Vol. 7 / 2016 No. 2

Journal on European History of Law

9 772042 640001 07

STS Science Centre

The European Society for History of Law

VOL. 7 / 2016 NO. 2

Editorial staff

JOURNAL ON EUROPEAN HISTORY OF LAW:

JUDr. PhDr. Stanislav Balík
Attorney at Law, Prague, Czech Republic

Prof. Dr. Barna Mezey
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Jozef Beňa, CSc.
Faculty of Law, Comenius University in Bratislava, Slovak Republic

Doc. JUDr. PhDr. Jiří Bílý, CSc.
Metropolite – University Prague, Czech Republic

Dr. Piotr Fiedorczyk
Faculty of Law, University of Białystok, Poland

Alberto Iglesias Garzón, Ph.D.
Charles III University of Madrid, Spain

Prof. Dr.iur. Dr.phil. Thomas Gergen, MA
European University for Economics and Management, Luxembourg

Prof. Dr. Gábor Hamza
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary

Prof. JUDr. Ignác Antonín Hrdina, DrSc.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

JUDr. Vilém Knoll, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic

Doc. dr. sc. Mirela Kresic
Faculty of Law, University of Zagreb, Croatia

Prof. zw. dr hab. Adam Lityński
Faculty of Law, University of Silesia, Katowice, Poland

Doc. Dr. Olga Lysenko
Faculty of Law, Lomonosov Moscow State University, Russia

Tony Murphy
Department of Law & Criminology, Sheffield Hallam University, UK

ao. Univ. Prof. Dr.jur. Christian Neschwara
Faculty of Law, University of Vienna, Austria

Doc. Dr. Dmitry Poldnikov
Faculty of Law, National Research University, Higher School of Economics, Moscow, Russia

Dr Dr Guido Rossi
Edinburgh Law School – University of Edinburgh, UK

Doc. JUDr. Karel Schelle, CSc.
Faculty of Law, Masaryk University, Brno, Czech Republic

Dr. Gábor Schweitzer, Ph.D.
Institute for Legal Studies of the Hungarian Academy of Sciences, Hungary

Adw. Ewa Stawicka
Attorney at Law, Warsaw, Poland

Dr. Magdolna Szűcs, Ph.D.
Faculty of Law, University of Novi Sad, Serbia

JUDr. Bc. Jaromír Tauchen, Ph.D., LL.M.
Faculty of Law, Masaryk University, Brno, Czech Republic

Prof. Dr. Wulf Eckart Voß
Faculty of Law, University of Osnabrück, Germany

TABLE OF CONTENTS

Diemut Majer: Die Französische Revolution als Hintergrund der europäischen Grundrechts- und Privatrechtsentwicklung 2

Philip Pajakowski: "The Free Conviction, Rising from within": Julius Glaser and the Establishment of Trial by Jury in Liberal Austria 27

Andrew Watson: The Silent Revolution in Methods of Advocacy in English Courts 36

Alessandro Hirata: Roman and Neo-Babylonian Private Law in a Comparative Legal History Perspective 48

Dmitry Poldnikov: Origins of General Concept of Contract in Western European Legal Science (12th through 16th Centuries) 53

Gábor Hamza: Tradition des römischen Rechts und Kodifikation des Privatrechts in Bulgarien 60

Tamás Nótári: Some Remarks on the Issue of Suicide in Roman Criminal Law. 65

Katalin Siska: Slavery in the Ottoman Empire. 71

István Sándor: On the Emergence and Development of the Trust Legal Institution. 80

Péter Bónis: Bona fides exuberans. A New Legal Concept of Twelfth Century Legal Scholarship 97

György Képes: The Birth and Youth of the Modern Hungarian Private Law. 102

Csaba Cservák: The Theory of the Distribution of Powers and its Practical Implementation, in Particular with Regard to the United States 114

Lu Da: Jus Sanguinis – The Basic Principle in Citizenship Law, Comparative Analysis of First Citizenship Law between Visegrad Four and China 123

Fanny Koleva: First Trademark Regulations in Bulgaria 130

Engjëll Likmeta, Enton Dimni: Historical – Legal View of the Freedom of Religion in Republic of Albania 139

Carmine Galloro: Der Rücktritt gemäß Art. 50 EUV unter Rechtshistorischen Aspekten. Der Fall des sog. ‚Brexit' 150

READERS REACT

Jozef Beňa: History of Law or History of State and Law. (On the Subject of Pedagogical and Scientific Work of Legal Historians) 162

BOOK REVIEWS

Peter Landau: Deutsche Rechtsgeschichte im Kontext Europas. 40 Aufsätze aus vier Jahrzehnten 168

Henning Kästner: Der Weimarer Landtag 1817-1848. Kleinstaatlicher Parlamentarismus zwischen Tradition und Wandel. 169

Viktor Winkler: Der Kampf gegen die Rechtswissenschaft. Franz Wieackers „Privatrechtsgeschichte der Neuzeit und die deutsche Rechtswissenschaft des 20. Jahrhunderts". 170

Martin P. Schennach: Neuere italienische Rechtsgeschichte: 19. und 20. Jahrhundert 171

Jiří Bílý: Christianizace římského antického státu (Stát – Právo – Náboženství – Společnost) 172

Michael Stolleis (Hrsg.): Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert (= Band 1: Rumänien, Bulgarien, Griechenland) 173

Julia Maria Gokel: Sprachliche Indizien für inneres System bei Q. Cervidius Scaevola 174

REPORTS FROM HISTORY OF LAW

Die Gründung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte in Pécs. Beweggründe – Motive – Visionen. 180

„Prolegomena per una palingenesi dei libri di Paolo ad Vitellium" 184

Forth Biennial Conference of the European Society for Comparative Legal History «Culture, Identity and Legal Instrumentalism» (Gdańsk-Gdynia, 28 June – 1 July 2016). 187

Guidelines for authors 189

JOURNAL ON EUROPEAN HISTORY OF LAW

© 2016 STS Science Centre Ltd.

All rights reserved. Neither this publication nor any part of it may be reproduced, stored in a retreival system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of STS Science Centre Ltd.. Published semiannually by STS Science Centre Ltd. „Journal on European History of Law" is a registered trademark of STS Science Centre Ltd.

Issued twice a year.

Printed in the EU.

ISSN 2042-6402

Die Französische Revolution als Hintergrund der europäischen Grundrechts- und Privatrechtsentwicklung*

(The French Revolution 1789 as Background for the Development of Human Rights)

*Diemut Majer***

Abstract

The French Revolution of 1789 is the most important event in modern history. Whilst in Europe the Revolution in the first three and a half years was regarded as a mere change of the competences of the monarchic power. The execution of King Louis XVI in January 1793 and the following terroristic politics by the leftwing „sansculottes" shattered the monarchies in whole Europe, which feared their collapse.

In the field of legislation, the monarchs tried to realize some liberal ideas (in order to push back too many revolutionary ideas). The first country to act was Prussia, which regulated the civil law („Allgemeines Landrecht" for the Prussian states of 1794). Austria created the „Allgemeines Gesetzbuch" which was inaugurated in 1811. France was given by Napoleon the Code civil (1804). In all legislations, political rights were not guaranteed – they referred only to the economic field. In the times of absolute monarchies, political rights had no place.

These three codifications were a compromise between the uprising liberal ideas (personal freedom, propriety rights, etc.) and the principle of the old corporate society (inequality, „Ständestaat"). They lasted for centuries. The CC of 1804 (in its necessary reforms) is valid in France till nowadays, as well as the Austrian „Allgemeines Gesetzbuch". The Prussian „Allgemeines Landrecht" was valid in the Prussian parts of Germany till 1900, before the „Bürgerliches Gesetzbuch (BGB)" for the German Reich was coming into force.

Key words: *French Revolution and its impacts on Europe – legislation and Revolution between Progress and Restauration - „Allgemeines Landrecht" of 1794 (Prussia), „Allgemeines Gesetzbuch" of 1811 (Austria), Code civil of 1804 (France) – all these codifications guaranteed economic liberties but no political rights.*

Einführung

Mit dem vorliegenden Thema ist eine Problematik angesprochen, die sowohl in der positiven Gesetzgebung wie auch in ihrer Rezeption vielerlei Widersprüche aufweist.

Die seit dem Erstdruck der Abhandlung 1989 verstrichene Zeit macht es notwendig, dem Leser, der sich „irgendwie" für die Epoche der Französische Revolution interessiert, die einzelnen Zeitabschnitte deutlicher als bisher vor Augen zu stellen. Dies betrifft zunächst die Eingrenzung des Gegenstandes selbst. Oftmals werden nämlich die Wirkungen der Französische Revolution mit denen der Napoleonischen Reformen in einer Art Gesamtschau verstanden und die Ergebnisse als eine große Bereicherung für Europa beurteilt. Man sprach zwar von zwei Welten, entdeckte jedoch so viele verbindende Elemente, dass auch der Begriff Gesamtschau gerechtfertigt ist. Dies war insbesondere in der Zeit des 200. Jubiläums der Französischen Revolution 1989 sowie des 200-jährigen Jubiläums des Code civil (2004) der Fall. Bei dieser Gesamtschau wurden zudem viele kulturelle Faktoren mit einbezogen (Literatur, Dichtung, Musik usw.). Dies tat ein Übriges, dass beide historische Zeitabschnitte vermischt und als revolutionäre Veränderungen gepriesen wurden, die 1789 ihren Anfang genommen hätten[1]. Tatsächlich ist jedoch präzise zwischen beiden Epochen zu unterscheiden. Die Französische Revolution hatte insbesondere seit den

* Dem Thema entsprechend wird im Folgenden vor allem diejenige Literatur exemplarisch angeführt, die die Konnexität der Französischen Revolution und ihrer Folgen für die europäische Rechtsentwicklung anspricht. Auf die Zitierung von Spezialliteratur zu den Einzelgebieten wurde weitgehend verzichtet, da sie außerhalb des Themas liegt und auch den Beitrag zu sehr „überfrachten" würde.
Die vorliegende Abhandlung ist die aktualisierte Fassung der Erstabdrucks in: Heinz Barta, Rudolf Palme, Wolfgang Ingenhauff (Hg.): Naturrecht und Privatrechtliche Kodifikation, Wien 1999, S.137ff., Nachdruck in: Jahrbuch der juristischen Zeitgeschichte, Bd.2 (2000/2001), S.1ff.

