prof. Dr. Tomáš Knoz als Co-Vorsitzender, Historiker (Brno), Dr. Eliška Fučíková, Kunsthistorikerin (Praha); Prof. Dr. Jan Županič, Historiker (Praha); Dr. Marek Vařeka, Historiker (Hodonín), bis Juni 2012, nachdem Dr. Ondřej Horák, Rechtshistoriker (Olomouc).

[2] 1. Tagung (Wranau bei Brünn, November 2011): *Liechtensteinische Erinnerungsorte in den böhmischen Ländern*; 2. Tagung (Wien, Juni 2012): *Die Liechtenstein: Kontinuitäten - Diskontinuitäten*; 3. Tagung (Brünn, Dezember 2012): *Die Liechtenstein und Kunst*; 4. Tagung (Prag, April 2013): *Das Fürstenhaus, der Staat Liechtenstein und die Tschechoslowakei im 20. Jahrhundert.*

* JUDr. Mgr. Ondřej Horák, Ph.D., Lehrstuhl für Rechtstheorie und Rechtsgeschichte, Juristische Fakultät, Palacký Universität, Olomouc, Tschechien.

János Zlinszky †

Jeder ungarische Rechtshistoriker wurde durch den Heimgang von János Zlinszky, der am 18. Juni 2015, in seinem 88. Lebensjahr erfolgte, sehr schwer betroffen. Einer der Altmeister der ungarischen Rechtsgeschichte und Romanistik ging von uns und ließ dadurch eine unersetzliche Leere in dem Herzen vieler seiner Kollegen, Schüler und Anhänger.

Prof. Dr. János Zlinszky wurde am 7. Marz 1928 in Budapest geboren. Sein Abitur legte er am Gymnasium der Piaristen in Budapest ab. Nach einjährigem Medizinstudium, immatrikulierte er sich an der juristischen Fakultät der Universität in Budapest. Da er sein Studium aus politischen Gründen nicht rechtzeitig abschließen konnte, erwarb er den juristischen Doktortitel erst im Jahre 1957.

Zwischen 1957 und 1968 arbeitete er als Rechtskonsulent verschiedener staatlicher Unternehmungen. Im Jahre 1961-62 legte er die Anwaltsprüfung ab. Ab 1968 arbeitete er als Rechtsanwalt in Dunaújváros. Später wurde er ins Präsidium der Anwaltskammer in Székesfehérvár gewählt. Im Herbst 1982 wurde er an die Staats- und Rechtswissenschaftliche Fakultät der Universität Miskolc berufen. Nach achtjähriger Tätigkeit als Dozent wurde er am 1. Juli 1990 zum Professor ernannt. Im Herbst 1989 wurde er zum Verfassungsrichter des damals gegründeten Verfassungsgerichts gewählt.

Während er seine Unterrichtstätigkeit an der Universität Miskolc weiterführte, begann er im Studienjahr 1994/95 – auf Ersuchen der ungarischen Bischofskonferenz – eine juristische Fakultät an der Péter Pázmány Katholischen Universität nach seinem eigenen Konzept zu organisieren. Er wurde Leiter des Instituts für Rechtsgeschichte, und war vom Mai 1995 bis Juni 2000 Dekan der Fakultät.

Zwischen 1992 und 1998 war er der ungarische Delegierte der Venedig-Kommission des Europarates. 1993 wurde er korrespondierender Mitglied der Österreichischen Akademie der Wissenschaften. Trotz seiner Emeritierung im Dezember 2002, bis zum Ende hielt er Kurse an der Universität.

Professor Zlinszky erfuhr mehrere Ehrungen und erhielt viele Auszeichnungen: er war Ehrendoktor der Universität Miskolc (2014). Er besaß unter anderem das Mittelkreuz mit dem Stern der Ungarischen Republik und war Komtur der Ritter des heiligen Gregor des Großen.

Wegen seines außergewöhnlichen und an Wendungen so reichen Lebens ist es schwierig, die vielen Wirkungsfelder von Professor Zlinszky als Wissenschaftler, Romanist, Rechtshistoriker, Verfassungsrichter und Lehrer zu würdigen.