** Univ.-Professorin em. Dr. Diemut Majer, Karlsruhe, Deutschland.

1 Vergl. dazu ausführlich: Marianne und Germania, Frankreich und Deutschland, Zwei Welten. Eine Ausstellung der Berliner Festspiele GmbH. Hrsg. von Marie-Louise von Plessen, Berlin 1997. H. U. Thamer, Aufbruch in die Moderne, a.a.O. S.65ff. (Synthese reformabsolutistischer Tradition und Rezeption französischer revolutionärer Errungenschaften (S.68); vergl. ferner: Germanisches Nationalmuseum, Nürnberg, Freiheit, Gleichheit, Brüderlichkeit. 200 Jahre Französische Revolution in Deutschland, München 1989. Zur Ära Napoleon vergl. näher: Werner Schubert & Mathias Schmoeckel (Hg.) 200 Jahre Code civil. Die Napoleonische Kodifikation in Deutschland und Europa, Köln, Weimar, Wien 2005; Claude Witz (Hg.) Le Bicentenaire du Code civil – 200 Jahre Code civil, Baden-Baden 2006: für Deutschland und speziell Baden vergl. Thomas Gergen, Der Code civil in Deutschland. Entstehung und Funktion des Bad. Landrechts von 1809, a.a.O. S.39ff, 53ff.; vergl. auch: Code Napoléon – Badisches Landrecht. Wegbereiter deutscher Rechtsgeschichte, Heidelberg. Ausstellung in der Badischen Landesbibliothek anlässlich des 200. Jahrestages der Gründung des Verlags C.F. Müller 1797, Heidelberg 1997; Zu Baden auch Fritz Sturm: Badisches Landrecht, Karlsruhe 2011.

sog. Septembermorden 1792 und der Hinrichtung des Königs Ludwigs XVI. 1793 mit der folgenden Schreckensherrschaft an Europas Fürstenthronen und in der öffentlichen Meinung ein äußerst negatives Bild hervorgerufen. Furcht und Schrecken ergriffen die Regierenden, das Bürgertum fürchtete Chaos und Umsturz[2]. Nur die liberalen Strömungen sahen in der Revolution etwas Positives – Sinnbild war der Freiheitsbaum, um den das Volk tanzte –, Gelehrte wie Immanuel Kant erblickten in der Revolution eine historische Zeitenwende, die gewissermaßen notwendig auch Exzesse und Gewalttaten mit sich gebracht habe[3]. Die liberalen Kreise, vor allem die Dichter und Schriftsteller, rühmten die Freiheit, die die Revolution gebracht habe[4], während andererseits Handel und Gewerbe die autoritäre Herrschaft Napoleons begrüßten, weil sie Gewerbefreiheit, Steuergleichheit usw. gewährleistete[5]. Keine der genannten Strömungen hat jedoch die Rechtswirkungen der Revolution in Betracht gezogen, denen die folgenden Abschnitte gewidmet sind.

Die Französische Revolution in Europa: Schreckgespenst oder geistige Erneuerung?

Wie kein anderes Ereignis war die Französische Revolution für die europäische Rechtsentwicklung des ausgehenden 18. und des 19. Jahrhunderts von größter Bedeutung, sei es hemmend, sei es inspirierend. Es ist jedoch außerordentlich schwierig, diese Bedeutung zu dokumentieren, da es in den (deutschsprachigen) Ländern an Literatur darüber fehlt, ob die Französische Revolution eine unmittelbare Rechtswirkung auf die europäischen Staaten gehabt hat[6]. Ihre Wirkungsgeschichte lässt sich infolge dessen nur daran ablesen, dass die bereits fertiggestellte Kodifikation hinsichtlich der Individualrechte in den europäischen Ländern in großer Eile „zurückgedreht“ oder ihr Inkrafttreten verzögert wurde. Angst und Schrecken waren die (allerdings nicht deutlich dokumentierte, sondern nur zu erahnende) Triebfeder hierfür, da die monarchischen Gewalten mit ihrer Stände- und Privilegienherrschaft gegen alle revolutionären Strömungen bewahrt werden sollten. Die (Rechts-) Wirkung der Französischen Revolution lässt sich daher nur als eine mittelbare beschreiben; die Gesetzgebung der frühliberalen Ära am Anfang des 19. Jahrhunderts hat sie aber nicht ausgelöst. Die großen Kodifikationen waren lange vor Ausbruch der Revolution konzipiert und fertiggestellt worden. Nur mittelbar, d.h. über die geistigen Strömungen der Zeit, übte sie ihre Wirkung aus; als konkretes historisches Ereignis wurde sie jedoch verdrängt oder explizit abgelehnt. Die (seltenen) rezeptionsgeschichtlichen Abhandlungen über die Wirkungen der Französischen Revolution beziehen sich daher nur auf die allgemeine Geistesgeschichte[7] und nur in geringem Umfang auf die Geschichtswissenschaft und Rechtsgeschichte[8]. Ein ähnliches Bild zeigt die Staatsrechtslehre, in der die Thematik bis in die zweite Hälfte des 20. Jahrhunderts entweder kaum erwähnt oder nur eine einseitige („Kampf der Ideen von 1789 gegen die Ideen von 1914“)[9] Erörterung gefunden hat. So haben wir das paradoxe Ergebnis, dass die Französische Revolution für die Rechtsentwicklung und Rechtswissenschaft allgegenwärtig war, oder wie Hans Hattenhauer formuliert: „Kein Ereignis der letzten 400 Jahre hat die Geschichte so stark geprägt“[10], aber nicht als konkretes Ereignis erörtert wurde. Die Französische Revolution findet eigentlich in der deutschsprachigen Rezeption des 18. und 19. Jahrhunderts nicht statt. Nur hin und wieder taucht sie auf, wie ein ferner Widerschein unheilvoller Ereignisse, die es zu fürchten und abzuwehren galt. Die Französische Revolution war daher, obwohl das auf ganz Europa ausstrahlende wichtig-

[2] Inge Stephen, Faszination und Abwehr, Französische Revolution und deutsche Literatur, in: Marianne und Germania, a.a.O. S.99ff.
Kathrin Kusch: Gegenrevolution, in Deutschland, in: Marianne und Germania, a.a.O. S.392ff.

[3] Die Französische Revolution wurde erst im Vormärz und dann 1848 zur realen Hoffnung der Liberalen. Vgl. M.-L- Plessen: Germania aus dem Fundus, in: Marianne und Germania, a.a.O. S.31ff, 33.

[4] Diese liberalen Schriftsteller, die in geselligen Gelehrtenzirkeln zusammenkamen, stellten sich Kunst und Kultur als „das Leben“ dar und huldigten den neuen Freiheitsideen (Gebr. Grimm, Gebr. Schlegel, Tieck, Bettina und Achim von Arnim, Clemens Brentano, Jean Paul, Adalbert Chamisso), während bürgerliche Schriftsteller wie Goethe, Schiller u.a., die Revolution ablehnten (Marianne und Germania, a.a.O. S.125ff.) Den Freiheitsgedanken sah man in den Freiheitsliedern und -bildern verkörpert (Freiheitsbaum). Man sah in der Revolution den „Triumph der Freiheit“)Marianne und Germania, a.a.O. S.125).

[5] Hans Ulrich Thamer, Aufbruch in die Moderne, in: Marianne und Germania, a.a.O. S.65ff.“Zwischen 1720 und 1820 habe sich in Deutschland alles gewandelt.“ S.68.

[6] Zu diesem Defizit vergl.: D. Grimm, Deutsche Verfassungsgeschichte 1776-1866, Frankfurt/Main 1988, S.49 ff., 52.

[7] Vgl. vor allem Kurt Epstein, Die Ursprünge des Konservatismus in Deutschland. Der Ausgangspunkt: Die Herausforderung durch die Französische Revolution, 1770-1815, München 1951.

[8] M. Neumüller, Politischer Liberalismus und Revolution. Das Problem der Revolution in der deutschen liberalen Geschichtsschreibung, Düsseldorf 1973. In der Rechtsgeschichte wird die Französische Revolution lediglich bei Hans Hattenhauer, Europäische Rechtsgeschichte, Frankfurt a.M. 1988, S.502 ausführlicher behandelt, jedoch vorwiegend in negativem Kontext (so auch in der 4.Aufl., 2004); vgl. auch ders., Die geistesgeschichtlichen Grundlagen des deutschen Rechts. Eine Einführung, 2. Aufl. Frankfurt a.M.1980.

[9] Die Rezeption der Französischen Revolution wurde Anfang des 20. Jahrhunderts von den kulturellen Eliten der beiden Länder als „Kampf der Ideen von 1789“ gegen die „Ideen (des Krieges) von 1914“ bezeichnet; er findet seine Fortsetzung in den Auseinandersetzungen in der Geschichtswissenschaft der Weimarer Republik, in der sich die Mehrheit der von deutsch-nationaler Tradition geprägten Historiker (F. Hartung, F. Meinecke, Heinrich Ritter von Sbrik [der österreichische Metternich-Biograph]) in der Ablehnung der Französischen Revolution einige war. Auf der anderen Seite standen Wissenschaftler wie Hermann Heller oder Hedwig Hintze, die Frau des bekannten Preußenforschers Otto Hintze, die sich 1928 als zweite Frau in Deutschland im Fach Geschichte (zu einem Thema der Französischen Revolution) habilitiert hatte und damals die bekannteste Revolutionsforscherin war. (Von den meisten Kollegen argwöhnisch betrachtet, emigrierte sie im August 1939 in die Niederlande, wo sie im Juli 1942 Selbstmord verübte, um der Deportation zu entgehen. Anm. d.V.). Hintzes Diktum von der Revolution als „Prüfstein der Geister“ bewahrheitet sich noch heute. Vgl. insbesondere ihre Einleitung zu A. Aulard, Politische Geschichte der Französischen Revolution, München-Leipzig 1924 und näher Steffen Kaudelka, Ein Lebenslauf mit Geschichte, in: Frankfurter Allgemeine Zeitung, 10. 10. 1998, IV, mit einer Biographie und Erörterung der Werke Hedwig Hintzes.

[10] Hans Hattenhauer, Europäische Rechtsgeschichte, a.a.O., S.502.

ste Ereignis der Neuzeit, gleichwohl, wie der Titel der Untersuchung beschreibt, nur Hintergrund, nicht Motor der Rechtsentwicklung des 19. Jahrhunderts. Diese merkwürdig anmutende Ausgangssituation soll im Folgenden näher beleuchtet werden.

Hierzu ist es erforderlich, einen Konnex zwischen Ereignis- und Geistesgeschichte und Französischer Revolution in der Weise herzustellen, dass gezeigt wird, wie sehr die Ereignisgeschichte von den herrschenden Lehren der Rechtswissenschaft und wie diese umgekehrt von der aktuellen Gesetzgebung abhängig waren und wie beide auf die Französische Revolution „reagierten", die wie ein drohendes Gewitter am Horizont stand – im Verschweigen oder in Ablehnung. Die erste Beschreibung der Revolution erschien erst nach 1848.[11] Demokratie erschien als „rasende Pöbelherrschaft". Sie sei mächtig im Zerstören, aber unfähig einen geordneten Staat herzustellen. Erst „linke" Wissenschaftler wie Karl Kautsky oder Wilhelm Blos entdeckten die revolutionsgeschichtlichen Themen, auch Hermann Heller und Hedwig Hintze. Der Freiburger Historiker Gerhard Ritter identifizierte noch nach 1945 das Streben nach Demokratie und politischer Selbstbestimmung (sprich: die Revolution) mit den Verbrechen des Nationalsozialismus. Erste *positive* Darstellungen der Französischen Revolution finden sich erst spät durch Martin Göring.[12]

Die Verfassungskämpfe der französischen Generalstände, später der Nationalversammlung, waren bis 1792 lediglich als konstitutionelle Auseinandersetzung innerhalb Frankreichs betrachtet worden, die die Grundlagen der Monarchie (umfassende Exekutivmacht, Vetorecht gegenüber Gesetzen etc.) unangetastet ließen. Mit der Hinrichtung Ludwigs XVI. im Januar 1793, dem noch im gleichen Jahr seine Frau Marie Antoinette, sein Bruder („Philippe Egalité") und seine Schwester im Zuge der Entwicklung der Revolution zur Schreckensherrschaft („La Grande Terreur") folgten, war die Revolution von einem französischen zu einem „gesamtpolitischen Ereignis" (E. R. Huber)[13] geworden, die wie eine Fackel Europa erleuchtete und den Untergang des Ancien Régime ankündigte. Die Throne der europäischen Fürsten schienen zu wanken. Die ursprüngliche Begeisterung für die Französische Revolution wich bald einem „Schreckensbild" (F. Furet)[14], das alle anderen Errungenschaften der Revolution, z.B. Abschaffung der Standesprivilegien und der Feudalordnung usw. überlagerte.

Dieser Wandel in der Beurteilung erfolgte innerhalb kürzester Zeit. Die revolutionären Ereignisse in Frankreich hatten zwar in der politischen Publizistik, aber auch im Bürgertum und in der einfachen Bevölkerung der angrenzenden Länder, wie ausgeführt, zunächst einen tiefgreifenden Eindruck hinterlassen. In den deutschen Ländern war man Augenzeuge: Man machte „Reisen in die Revolution" (wie die Reiseberichte von J. H. Campe zeigen). Die Zeitungen brachten laufende Berichterstattungen, Korrespondenten in Paris berichteten unmittelbar von den revolutionären Ereignissen[15]. Die Dichterzirkel der Romantik, für die das Leben aus Kunst und Kultur bestand, huldigten dem Geist der Freiheit. Die neuen, auf der Aufklärung beruhenden Ideen wurden, auch wenn man die Revolution als Produkt der Aufklärung ablehnte, von den Fürsten Europas in der einen oder anderen Weise übernommen. Staatszweck war jetzt nicht mehr das Staatswohl (salus publica), sondern auch das Glück der Untertanen, das jedoch kein Leben nach freigewählter Entscheidung bedeutete, sondern, da der Absolutismus beibehalten wurde, die Pflicht des Herrschers umfasste, die Untertanen mangels ausreichender Bildung zu einem Leben nach aufgeklärten Maximen anzuleiten (aufgeklärter Absolutismus). In die in Vorbereitung befindlichen oder abgeschlossenen Entwürfe der deutschsprachigen Kodifikationen (des preußischen ALR und des österreichischen ABGB) wurden an die Allgemeinen Menschenrechte angelehnte Deklarationen über grundrechtsähnliche Rechte der Untertanen übernommen[16].

Seit den Exzessen der Revolution ab 1792 verlor Frankreich jedoch seinen Vorbildcharakter. Zunehmend breitete sich „Revolutionshysterie" aus, ein „roll-back" lähmte den Reformwillen der aufgeklärten Gesetzgebung der Monarchien für fast 50 Jahre[17]. Preußen, das nach einer Äußerung seines Außenministers Struensee die Revolution „von oben nach unten" durchsetzen wollte[18], wurde von Revolutionsfurcht und Unentschlossenheit gehemmt und beschränkte sich auf die Befreiung der Domänenbauern (1807).

Die österreichische Politik unter Metternich ging noch weiter zurück. Sie „lebte ganz aus der Negation" gegenüber den durch die Französische Revolution verbreiteten Forderungen. Zensur und Verbote sollten den revolutionären Zeitgeist bannen und „Ruhe und Ordnung" gewährleisten. Reformen wurden mit Umsturz, ja mit Gewalt gleichgesetzt (woraus später der Hochverratsbegriff [gewaltsamer Umsturz] entstand, wie er später in das deutsche Strafgesetzbuch Aufnahme finden sollte). Jede Veränderung als solche war verpönt. Nicht nur Immobilismus regierte in Österreich; es wandelte sich auch seit 1794 zum Polizeistaat[19]. Jede Nachgiebigkeit gegenüber den bürgerlichen Forderungen galt als „Vorschubleisten" gegenüber der Re-

[11] Walter Grab, Französische Revolution und deutsche Geschichtswissenschaft, in: Freiheit, Gleichheit, Brüderlichkeit, a.a.O S.41ff.
[12] Walter Grab, a.a.O S.47.
[13] E. R. Huber, Deutsche Verfassungsgeschichte seit 1789, Bd. I, Stuttgart 1957, S.13.
[14] So auch Irmtraud Götz von Olenhausen (Hg.), 1848/49 in Europa und der Mythos der Französischen Revolution, Köln 1998, S.13.
[15] Deutschland und die Französische Revolution 1789-1806, in: Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert, Band I, hrsg. von Theo Stammen und Friedrich Eberle, Darmstadt 1988, S.15ff.
[16] Grimm, a.a.O., S.49 ff.
[17] Heinz Barta, Martini-Colloquium, Begrüßung und Einleitung, Anm.15 mit Bezugnahme auf Karl Michael Hebeis, Karl Anton von Martini (1726-1800), Frankfurt/Main 1996, S.73f., 89ff.
[18] Diese Äußerung gegenüber dem französischen Geschäftsträger findet sich bei Otto Hintze, Die Hohenzollern und ihr Werk, Berlin 1915, S.427, zit. nach D. Grimm, a.a.O., S.53: „Die heilsame Revolution, die ihr von unten nach oben gemacht habt, wird sich in Preußen langsam von oben nach unten vollziehen. Der König ist Demokrat auf seine Weise: er arbeitet unablässig an der Beschränkung der Adelsprivilegien und wird darin den Plan Josephs II. verfolgen, nur mit langsameren Mitteln. In wenigen Jahren wird es in Preußen keine privilegierte Klasse mehr geben".
[19] Grimm, a.a.O, S.52 ff.

volution. So war die Zeit, insbesondere in der Metternich-Ära, gekennzeichnet durch „Entschlusslosigkeit und Stillstand“[20]. Die süddeutschen Staaten hingegen, die als die ehemaligen Rheinbundstaaten den französischen Ideen eher verhaftet waren, holten am Anfang des 19.Jahrhunderts einen Teil des in Österreich und Preußen begonnenen, aber „ausgesetzten“ Modernisierungswerks in Bezug auf das Verhältnis zwischen Bürger und Staat nach, wie später noch darzulegen sein wird.

Das Interesse der Öffentlichkeit an den Ereignissen war bereits in den letzten Jahren des ausgehenden Jahrhunderts erloschen, je mehr die Revolution durch andere Ereignisse (Herrschaft des Direktoriums, napoleonische Kriege etc.) überlagert wurde. So hieß es in einem Artikel der Zeitschrift „Neuer Telegraph“ mit dem Titel „Politische Ansicht Europas, geschrieben im Oktober 1805 beim Ausbruch des Krieges (Invasion Napoleons)“[21].

> „Die Französische Revolution, welche in den politischen Verhältnissen der europäischen Staaten eine so große Reform veranlasste, sieht man jetzt fast vergessen und mit ihren großen Ereignissen betrachten sie die meisten Menschen als nur noch ein der Geschichte gehöriges Bild der Vergangenheit. Ist es der Plan der Kabinette oder die Anhäufung größerer Begebenheiten der neuesten Tage, dass man die Folgen derselben mit Stillschweigen übergeht, und nur den Gesichtspunkt auf die Ereignisse des Tages ohne die Beachtung der Ursachen und Wirkungen richtet?“

Alles, was auch nur an 1789 erinnerte, war somit spätestens seit diesen „größeren Begebenheiten“ der Ablehnung verfallen. Die Revolution, das war das Schreckgespenst, ebenso wie der Begriff der Volksherrschaft bzw. der Demokratie. Friedrich Gentz, einer der führenden restaurativen Staatsrechtslehrer und Professor in Berlin, brachte den Begriff der Volkssouveränität mit dem Begriff der „blutigen Volksaufläufe“ in Frankreich in Zusammenhang „Nicht das Übergewicht der Menge, sondern das Übergewicht des Geistes und die organisierte Gewalt regieren die Welt“[22]. Selbst die Menschenrechte wurden nicht mehr als normative Gebote begriffen, sondern mit Umsturz in Verbindung gebracht. So schrieb Joseph Görres in seiner Schrift „Europa und die Revolution“, 1821 u.a.:

> „… Ob ein zerstörender anarchischer Trieb alles… zu zerstören sich bemüht, ob es allgemeine Abstraktionen von Gewalt, von der ursprünglichen Herrschaft… oder andere von der unbedingten Freiheit und der ursprünglichen Gleichheit dasselbe placken; es wird gleich sicher seinem Verderben entgegengehen. Dreißig Jahre hat die Welt das Spiel getrieben… Die Fürsten haben das Blutgerüst bestiegen, wenn das Glück gegen sie Partei genommen und die Völker sind… untergegangen“[23].

In den Blick traten nunmehr (wieder) die „großen Gestalten, wie Friedrich II. und Maria Theresia“, die an der Spitze der großen Staaten standen (E. R. Huber). Noch so berechtigte Änderungswünsche durften nur im Einvernehmen mit der Obrigkeit verfolgt werden. Ihre Erfüllung hing allein vom Monarchen ab. oder man verwies auf die Gerichtsinstanzen des alten Reiches, die Ordnung und Sicherheit gewährleisteten, so dass „französische Revolutionsprozesse schwerlich zu befürchten“ seien[24]. Änderungen mit Gewalt zu erzwingen, erschien als Frevel, als Versuch einer „Empörung“[25], d.h. von Hoch- oder Landesverrat nicht nur gegen die staatliche Ordnung, sondern zugleich gegen die „gottgewollte“ Ordnung der Monarchie. Die Abwehrhaltungen inspirierten darüber hinaus auch „radikale“ Gegenbewegungen, so die später zu erörternde Restauration und Reaktion in der Staatsrechtslehre (K.L. von Haller, F. Gentz), die Historische Rechtsschule (C. F. von Savigny) und die politische Romantik (Schelling, Novalis, A. Müller).