Seine Beziehung zum römischen Recht geht auf das Jahr 1948 zurück. Als Jurastudent im dritten Semester stellte ihn der europaweit bekannte Professor des römischen Rechts Géza Marton als studentische Hilfskraft an und beauftragte ihn mit der Neukatalogisierung der Institutsbibliothek. Diese erste Berufung hatte bedeutende Folgen und bestimmte Zlinszkys ganzes Leben. Schon als Student begann er, sich mit den Quellen des römischen Rechts ernsthafter zu beschäftigen. Seine erste Arbeit war die kommentierte Übersetzung der Fragmente des XII-Tafelgesetzes, die sich auf lange Zeit bewehrte, denn im Jahre 1985, vierzig Jahre nach der Erstveröffentlichung, wurde das Werk wieder verlegt, und wird auch heute noch von den ungarischen Jurastudenten benutzt. Aus dieser Zeit datierte sich auch sein Interesse für die Fragen des archaischen Rechts von Rom und bildete den vielleicht wichtigsten römisch-rechtlichen Forschungsbereich von Zlinszky.

Die vielversprechende Akademiker-Laufbahn wurde aber im Jahre 1951 unterbrochen. Auch der 1957 erworbene Doktortitel bedeutete für János Zlinszky keineswegs, dass er nun in den Universitätsbetrieb und zur gewöhnlichen Forschung zurückkehren konnte. János Zlinszky blieb jedoch seinen Träumen auf seine Weise treu. Wenn auch nicht in Bibliotheken oder am Schreibtisch, so las er die Digesten--abschnitte, die zu seiner ersten größeren römischrechtlichen Arbeit (Die Frage der Verschollenheit im römischen Recht) führten, im Zug.

In den folgenden Jahren, nach einem ins Wasser gefallenen Humboldt-Stipendium, beschäftigte er sich, neben der tagtäglichen praktischen Arbeit, vor allem mit Fragen der Rezeption des römischen Rechts in Ungarn. Durch die dadurch erzielten Ergebnisse machte er sich vor allem im Ausland einen Namen. Das führte zur Einladung von Helmut Coing, die ungarischen Teile des Handbuchs der Quellen und Literatur der europäischen Privatrechtsgeschichte zu verfassen. Seine Vorträge und Abhandlungen bezüglich der ungarischen Privatrechtsgeschichte machte Schule. Auf diese Weise wurde er zu einem der bedeutendsten Rechtshistoriker des Landes, zwar ohne Lehrstuhl, aber sowohl im Ausland als auch im Inland anerkannt.

Seine alte Liebe zum römischen Recht erlosch aber nie. In den späten 80er-Jahren hatte er dann die Möglichkeit – am Lehrstuhl für Römisches Recht der Universität Miskolc – zu den Problemen des archaischen Rechts zurückzukehren. Durch die Hilfe der Professoren Kaser, Waldstein und Wieacker, sowie zahlreicher anderer Kollegen aus ganz Europa beflügelt, wollte er die „verlorenen“ drei Jahrzehnte aufholen. Seine Forschungsergebnisse wurden Schritt für Schritt veröffentlicht und seine Vorträge lösten rege Diskussionen aus. Nach seinen Thesen war Rom eine aus den heterogenen Bruchteilen der Nachbarvölker zustandegekommene künstliche Konstruktion. Eine Gemeinde, die von Anfang an als Staat, als rechtssetzender Staat organisiert war. Um diese These zu belegen, setzte er sich mit den Fragen der archaischen Eigentumsordnung und des Prozessrechtes auseinander. Daneben stellte er Thesen bezüglich der Ausbildung der

plebs Romana auf und lenkte dabei die Aufmerksamkeit auf die Rolle der *clientes regis*. Er wusste zu zeigen, dass seine Auffassung bezüglich der Entstehung Roms mit der der archaischen Familienordnung übereinstimmt.