Auch die vormärzliche liberale Richtung, die sich in Deutschland seit 1830 entwickelte, gehört letztlich zu diesen Abwehrbewegungen, weil sie dem entscheidenden Punkt, der Frage nach der Staatsform, auswich. Trotz aller Begeisterung für Freiheit und Gleichheit war Ziel der Liberalen nicht die Abschaffung der Monarchie, sondern die konstitutionelle Monarchie (Bindung des Fürsten an die Zustimmung der Stände), abgesehen von der kleinen Minderheit der Demokraten, die die französische Revolutionsmystik, insbesondere in Süddeutschland und in der preußischen Rheinprovinz, übernahmen und von beiden, Staat und Liberalen, als Feinde betrachtet wurden[26]. Das Vehikel zur Ablehnung der Revolution war ihre „Vergeistigung“.

Beide Kontrahenten, Obrigkeitsstaat und Liberale, lehnten die Revolution als „Schreckensherrschaft“, als „Jakobinismus“, „Kommunismus“ oder „Fremdherrschaft“ ab. Die Liberalen verwahrten sich dagegen, „dass sich die Geschichte der Großen Revolution wiederholen könne, oder gar müsse“[27]. Man wollte keine „französischen Zustände“. Typisch für diese Haltung ist z.B. der bedeutende politische Publizist und Rechtsanwalt

---

[20] Theodor Schieder, in: Gebhard, Handbuch der deutschen Geschichte, Bd.3, 9. Aufl., Stuttgart 1970, § 22, S.102.

[21] Zitiert nach: Deutschland und die Französische Revolution 1789-1806, in: Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert, Bd. I, hrsg. von Theo Stammen und Friedrich Eberle, Darmstadt 1988, S.25.

[22] Betrachtungen über die politische Lage in Europa, zit. nach: Hartwig Brandt (Hg.), Restauration und Frühliberalismus 1814-1840, Darmstadt 1969, S.224, 227 (1823).

[23] Zit. nach Brandt, a.a.O., S.118.

[24] 1796 formulierte der deutsche Staatsrechtslehrer Karl Friedrich Haeberlein: „Die Deutschen sollten Gott danken, dass sie an den Reichsgerichten sogenannte ‚Revolutionsprozesse‘ führen könnten. Solange die Reichsverfassung diese durch Streitigkeiten zwischen Herren und Untertanen veranlassten, streng geregelten Verfahren ermögliche, habe man in Deutschland „französische Revolutionsprozesse“, die ‚an keine Form gebunden seien‘ schwerlich zu befürchten. (Zit. nach: Helmut Gabel „dass Ihr künftig von aller Widersetzlichkeit, Aufruhr und Zusammenrottung gänzlich abseht“ – Deutsche Untertanen und das Reichskammergericht, in Frieden durch Recht, Das Reichskammergericht von 1495-1806, 1994, S.273.

[25] Mit Recht könne in Deutschland jeder Versuch, „einer eigenmächtigen Selbsthilfe“ als Versuch einer ‚Empörung‘ betrachtet werden“, Haeberlein, a.a.O.

[26] J. Götz von Olenhusen, a.a.O., S.71 ff.

[27] I. Götz von Olenhusen, a.a.O., S.13, 16.

Gustav Struve (1793-1849), einer der führenden Revolutionäre von 1848/49, der den französischen Zentralismus und die „egalitäre“ Gleichheit mit Abneigung betrachtete. Für ihn war der Kampf der „Freunde des Volkes“ gegen die Fürsten ein „Kampf des Geistes“[28]. In einer Denkschrift vom April 1848 propagierte er eine friedliche Lösung mit parlamentarischen Mitteln, die sogar bis zum Schutz der Monarchie als Institution gehen sollte. Selbst wenn die Republik scheitere, würde man „einen gewaltsamen Angriff der Republikaner (= Demokraten) auf die Monarchie zu „verhindern“ wissen[29]. Die revolutionären Worte Struves: „Es bleibt zu hoffen, dass alle Völker Europas sich gegen ihre Despoten erheben. Das Ergebnis wird sein: Die Vereinigten Staaten von Europa“[30] sind daher nur in diesem Licht zu sehen. Selbst der „linke“ Journalist und mitreißende politische Redner Johann Georg August Wirth pries, mitten in der Metternich-Ära und ihrer politischen Zensur, die Französische Revolution zwar als „Wiedergeburt des Menschengeschlechts“, war aber gegen jedes Blutvergießen (1833). Er wollte einen deutschen Staat mit einem deutschen Kaiser an der Spitze. Nur „auf Bildung und Meinungsfreiheit könne die Republik gegründet sein“. (Die „Ausübung aller politischen Rechte erfolgt nach der eigenen Selbstbestimmung eines jeden Bürgers“)[31].

Die Abwendung von der Revolution als historisches Ereignis und die Hinwendung zum Kampf der Ideen ist auch im Bildungsbürgertum und in der Staatsphilosophie zu beobachten, die, wie erwähnt, die Ereignisse in Frankreich zunächst, ebenso wie die aufgeklärten Fürsten und die politischen Liberalen, höchst positiv aufgenommen hatten. Folgende Beispiele mögen dies verdeutlichen.

Die leidenschaftlichen Debatten in der französischen Nationalversammlung, die Aufhebung der Feudalordnung, später der Schwung der Revolutionsarmeen, der Zusammenbruch des Reiches, die Besetzung Deutschlands, die cäsarische Erscheinung des Kaisers Napoleon, von Hegel als „Verkörperung des Weltgeistes in Waffen“ bezeichnet[32], der eine neue Ära einläutete, erschienen als wundersame Vorboten großer Ereignisse. Kant, Herder, Fichte, Klopstock, Arndt, Hölderlin, Wieland, Schiller – mit Ausnahme des Skeptikers Goethe[33] (der in ihr nur „Kräfte der Zerstörung, des Schreckens und der Willkür“ sah)[34] sahen die Revolution als geistige Befreiung, an die Stelle der Autoritäten von Kirche und Reich sollten Freiheit und Gleichheit treten – allerdings nur im Reich des Geistes nicht sofort, sondern erst nach „gehöriger Erziehung“ des Menschengeschlechts (Schiller). Da die Demokratie als Herrschaft vernunftgeleiteter Menschen mit dieser „Erziehung“ unlösbar verbunden wird, erschien die Verwirklichung der Freiheitsidee in den aktuellen Zeitabläufen allerdings nicht möglich: Sie wird in eine ungewisse Zukunft oder in die Vergangenheit – in das Spanien Philipp's II. (Don Carlos) oder in den Freiheitskampf der Eidgenossen gegen Habsburg im 16. Jahrhundert (Wilhelm Tell) verlegt.

Die Französische Revolution bildete somit nur den allgegenwärtigen Hintergrund, „die Farbe für die Erleuchtung des Gemäldes“, Wetterleuchten und Verheißung zugleich am fernen Horizont der geistigen Entwicklung der Menschheit. Fichte hielt die Philosophie Kants für weit wichtiger als die Französische Revolution, die auf die gesamte Menschheit im Hinblick auf eine ferne Zukunft bezogen und damit „entaktualisiert“ wird. So schrieb er 1793 in der Vorrede zu seiner Schrift: Der Beitrag zur Berichtigung der Urteile des Publikums über die Französische Revolution:

> „Kant's Denken ist die… ungleich wichtigere Revolution, während die Französische Revolution für sie nur Anlass und die Farben zur Erleuchtung des Gemäldes lieferte. Die französische Revolution scheint mir wichtig für die gesamte Menschheit. Ich rede nicht von den politischen Folgen… so scheint mir die Revolution ein reiches Gemälde über dem großen Text: ‚Menschenrecht und Menschenwert' zu sein“[35].

Die Leugnung der Französischen Revolution als *historisches* Ereignis und Quelle (im Unterschied zu ihrer *geistigen* Quelle, der Aufklärung) für die Menschenrechte setzte sich auch in deren Rezeption im 20. Jahrhundert fest, ja, ist bis heute in der Rechts- und Verfassungsgeschichte einer der maßgeblichen topoi. Die Verdrängungsmechanismen sind dabei unterschiedlich. Entweder verschwindet der Begriff völlig, wie schon im 19. Jahrhundert[36], oder er taucht nur mit dem Begriff „antirevolutionär“ auf[37]. Ausschlaggebend hierfür dürfte gewesen sein, dass die Freiheits- und Gleichheitsideen einmal mit den napoleonischen Kriegen verknüpft und damit als fremde Ideen, gewissermaßen als Besatzungsrecht, empfunden wurden, wie z.B. bei den Standardwerken von Hermann Conrad

---

[28] Peter Hank, Gustav Struve, Der vergessene Visionär, 2. Buch, WO-Verlag, Freiburg 1998, S.22.

[29] Hank, a.a.O., S.33.

[30] Hank, Gustav Struve, Der vergessene Visionär, 1. Buch, Freiburg 1998, S.25.

[31] (und muss man wohl hinzufügen, erst dann, wenn die Bildung ihn zur Selbstbestimmung befähigt, Anm. d.V.): Johann Georg August Wirth, Die Rechte des deutschen Volkes, Eine Verteidigungsrede vor den Assisen zu Landau, Nancy 1833, Neudruck Potsdam 1998, XLIII, XLIV.

[32] Zit. nach E. R. Huber, a.a.O., S.15.

[33] „Denn wer leugnet es wohl, dass hoch sich das Herz ihm erheben, die freie Brust mit reinerem Pulsen geschlagen, Als sich der erste Glanz der geschlagen neuen Sonne heranschob, als man hörte vom Rechte der Menschen, das allen gemeinsam, von der begeisternden Freiheit und von der löblichen Gleichheit“ (Hermann und Dorothea 1796, VI 6). Der Dichter fügte jedoch skeptisch hinzu: „Aber der Himmel trübte sich bald. Um den Vorteil der Herrschaft stritt ein verderbtes Geschlecht, unwürdig, das Gute zu schaffen“ (a.a.O. VI, 40).

[34] Huber, a.a.O., S.13.

[35] Vorrede zu „Der Beitrag zur Berichtigung der Urtheile des Publikums über die französische Revolution“, Zürich 1793, in: R. Schottki (Hg.), Beitrag… (1973).

[36] So taucht der Begriff Revolution z.B. in dem vielbändigen damaligen Standardwerk von Rotteck Welcker, Lexikon der Staatswissenschaft, Altona 1836ff, nicht auf.

[37] So z.B. in der Geschichte der deutschen Rechtswissenschaft, hrsg. von Erler/Kaufmann 1973, kommt Revolution nur in dem Kontext „antirevolutionärer“ Code Civil vor.

(Deutsche Rechtsgeschichte)[38], und Otto Kimminich, Verfassungsgeschichte der Neuzeit („Die Französische Revolution ist kein Datum der deutschen Verfassungsgeschichte")[39] deutlich wird. In der Europäischen Rechtsgeschichte von Hans Hattenhauer[40] ist die Abneigung dann schon sehr viel tiefgreifender. Sie stellt eine „ungeheure Rechtsunordnung" dar, ist nichts als eine „vulgarisierte Vernunftrechtslehre" von „Christian Wolff, Pufendorf[41], auch aus den Vereinigten Staaten".

Auch der Code Civil, ein Produkt der autoritären Herrschaft Napoleons – den man als Besatzer Deutschlands und den Code Civil als „Begleitmusik" dieser Besatzung ablehnte – wird in deutlicher Abgrenzung zur Revolution gesehen: Er trage den „Geist der Revolution, dem er entstamme, nicht in umstürzlerischen Bestimmungen an der Stirn, sondern bekenne ihn in seinen tragenden Prinzipien: Einheit, Gleichheit, Freiheit. Er knüpfe zumeist an das Recht des Ancien Régime an und sei geradezu eine Reaktion auf die Revolution, „antirevolutionär"[42]. Die Französische Revolution, Naturrecht und Aufklärung, Freiheit und Gleichheitsideen verschwimmen also zu einem Gesamtkomplex „Revolution", der sich weiter in ein Gesamtbild „Frankreich" oder „französische Verhältnisse" oder „Umsturz" auflöst. Erst Napoleon, der „neue Justitian" (H. Hattenhauer) habe Chaos und Unordnung beseitigt.

In der deutsch-national bestimmten Literatur fiel schließlich in offensichtlicher Anlehnung an die Herrschaftsformen des Alten Reiches vor 1806[43] auch der (durch die Revolution geschaffene) Begriff der Nation der allgemeinen Verdammnis anheim. Ab 1792 habe die „europäische Solidarität" die Intervention der Großmächte Frankreich erzwungen, um den Angriff auf die Gesamtordnung Europas zu hemmen. Freiheit und Gleichheit seien nur kurzfristig als Rechte des Individuums angesehen und alsbald der nationalen „Aktionseinheit" untergeordnet worden.

Der (revolutionäre) Begriff der Nation, mit einem fast endlosen Katalog negativer Sigmata („revolutionäre Willenseinheit" etc.) versehen[44], wird nun zur Wurzel allen Übels, von Krieg, Diktatur, Unterdrückung: Dieser Begriff sei „von selbst" in Krieg, in die freiheitsvernichtende Diktatur („aggressive Stoßkraft" der „zur Diktatur gewordenen Nation")[45] und in die Herrschaft Napoleons („nationalplebiszitärer Cäsarismus des Kaisertums") gemündet, der das Gleichgewicht Europas bedroht habe. Freiheit und Gleichheit seien durch den „Gemeinwillen zerstört" worden. Das gesamte System der bürgerlichen Rechtsstaatlichkeit sei dem Souveränitätsanspruch des „nationalen Gemeinwillens" gewichen. So heißt es bei E. R. Huber u.a.: Die „entfesselten Kräfte des revolutionären Nationalismus" hätten „sich durch sich selbst" zur erobernden Aggression getrieben. Die „radikale Revolution" sei „notwendig" in die „radikale Diktatur" übergegangen[46].

Der Angriff auf den Begriff der Nation symbolisierte die Ablehnung der Staatsform der Republik und der Demokratie. In Deutschland habe man, so die Gelehrten, auf „maßvolle Reformen einer starken und weisen Regierung gehofft, die ohne tiefere Erschütterung der sozialen Existenz" hätten übernommen werden können. Der revolutionäre Begriff der Nation habe jedoch auch in Deutschland, nach dem Sieg des „nationalstaatlichen Radikalismus", Fuß gefasst. Nach der Niederlage gegen Napoleon nämlich sei der (an sich gute) deutsche Patriotismus gewachsen und „aggressiv und revolutionär" geworden[47].

So groß war die Furcht vor der Revolution, dass schon jeder Gedanke der Einheit der deutschen Stämme oder einer einheitlichen Gesetzgebung bereits als Bedrohung empfunden wurde, weil hinter diesem Gedanken die Nation (der mündigen Staatsbürger) und nicht mehr nur die Untertanen des alten Ständestaats standen. Diese Befürchtungen sind auch der Hintergrund der weiter unten zu erörternden Gegenbewegung der Historischen Rechtsschule, die jede einheitliche Kodifizierung des Rechts als „revolutionär" ablehnte. Diese Furcht war so lebendig, dass die Regierungen selbst Forderungen gemäßigter Romanisten wie des 1797 geborenen Präsidenten des ersten Deutschen Juristentages, Carl Georg von Wächter[48], der wenigstens ein *Zusammengehen* möglichst großer Staaten im Recht befürwortete, ablehnten, da das Wetterleuchten der Französischen Revolution schon eine vereinheitlichende Gesetzgebung als gefährlich erscheinen ließ. Der 1844 auf den ersten Juli in Mainz einberufene Anwaltstag, der solche Forderungen unterstützte, wurde von Preußen, Bayern und Kurhessen verboten. 1846 scheiterte ein sächsischer Anwaltstag, weil „in offenbar blinder Furcht vor drohendem Umsturz"(!)[49] die sächsische Regierung die Veranstaltung untersagte[50]. Erst 1860 hatte der im Vorstand der 1859 gegründeten Juristischen Studiengesellschaft in Berlin entstandene Vorschlag, einen Deutschen Juristentag zu gründen, mit dem Ziel einer „rechtseinheitlichen

[38] Deutsche Rechtsgeschichte, Bd. II, Karlsruhe 1966, S.398 ff.
[39] Otto Kimminich, Verfassungsgeschichte der Neuzeit, 3. Aufl., Baden-Baden 1987, S.273.
[40] Hans Hattenhauer, Europäische Rechtsgeschichte, Heidelberg 1992.
[41] Die Französische Revolution verkörperte in ihrer Erklärung der Allgemeinen Menschenrechte die Ideen der französischen Aufklärung, nicht der viel älteren deutschen Naturrechtslehre (Anm. d. V.).
[42] Handwörterbuch der deutschen Rechtsgeschichte, hrsg. von A. Erler/E. Kaufmann, Bd. I, Köln 1971, S.620 ff.
[43] So vor allem E. R. Huber, Deutsche Verfassungsgeschichte seit 1789, Bd. I, Stuttgart 1957, S.3 ff., 8, 17.
[44] Siehe die Häufung der Negativbegriffe für die Nation als „extrem", „kollektiv", „entfesselt", „aggressiv", „radikal", „diktatorisch" (Huber, a.a.O.).
[45] Huber, a.a.O., S.13.
[46] Huber, a.a.O., S.13; 11, wo es weiter heißt: Die Legitimität des Staates sei „radikal", „nationaldemokratisch" geworden. Royalismus, Klerikalismus und Föderalismus seien zum „Feind" erklärt worden, auch die Gliederung des Volkes in Stände. An die Stelle des durch Naturrecht und göttliches Recht begrenzten Absolutismus sei die „aller Begrenzung enthobene" „Staatsraison" der absoluten Demokratie" getreten. Das „europäische Gleichgewicht" sei durch den Führungsanspruch der revolutionären Nation in Frage gestellt. Der Grund hierfür (liege) im Contrat Social Rousseaus".
[47] a.a.O., S.13 f.; Nation und Humanität seien in Deutschland stets verbunden gewesen, auf „Sittlichkeit und Recht" gegründet.
[48] Vgl. dazu: Hans Jürgen Rabe, Der Deutsche Juristentag und sein erster Präsident, in: NJW 1998, 1681 ff.
[49] H. J. Rabe, a.a.O., S.1681.
[50] Weißler, Geschichte der Rechtsanwaltschaft, Nachdruck 1967, S.509 ff., 516.

Entwicklung“ (Privatrecht, Prozessrecht, Verfahrensrecht), Erfolg. Die liberalen Juristen betrachteten die Einführung der französischen Rechtsordnung in den damals von Frankreich besetzten linksrheinischen Gebieten nun nicht mehr als Oktroi eines „fremden Rechts“, sondern politisch als einen ersten Schlag gegen die absolute Monarchie und die Partikularinteressen der Stände. Für sie hatte die napoleonische Gesetzgebung gezeigt, was nationale Identität, Einheit des Volkes und revolutionärer Geist bewirken können; sie inspirierte schließlich, am Ende des 19. Jahrhunderts, auch die Juristen in Deutschland, eine umfassende Gesetzgebung für alle deutschen Staaten zu fordern.

1. Die Entwicklung der Grundrechte nach der Großen Revolution in Frankreich

Die Grundrechtsentwicklung in Frankreich, die in der Erklärung der Allgemeinen Menschen- und Bürgerrechte vom 26. August 1789 ihre erste Ausprägung erhielt, war vorgezeichnet durch die aus dem Naturrecht der Aufklärung hergeleiteten Begriffe von Freiheit und Gleichheit. Ihr Ursprung lag in der natürlichen Freiheit und Gleichheit aller Menschen, wie sie schon Thomas Hobbes formuliert hatte. Nach ihm schließen sich die Menschen in einem Gesellschaftsvertrag zusammen und übertragen diese Rechte auf einen Souverän, der diese Rechte anstelle und für die Untertanen ausübt (Unterwerfungsvertrag). Nach Montesquieu hingegen, der ebenfalls von der natürlichen Gleichheit aller ausgeht, geht diese im Lauf der Entwicklung verloren, und soll durch den demokratischen Gesetzgeber wiederhergestellt werden (De l’esprit des lois, 1748)[51]. Für Rousseau, der die Gleichheit in den Mittelpunkt seiner politischen Theorie stellt, ist die natürliche Gleichheit durch die Eigentumsverhältnisse beseitigt worden, die soziale Ungleichheit schafft; sie soll durch die Schaffung der volonté générale als Souverän wieder hergestellt werden, so dass „alle etwas und keiner von ihnen zu viel hat“ (Vom Gesellschaftsvertrag oder Grundsätze des Staatsrechts, S. 287).

Rousseaus Gleichheitsbegriff ist eng verknüpft mit seinem Freiheitsbegriff, der Unabhängigkeit von der Herrschaft anderer (der Eigentümer) bedeutet. Bedingung dafür ist die rechtliche Gleichheit (Gleichheit vor dem Gesetz). Freiheit und Gleichheit sind nun nicht mehr auf den status naturalis „zurückdatiert“, sondern gelten auch im status civilis.