Parallel zu diesen Arbeiten begann er das römische Strafrecht näher zu untersuchen. Die ungelösten-unlösbaren Fragen der Strafrechtsordnung und die strittigen Lösungen dieses Bereichs weckten sein Interesse. Er brachte das römische Strafrecht auf den Katheder, er las es jahrelang und schrieb ein Lehrbuch dazu. Mit diesem Lehrbuch löste er ziemlich rege Diskussionen aus und eröffnete auch ein neues Forschungsfeld für die Romanisten Ungarns. Er untersuchte einige strafrechtliche Fragen detaillierter und zeigte, dass das römische Recht auch im Bereich des Strafrechts der Lehrmeister der europäischen Rechtsordnungen gewesen sein konnte.

Nach dem Beispiel von Mommsen vernachlässigte Zlinszky auch die Fragen betrefflich des römischen Staatsrechts nicht. In seinen diesbezüglichen Arbeiten legte er einerseits dar, wie der römische Staat aufgebaut und organisiert wurde, andererseits wie sich diese Organisation entwickelte. Aber es wurde auch gezeigt, wie dieses System im täglichen Leben funktionierte. Zlinszky war der Überzeugung, dass der Ursprung mehrerer „genuiner" Institute des römischen Privatrechts im *ius publicum* zu suchen und zu finden ist. So fußten – seiner Meinung nach – die römische Vermögenskonzeption oder der Gedanke der juristischen Personen im öffentlichen Recht.

Wie erwähnt, schaffte Professor Zlinszky mit seinen rechtshistorischen Arbeiten, die sich mit der Rechtsentwicklung des neuzeitlichen Ungarns beschäftigen eine „Schule". Als berufener Vollender der Forschungskonzeption von György Bónis veröffentlichte er mehrere kleinere Arbeiten bezüglich der Entwicklung der ungarischen Rechtswissenschaft im Bereich des Zivil-, Straf- und Prozessrechts veröffentlicht. Als Kenner dieser Bereiche wirkte er beim Entstehen mehrerer Lehrbücher mit. Er wurde nimmer müde die europäischen Beziehungen der ungarischen Rechtsentwicklung vom ihren Anfängen bis zum 20. Jahrhundert zu betonen und zu belegen.

In den 90er Jahren hielten ihn die vielseitigen Aufgaben als Verfassungsrichter und dann als Gründungsdekan der Juristischen Fakultät der katholischen Universität in Budapest nicht von der wissenschaftlichen Tätigkeit zurück. Immer wieder neue Forschungsfelder gesellten sich zu den früheren Arbeitsgebieten. Die wissenschaftliche Begründung der ungarischen Rechtsstaatlichkeit und rechtsethischen Fragen faszinierten ihn ebenso, wie die Vorbereitung des neuen ungarischen Privatrechtsgesetzbuches und die Probleme der Hochschulpolitik. Er veröffentlichte neben 13 wissenschaftlichen Monographien und Lehrbücher mehr als 300 Abhandlungen aus den verschiedensten Bereichen seines Interessenkreises.

Als Rechtshistoriker genoss er in den letzten Jahrzehnten in Ungarn ein einzigartiges Ansehen. Dies wurde vielleicht nur von der Anerkennung seiner wissenschaftsorganisatorischen Fähigkeiten übertroffen. Als er in Miskolc zum Katheder der neugegründeten Fakultät für Rechtswissenschaften – eigentlich – zurückkehrte, fehlten die Voraussetzungen für Forschung und Lehre fast völlig. Nach einigen „mit Volldampf" durchgearbeiteten Jahren, und durch Mithilfe mehrere in- und ausländischer Kollegen, stampfte er ein Institut aus dem Boden, an dem Forschungsarbeit ermöglicht wurde und an dem die Studenten ihren eigenen Forschungsinteressen nachgehen konnten. Er verstand es mit den verschiedensten Leuten einen gemeinsamen Nenner zu finden, und im Interesse des Instituts Kompromisse zu schließen. Sein Name eröffnete die Quellen mehrerer Stiftungen und die Türen vieler ausländischer Universitäten. Als Wissenschaftsorganisator machte er sich die Mühe, jede Forscher in Ungarn, die im Bereich der Romanistik, der Rechtsgeschichte und Rechtsphilosophie tätig waren und sind, mit dem gemeinsamen Ziel, dieser Wissenschaftszweige zu stärken und an Boden gewinnen zu lassen, an einer gemeinsamen „Front" zu vereinigen. Es ist zu bemerken, dass dieser Zusammenhalt – Dank der unermüdlichen Arbeit von Professor Zlinszky – bis zur heutigen Tage überdauert.