Diese Forderungen werden in der französischen Staatsphilosophie zum festen Topos, zum Idealbegriff einer gerechten Ordnung. Schon Jahrzehnte vor 1789 in Frankreich weit verbreitet, wurden sie mehr und mehr zur politischen Parole erhoben – nicht zuletzt durch die ökonomische Misere (Staatsbankrott) – die in die Revolution von 1789 einmündete. Artikel 1 der Erklärung der Allgemeinen Menschen- und Bürgerrechte vom 26. August 1789 formuliert dieses Postulat, das seitdem zum Inbegriff aller freiheitlichen Verfassungen geworden ist: „Die Menschen werden frei und gleich (en droit) geboren und bleiben es. Die sozialen Unterschiede können nur auf dem gemeinsamen Nutzen bestehen“. Diese Freiheits- und Gleichheitsrechte waren die Antwort auf die Ungleichheiten im absolutistischen Staat, dessen ständische Ordnung vor allem „nach rückwärts“ gerichtet war[52]: Diese Ungleichheiten mussten als erste beseitigt werden, damit sich Freiheit überhaupt entfalten konnte: Schon in der Nacht des 4. August 1789 hatte die Nationalversammlung die Aufhebung des Feudalsystems, d.h. vor allem die Befreiung der Bauern aus der Gutsherrschaft, die Aufhebung der Frondienste (ohne Entschädigung) sowie des Zehnten für die Geistlichkeit beschlossen – Grundsätze, die die Basis für die Allgemeine Menschenrechtserklärung vom 26. August 1789 bildeten.

Die Revolutionsverfassungen von 1791 und 1793 nahmen die Allgemeine Menschenrechtserklärung auf und stellten sie dem eigentlichen Verfassungstext voran. Die Verfassung von 1791 formulierte darüber hinaus im Text weitere Ausprägungen der Freiheits- und Gleichheitsrechte, z.B. Aufhebung des erblichen Adels, Freizügigkeit, Gewissens- und Meinungsfreiheit, Presse- und Versammlungsfreiheit, Gewaltentrennung (Mitwirkung der Volksvertretung an der Legislative), Schutz des Eigentums gegen Enteignung, Zugang für jeden Bürger zu öffentlichen Ämtern, Steuergleichheit, gleiches Schulsystem und erhob gleichzeitig das Gesetz zum Maßstab des Handelns aller: La loi est l’expression de la volonté générale. Der Staat war die Herrschaft der in der Nationalversammlung sich manifestierenden volonté générale. Diese hatte das Gesetzgebungsrecht, gegen das der König allerdings ein Vetorecht hatte, das wiederum von der Nationalversammlung überstimmt werden konnte. Erstmals wurde auch die staatsbürgerliche Gleichheit kodifiziert: Gleichheit vor dem Gesetz. Die Gleichheit betraf jedoch weder die politischen Rechte (Wahlrecht), da die Revolution das Zensurwahlrecht[53] und die indirekte Wahl eingeführt hatte[54] (die von der Verfassung von 1791 übernommen wurden) noch den Bereich der sozialen Gleichstellung aller Menschen: Diese war wegen des Fortbestehens der Eigentumsverhältnisse nicht erreicht worden.

Die Jakobiner-Verfassung von1793 hingegen (die von den Pariser Sektionen gegen die Nationalversammlung erkämpft wurde, jedoch nie in Kraft trat) enthielt weitergehende Forderungen nach sozialer Gleichheit: Art. 2 gewährleistete Freiheit, Sicherheit, Eigentum und gleiches Wahlrecht für alle (Männer); zugleich wurde das Recht auf Fürsorge und Bildung für alle Bedürftigen verankert sowie das fakultative Referendum (als mit der Nationalversammlung gleichberechtigte Gesetzgebungsmodalität) vorbereitet.

Die Freiheits- und Gleichheitsrechte der Verfassungen in den USA wurden oft als Vorbild für die französische Verfassungsgebung, ja, die Virginia Bill of Rights 1776 als unmittelbare Vorläuferin der Grundrechte in den französischen Verfassungen bezeichnet. Gleichsam war beiden der Schwung und das revolutionäre Pathos der Freiheitsrechte, die z.T. wörtlich übereinstimmten - Art. 1 der Bill of Rights 1776: („that all men are by nature equal and free and independent and have certain

[51] Zuerst anonym in Genf gedruckt, 1748 anonym in Paris erschienen.

[52] Vgl. näher Dieter Grimm (Bearb.), in: Helmut Coing (Hrsg.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, Bd. 3, I. Teilband, München 1982, S.23 ff.

[53] Es handelte sich um einen dreistufigen Steuerzensus ansteigend für Aktivbürger, Wahlmänner und Abgeordnete.

[54] Am 22. 11. 1789; wahlberechtigt waren nur die Grundeigentümer, also bei weitem nicht alle Franzosen.

inherent rights…"). Doch verfolgten beide Verfassungswerke durchaus verschiedene Ziele: die amerikanischen Verfassungen die Errichtung einer neuen politischen Ordnung, die die Sozial- und Rechtsordnung Englands beibehielt und weiterentwickelte, während in Frankreich eine neue politische und zugleich soziale Ordnung (Abbau des Ständestaats) geschaffen werden musste[55]. Die amerikanischen Grundrechte in der Virginia Bill of Rights von 1776 und in der Unabhängigkeitserklärung der 13 Neuengland-Staaten vom 4. 7. 1776, die in der USA-Verfassung von 1787 („we, the people oft he US"[56]) und ihren amendments 13 – 15 in der 2. Hälfte des 19. Jahrhunderts und im amendment 19 am Anfang des 20. Jahrhunderts[57] ihre Fortsetzung fanden, waren daher viel pragmatischer, d.h. „materieller", auf den Schutz des Eigentums gerichtet[58] („pursuit of happiness")[59], während die französischen Grundrechte sich durch ihren hohen theoretischen Gehalt und ihren universellen Geltungsanspruch auszeichneten[60]. Die USA-Verfassung von 1787 war eher eine Verfassung der Gründerväter, einer Siedlergesellschaft, die eine „first new nation" gründen wollten, während die Grundrechtsentwicklung in Frankreich mehr auf Rousseau fixiert war: es galt, die ständischen Privilegien abzuschütteln und den Gesetzgeber als Ausdruck der volonté générale zu installieren.

Eine weitere Wurzel für die Entwicklung der Freiheits- und Gleichheitsrechte in Frankreich lag in den sozialen Verhältnissen begründet, die in den folgenden Jahrzehnten zu ihrer erheblichen Abschwächung führten. Die Gleichheit war seit 1789 schon nach dem Willen ihrer Schöpfer nie als soziale Gleichheit, sondern nur als Gleichheit *in* der Freiheit konzipiert worden[61], doch musste sie zwangsläufig zu weitergehenden Forderungen führen. Die Gleichheitsdiskussion rührte an die bestehende soziale und ökonomische Ungleichheit der Bevölkerung und rief zahlreiche Forderungen radikaldemokratischer, frühkommunistischer und anarchistischer Art nach sozialer Gerechtigkeit, die als politische Forderung formuliert wurden, hervor; ihr Niederschlag ist in der Jakobinischen Verfassung von 1793 (Recht auf Fürsorge), allerdings in erheblich abgeschwächter Weise, enthalten. Da diese Verfassung wegen der Revolutionswirren nie in Kraft trat, geriet die soziale Ungleichheit, und mit ihr auch die politische Gleichheit, im Verlauf der Diskussion immer mehr in den Hintergrund: Die Eliten kehrten in der Direktorialverfassung 1795 bereits zur direktorialen Regierungsform zurück, die soziale Rechte nicht kannte und auch die politischen Gleichheitsrechte oder –postulate zurücknahm. Das gleiche gilt für die napoleonische Herrschaft. Napoleon, als „Erbe der Revolution" betrachtet, verdient diese Bezeichnung nur insoweit, als er die Rechtsgleichheit der bürgerlichen Gesellschaft (im Code Civil 1804) verwirklichte. Er versprach, das „Ende der Revolution", aber die Bewahrung ihrer Errungenschaften. Ihre wichtigsten (die politischen Freiheitsrechte und die Volkssouveränität)[62] beseitigte er jedoch (mit Ausnahme des Schutzes des Eigentums [gegen staatliche Enteignung]): Im autoritären Staat konnte es keine staatsbürgerlichen Rechte geben. Die bürgerliche Gesellschaft entfaltete sich daher nur im Privatrecht (durch den Code Civil); sie trennte sich von der politischen Form, mit der sie begonnen hatte. Die napoleonischen Verfassungen von 1799 und 1803, die die Herrschaft des Diktators durch Beibehaltung der indirekten Wahl, Einführung des Erbkaisertums und Berufung der Amtsträger von oben sicherten, enthielten, den Vorstellungen des Kaisers entsprechend, keine Grundrechte mehr.

Nach dem Ende der napoleonischen Herrschaft nahmen die Grundrechte eine andere Entwicklung, die durch das für Frankreich typische Nebeneinander von autoritärer Herrschaftsform und grundlegenden liberalen Gewährleistungen geprägt war. In ihnen wirkte das Erbe der Revolution nach.

Die Charte Constitutionelle von 1814 (mit Änderung von 1815), die mit Ludwig XVIII. die Bourbonen zurückbrachte, installierte einerseits die konstitutionelle Monarchie und das Zweikammersystem (der Monarch ist Gesetzgeber bei der Ausübung der Staatsgewalt, jedoch an die Zustimmung der beiden Kammern gebunden). Gleichzeitig wurden jedoch die wichtigsten Grundrechte wieder in die Verfassung aufgenommen: Rechtsgleichheit, persönliche Freiheit, Presse-, Religionsfreiheit, Schutz des Eigentums.

Dies führte in den 20er Jahren des 19. Jahrhunderts zu lebhaften Prinzipien- und Reformdiskussionen, die Frankreich als Vorbild politischer Freiheit erscheinen ließen, selbst nach dem Wiedererstarken der ultraroyalistischen Bewegung seit 1821. Es waren Versuche der Monarchie, genau diese Rechte zu beschneiden – Aufhebung der Pressefreiheit und Verschärfung des Zensus im Wahlrecht – die zur Julirevolution von 1830 führte, die die Bourbonen zur Abdankung zwang und eine parlamentarische Monarchie (unter dem „Bürgerkönig" Louis Philippe von Orléans) an die Herrschaft brachte. Danach fiel, wie schon in den 20er Jahren, Frankreich wieder in autoritäre Praktiken unter Beibehaltung der Charte von 1814 (vor allem unter Guizot) zurück. Im Vordergrund stand die ökonomische Entfaltung („enrichissez-vous"); der Republikanismus wurde zurückgedrängt, politische Reformen (Wahlrechtsreform [Senkung des Zensus] und Parlamentsreform [Ausschluss der Staatsbeamten von der Kandidatur als Abgeordnete]) verweigert. Und es war wiederum die Verweigerung dieser Postulate, die bei den Liberalen den

[55] Grimm, a.a.O., S.24.

[56] „people" umfasste aber die Mehrheit der Bevölkerung nicht: Sklaven, Schwarze, auch die Frauen, die nicht als „Personen" im Rechtssinne (d.h. als voll Geschäftsfähige) wahrgenommen, sondern nur als beschränkt geschäftsfähig betrachtet wurden.

[57] Gleiches Wahlrecht, unabhängig von Farbe, Geschlecht etc., Gleichheit vor dem Gesetz.

[58] Vgl. näher Majer, a.a.O., S.61.

[59] Art. I der Virginia Bill of Rights 1776 lautete: "… Dass alle Menschen gleich frei und unabhängig sind und bestimmte angeborene Rechte besitzen… nämlich das Recht auf den Genuss des Lebens und der Freiheit, auf die Mittel zum Erwerb und Besitz von Eigentum, das Streben nach Glück und Sicherheit und das Erlangen beider…". (Glück ist hier i.S. materieller Wohlfahrt zu verstehen, Anm. d. Verf.).

[60] In Ziff. 17 der Erklärung der Allgemeinen Menschenrechte wird allerdings das Eigentum als „heilig" und „unverletzlich" bezeichnet (aber es steht doch nicht, wie in der Virginia Bill of Rights, im ersten Satz, Anm. d. Verf.).

[61] Grimm, a.a.O., S.25.

[62] Nach der napoleonischen Verfassung von 1799 erstellte das Volk lediglich Kandidatenlisten, die Exekutive wählte aus ihnen die sog. Repräsentanten.

Ruf nach grundlegenden politischen Reformen, bei den Radikalen zusätzlich nach sozialen Reformen weckten und erneut zum Ausbruch einer Revolution, derjenigen von Februar 1848, führte. Das allgemeine und gleiche Wahlrecht wurde verkündet, jedem Staatsbürger die Garantie eines Arbeitsplatzes versprochen (Nationalwerkstätten). Eine neue Verfassung trat im November 1848 in Kraft, die ein Präsidialsystem unter einem vom Volk auf vier Jahre gewählten Präsidenten (dem am 10. 12. 1848) gewählten Louis Bonaparte (einem Neffen Napoleons) vorsah; diese währte jedoch nur bis zum Staatsstreich Bonapartes 1851, der in einer neuen Verfassung von 1852[63] das Kaisertum mit einem gesetzgebenden Senat wieder einführte (L'Empire) und alle politischen Rechte eliminierte. Erhalten bleiben jedoch die „rudimentären" Menschenrechte: Abbau der ständischen Privilegien, Steuergleichheit, Gleichheit vor dem Gesetz (Gericht), die sich allerdings nur im Bürgerlichen Recht entfalten konnte: Das Gleichheitspostulat, das in der Französischen Revolution wegen der durch die Ständegesellschaft geschaffenen sozialen Ungleichheiten kurzfristig nicht verwirklicht werden konnte, blieb auch jetzt noch auf die rechtliche Gleichheit beschränkt. Auch in der Mitte des 19. Jahrhunderts blieb die Gleichheit ohne sozialen Gehalt. Sie wurde daher immer drängender zum Schlüsselbegriff einer im spezifisch modernen Sinn auf Emanzipation und Partizipation gerichteten Bewegung aus dem Bürgertum, die in der 2. Hälfte des 19. Jahrhunderts auf die Arbeiterbewegung übergriff, die politische Mitsprache und damit Integration in den Staat verlangten.

2. Die Angst vor der Revolution: Stagnation der Grundrechte im Deutschen Bund

Die Grundstrukturen der französischen Verfassungsgebungen hatten in Europa ein ungeheures Echo: Zwischen 1792 und 1814 sind (ohne die französischen Verfassungen von 1795, 1799, 1803 und 1814) unter napoleonischer Herrschaft ca. 40 Verfassungen in den sog. Tochterrepubliken und Vasallenstaaten erlassen worden, die zentrale Einheitsstaaten auf der Grundlage der Volkssouveränität begründeten[64], allerdings, ebenso wie schon die Direktorialverfassung von 1795 und die folgenden Verfassungen, keine politischen Rechte, sondern nur Gewährleistungen der bürgerlichen zivilrechtlichen Freiheiten enthielten.

Von Frankreich ausgehend, verbreiteten sich die Diskussionen über Freiheit und Gleichheit, die auch in Frankreich selbst ganz verschieden rezipiert wurden[65]. Gleiches galt für das zwischen ihnen bestehende politische und soziale Spannungsverhältnis[66], das ebenso wie die Bedeutung der Revolution von 1789 selbst in Frankreich aufgrund der in der Charte Constitutionelle 1814 gewährleisteten Pressefreiheit lebhaft diskutiert wurde, auch in den Zeiten autoritärer Herrschaft der Royalisten und Ultramontanen. Auch in der politischen Publizistik und in der Staatslehre in ganz Europa hatten die Ideen aus Frankreich zunächst durchaus Anklang gefunden: Die Vertreter des sog. liberalen Naturrechts argumentierten, dass die Freiheitsrechte dem Menschen als solchem kraft natürlichen Rechts zustanden; sie bedurften keiner „Gewährung" durch den Monarchen mehr, sondern nur noch der „Verbürgung". Methodisch an Kant anknüpfend, wurde der Gesellschaftsvertrag, wie er in Deutschland von Samuel Pufendorf und der ihm nachfolgenden Staatslehre als „Unterwerfungsvertrag" konzipiert worden war, in der Weise umgedeutet, dass die Individuen ihre Rechte nicht mehr *vollständig* auf den Staat, d.h. auf den Monarchen übertrugen; vielmehr wurde nach dieser Auffassung der Gesellschaftsvertrag gerade zum *Schutze* dieser – als natürlich i.S. von unveräußerlichen, d.h, auch nicht als übertragbar betrachteten Rechte – geschlossen. Das kam im Ergebnis der Idee des österreichischen Staatsmannes Karl Anton von Martini entwickelten Vereinigungsvertrages über eine demokratisch organisierte Staatsverfassung nahe, den dieser schon 1767 (De lege naturali positiones – Lehrsätze über das Naturrecht) und in einem weiteren Werk 1768 (Positiones de jure civitatis) entwickelt hatte.

Der Staatszweck war daher nicht mehr das umfassend verstandene Gemeinwohl (salus publica) oder das vom Herrscher bestimmte Glück der Untertanen, sondern der Schutz der individuellen Freiheiten. Diese enthielten somit Rechtscharakter, sie zielten (über Kant hinausgehend) auf institutionelle Verbürgung in einer Verfassung.

Die Frage nach der Legitimation und des Ausmaßes dieser Verbürgung führten jedoch zum Bruch mit der französischen Entwicklung, der auf zwei Entwicklungsstränge zurückzuführen ist. Einmal bewirkten, wie ausgeführt, die Schreckensherrschaft der Französischen Revolution seit 1793, aber auch die schockartig wirkenden Veränderungen in Europa durch Napoleon, seine Siege über die Monarchien Europas, eine grundsätzliche Abkehr von allen revolutionären Projekten, die von vornherein mit Umsturz und Gewalt gleichgesetzt wurden, so berechtigt deren Anliegen auch waren. Der „Gegenstand des Schreckens" (F. Furet) inspirierte keine theoretische Auseinandersetzung mit diesen Prinzipien.

Das Auf und Ab der revolutionären Ereignisse in Frankreich, das stete Schwanken Frankreichs zwischen Monarchie und Demokratie seit dem Ende der napoleonischen Herrschaft, jenes merkwürdige Nebeneinander von liberalen Freiheiten und autoritären Staatsformen („La France n'est ni une démocratie, ni une aristocratie", [Edgar Quinet]), verstärkte in den politischen

[63] Diese Verfassung blieb bis 1870 in Kraft. 1870 wurde Napoleon III im deutsch-französischen Krieg gefangen genommen und dankte ab. Die III. Republik 1870-1940 hatte keine Verfassung.

[64] Siehe die Aufstellung bei D. Grimm, a.a.O., S.33.

[65] Vgl. ausführlich Elisabeth Fehrenbach, Vom Ancien Régime zum Wiener Kongress, 2. Aufl., München 1986, S.148 ff. (Die Revolution als „Schreckensherrschaft" einerseits, als Künder der Freiheitsideen, als Vorbote einer egalitären Gesellschaftsordnung andererseits), die die Rezeptionsrichtungen, z.B. konservativer („Verschwörungstheorie") (Taine, Thiers, Michelet) und sozialistischer (Jaurčs, Lefčbre, Mathiez, Soboul, Furet etc.) Richtung beschreibt.

[66] Vgl. dazu ausführlich Majer, Der lange Weg zur Freiheit und Gleichheit. 14 Vorlesungen zur Rechtsstellung der Frau in der Geschichte, Wien 1995, insbes. S.135 ff.

Bürokratien der europäischen Fürsten die Abneigung gegen „französische Verhältnisse".