Sowohl in Miskolc, als auch – in einer höheren Dimension – in Budapest ergriff er jede Möglichkeit seine Kollegen, Schüler und Studenten zu unterstützen, ihnen würdige Forschungsmöglichkeiten zu schaffen. Er arbeitete wie kein Zweiter für die Hebung des Unterrichtsniveaus der Rechtsgeschichte. Er arbeitete Reformpläne aus, die sich nach zähem Ringen auch auf allen Fakultäten Ungarns übertragen ließen. Nach seiner Auffassung könnte kein Jurist ohne die Aneignung einer historischen Betrachtungsweise „Volljurist" sein. Ohne die historischen, ethischen und theoretischen Grundlagen zu kennen, könnten die Juristen ihre gesellschaftliche Funktion nicht erfüllen. In diesem Sinne tat Zlinszky stets – sogar ohne seine Gesundheit zu schonen – sein Bestes.

Endlich – obwohl es vielleicht nicht unbedingt im Profil einer wissenschaftlichen Zeitschrift passt – muss es erwähnt werden, dass auch seine Fähigkeiten als Lehrer sich mindestens auf der gleichen Höhe mit seiner Bedeutung als Forscher, Wissenschaftsorganisator und Mann der Feder befanden. Für seine Studenten war er der personifizierte Professor, der elegante Redner, der die außergewöhnliche Fähigkeit hatte, sein Interesse am behandelten Gegenstand faszinierend auf seine Zuhörerschaft zu übertragen. Seine große Beliebtheit bei Studentengenerationen stammte vor allem auch davon, dass er stets nicht nur das römische Rechtssystem behandelte, sondern jeweils auch die gegenwärtigen Entwicklungslinien und die moderne Anwendbarkeit der durch das römische Recht erworbenen Kenntnisse aufzeichnete. Durch seine praktischen Erfahrungen verstand er es seine Vorlesungen, Seminare und Vorträge so zu gestalten, dass auch jene Hörer, die sich mit beiden Beinen fest in der Gegenwart zu stehen glaubten, dafür Interesse finden konnten. Professor Zlinszky maß sowohl dem Recht als auch der Lehrtätigkeit eine sittliche Funktion bei. Seinen Idealen folgend wollte er durch sei-

ne Lehrtätigkeit solche Juristen erziehen, die zu einer immer vollkommeneren Verwirklichung der Gerechtigkeit befähigt sind. Er lehrte was ethisch ist und ging mit gutem Beispiel voran. Er sah auch in der Gründung der juristischen Fakultät der katholischen Universität eine einmalige Möglichkeit, seine Ideale in die Tat umzusetzen. Deshalb machte er immer die Nacht zum Tag und glaubte daran, die christliche Moral, das Fachwissen und den Gerechtigkeitssinn in einer neuen Juristengeneration vereinigen zu können.

Seinen Schülern versuchte er unermüdlich alle seiner Erfahrungen, Kenntnisse und auch seine Einstellung weiter zu geben. Selbstlos und uneigennützig teilte er ihnen seine Forschungsergebnisse bzw. seine Ideen mit. Er verstand es Jedem die Aufgabe zu geben, zu deren Verwirklichung der Betroffene fähig war, und wofür seine Begeisterung zu erwecken war. Von Grund auf bezog er die jüngeren Kollegen in seine internationalen Beziehungen ein, ließ sie Sprachen lernen, reisen und forschen, während er zu Hause am Lehrstuhl die Festung hielt.

Wie die Äußerungen vieler Kollegen aus ganzem Europa – die anlässlich des Heimgangs von Professor János Zlinszky an die Adresse ihrer ungarischen Kollegen eingegangen sind – zeigen, wird der Doyen der ungarischen Rechtsgeschichte nicht nur uns fehlen. Man kann sich nur mit größter Dankbarkeit an ihn erinnern.

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