Die Zuflucht zu dem bewährten Muster des aufgeklärten Absolutismus lag daher nicht fern, der allerdings durch liberale Reformen ergänzt werden sollte. Der Monarch, der das Gesetzesinitiativrecht innehatte, sollte bei der Gesetzgebung an die Zustimmung der Repräsentativkörperschaften gebunden sein. Das ist die Geburtsstunde der konstitutionellen Monarchie. Nicht mehr die Anerkennung, nur noch die Verbürgung der natürlichen Freiheit oblag dem Monarchen, der nach wie vor Inhaber der Staatsgewalt war. Die Reformdiskussion in den süddeutschen Staaten hat das Ziel der Bindung der Monarchie an die Gesetze in der „Ausübung der Staatsgewalt" in den frühkonstitutionellen Verfassungen erreicht. Das wichtigste Werk dieser Richtung ist das Lehrbuch des Vernunftrechts von Carl von Rotteck (Band I – IV, 1829-1835), sowie das Rotteck-Welcker'sche Staatslexikon (15 Bände, 1848), das das wesentliche Werk für das Staatsdenken der frühliberalen Ära darstellt. Die liberale Staatstheorie enthielt jedoch einen unlösbaren Widerspruch, weil es keine Mittel gegen die Nichtachtung der Freiheiten durch den Monarchen gab. Die notwendige Konsequenz, dass die Verwirklichung der natürlichen Rechte nur in einer republikanischen Verfassung gesichert werden kann, hat die liberale Staatslehre in Deutschland nicht gezogen; die Forderungen nach Volkssouveränität und demokratischem Staat galten als Angriff auf die Staatsform, auf „den Staat" und damit als „Hochverrat", Staat und Monarchie waren identisch. Die Entwicklung in den großen Staaten hinkte den konstitutionellen Theorien hinterher. In den revolutionären Strömungen aus Frankreich bewegte sie sich in den eingefahrenen Bahnen der vernunftrechtlichen Tradition des 18. Jahrhunderts fort, die im aufgeklärten Absolutismus in Preußen und Österreich noch keinerlei rechtliche Bindung des Monarchen kannte[67]. Insgesamt gesehen führte die Abwehr der Freiheits- und Gleichheitsideen aus Frankreich in Deutschland fast zwangsläufig zur Kapitulation der Staatslehre vor den bestehenden Machtverhältnissen der Monarchien. Man wollte daher auch nicht mehr über ihre Grundlagen, ob sie richtig und angemessen seien, diskutieren. Die Lehre vom richtigen oder natürlichen Staatsrecht beschränkte sich mehr und mehr auf die Kompilation und Kommentierung des positiven Rechts, sei es in der Aufarbeitung des Statutarrechts des Alten Reiches, sei es in der Kommentierung der neuen Zusammenschlüsse (Rheinbund 1803, Deutscher Bund 1815) oder in der Bearbeitung der frühliberalen Verfassungen der süddeutschen Staaten[68]. Die Staatslehre wandelte sich zur Staatsrechtslehre.

Die Abwehr der Französischen Revolution und der nachfolgenden revolutionären Ereignisse (Julirevolution 1830) ging so weit, dass andere geistige Strömungen die gesamten vernunftrechtlich konstruierten Staats- und Rechtskonstruktionen, die man als Kern der neuen Ideen betrachtete, verwarfen und einem „organischen" Verständnis von Staat und Recht huldigten, das keine rationalen Grundlagen hatte und hinter dem letztendlich die religiöse Idee der Monarchie „von Gottes Gnaden" stand (romantische Staatslehre – Schelling, Novalis). Die Freiheit erfüllte sich nach dieser Auffassung nicht in staatsbürgerlicher Freiheit oder in einer Umgestaltung von Staat (zur republikanischen Staatsform) und Gesellschaft, sondern in der Einordnung des Individuums in die Stände, dieser in die Gemeinschaft (korporative Mitwirkung), verkörpert in Schellings Bild des Baumes, das in Stamm und Ästen die hierarchisch strukturierte Gesellschaft und die Funktion der ständischen Gliederungen gegenüber dem Hauptstamm (Monarch) versinnbildlichte. Ähnlich hatte schon die Staatslehre der Restauration und der Reaktion (u.a. Karl Ludwig von Haller[69], Adam Müller, Friedrich von Gentz, R. Maurenbrecher u.a.) argumentiert. Der „modernste" Vertreter dieser Richtung ist der bereits erwähnte Friedrich Julius Stahl, Professor an der Berliner Friedrich-Wilhelms-Universität, der seine Lehre vom Gottesgnadentum mit wichtigen verfassungsrechtlichen Grundsätzen verband[70]. Revolution ist nach ihm die „Ur-Umwälzung", sie ist „Unglaube", „Sünde"[71]. Er hält aber auch den Fürsten den Spiegel vor: die (Französische) Revolution ist das Gericht Gottes über die Fürsten, die die notwendigen Reformen verweigern.

Der Unterschied zwischen der restaurativen und liberalen Richtung bestand nur in der Legitimität der Staatsgewalt: Während erstere die Legitimität der monarchischen Staatsform mit religiösen Inhalten (Gottesgnadentum) begründete, sah die liberale die Legitimität in dem vernunftgeleiteten Fürsten verkörpert, der politische Reformen im Rahmen der Gesetzgebung (und mit Zustimmung der Repräsentativkörperschaft) verwirklichte.

Das Fehlen einer grundsätzlichen Auseinandersetzung darüber, wie die Freiheits- und Gleichheitsrechte im Falle des Missbrauchs durch die fürstliche Gewalt zu schützen seien, führte zu einer Stagnation der Grundrechtsentwicklung in den deutschsprachigen Staaten, die in Preußen fast 60 Jahre (bis zum Erlass der Verfassung von 1850), in Österreich fast 80 Jahre währte, das erst 1867 das erste Staatsgrundgesetz erhielt. Zwar waren in den ersten Jahren der Revolution, wie in der Einführung bereits erwähnt, grundrechtsähnliche Bestimmungen in die verabschiedungsreifen Kodifikationen des Preußischen Allgemeinen

---

[67] Wichtige Vertreter dieser Lehren sind: G. Hufeland: Lehrsätze des Naturrechts, 1790; K. H. Heydenreich: Grundsätze des natürlichen Staatsrechts und seine Anwendung, I – II, 1795; ders.; System des Naturrechts nach kritischen Prinzipien, 1794-1795.

[68] So z.B. bei J. L. Klüber, Staatsrecht des Rheinbundes, 1809; ders., Öffentliches Recht des Deutschen Bundes und der Bundesstaaten, 2. Abt., 1817. Weitere Vertreter dieser Richtung waren C. A. M. von Aretin, Staatsrecht der konstitutionellen Monarchie, I – II/2, 1824-1827; ferner H. Zoepfl, Grundsätze des allgemeinen Staatsrechts, 1841 und H. A. Zachariä, 40 Bücher vom Staate, 1820-1832; ders., Deutsches Staats- und Bundesrecht I, 1841.

[69] Die Restauration der Staatswissenschaft, Bd. I – VI, 1816-1834.

[70] Stahl, Friedrich Julius, Philosophie des Rechts I – II/2, 1830-1837; Das monarchische Prinzip, 1845.

[71] Zit. nach Hermann Kunst (u.a. Hrsg.): Evangelisches Staatslexikon, 2. Aufl., Stuttgart-Berlin 1975, S.2211.

Landrechts und des österreichischen ABGB aufgenommen[72], jedoch mit der Hinrichtung Ludwigs XVI. 1793 wieder entfernt und die Kodifikationen verspätet in Kraft gesetzt worden. Martinis Entwurf trat nur 1797 im fernen Westgalizien in Kraft. Es herrschte eine regelrechte Angst vor der Revolution. Alles, was mit rechtlicher Gleichheit zu tun hatte, wurde als „Gleichmacherei" diskreditiert. 1795 wurde von den Nachfolgern Martinis gefordert, „alles Zeug von Menschenrechten und natürlicher, bürgerlicher Freiheit" im Entwurf wegzulassen[73]. Es waren die Vorwürfe, die auch gegen die Verfasser des Preußischen ALR (von Carmer, Suarez und Klein) vorgebracht wurden. Die Angst vor der Revolution lähmte den gesamten Bereich der Verfassungsreform[74], in dem das Bürgertum eine Anpassung an die moderne Entwicklung und das hieß Abbau der alten Ständeordnung, immer dringender forderte. Auch durch die nationale Begeisterung nach dem Sieg über Napoleon 1813/14 konnte diese Stagnation nicht beseitigt werden. Es fehlte zwar nicht an Ideen einer Reichsreform[75], die allerdings von Partikularinteressen aller Art geschwächt war[76] und unter dem Eindruck der Repression des Metternich-Systems (Karlsbader Beschlüsse von 1819), nicht zum Zuge kommen konnten. Seit diesen Beschlüssen, die Pressezensur, Einfuhrverbote, Berufsverbote, Vereinsverbote und politische Überwachung angeordnet hatten, herrschte in jeder öffentlichen Diskussion ein feindliches Klima.

Ein Beispiel dieser restaurativen Entwicklung ist Art. 13 der Akte des Deutschen Bundes von 1815, der die Fürsten verpflichtete, „landständische" (d.h. Verfassungen mit Volksrepräsentation) in allen Einzelstaaten einzurichten. Dieser Beschluss wurde jedoch nur teilweise ausgeführt, da Art. 27 und 55 der Wiener Schlussakte von 1820 diese Verpflichtung wieder zurückgenommen bzw. abgeschwächt und es „den souveränen Fürsten überlassen (hatte), diese landständischen Verfassungen mit Berücksichtigung der früheren ständischen Rechte als auch der gegenwärtig obwalteten Umstände neu zu ordnen"[77]. Spätere Beschlüsse von 1824, 1830 und 1834 stellten das monarchische Prinzip über alle Reformerwägungen, das durch die Verfassungen nicht gefährdet werden dürfe[78].

Bis 1824 hatten 29 der insgesamt 38 Einzelstaaten[79] Verfassungen; weitere Verfassungen folgten nach 1830, aber unter Beibehaltung des Zensuswahlrechts (Bindung des aktiven und passiven Wahlrechts an Grundbesitz und Steueraufkommen) und der gesamten altständischen Ordnung. Die Verfassungswerke hatten also nur den Schein des Fortschritts für sich, da sie unter dem Vorbehalt der jederzeitigen Änderung durch die Fürsten aufgrund der o.g. Bundesbeschlüsse standen.

Am meisten stagnierte die Entwicklung der Freiheits- und Gleichheitsrechte in Preußen und Österreich. Preußen hatte 1810 landständische Repräsentativverfassungen auf Provinzialebene „wie für das Ganze" versprochen, sein Versprechen aber nicht eingehalten. 1823 wurden Provinziallandtage einberufen, die jedoch wirkungslos blieben, da sie nur wenige Kompetenzen hatten. Die Reformen beschränkten sich auf Einzelgebiete[80], z.B. 1810 Aufhebung der Zunftschranken, 1821 Einführung der Gewerbefreiheit[81]. Aus Furcht vor revolutionären Neuerungen wurden jedoch auch diese Reformen nur halbherzig betrieben. So wurden 1807 die Bauernbefreiung (d.h. die Aufhebung der Erbuntertänigkeit) und die Bodenbefreiung (Verkehrsfähigkeit des Bodens) eingeführt, jedoch, wie unten auszuführen ist, von der vorher erfolgten Ablösung nach dem Wert des Bodens abhängig gemacht, die die meisten Bauern nicht aus eigener Kraft aufbringen konnten.

Während in Preußen zumindest im wirtschaftlichen Bereich einzelne Rechte verwirklicht wurden, drängten die politischen Kräfte im Habsburgerrich in der Restaurationszeit nicht nur auf eine Beibehaltung des Status quo, sondern auf eine Rückkehr zum theresianischen fürstlichen Absolutismus. Zwar hatten die

---

[72] Die Martini freilich schon vor 1789, aus seiner Theorie des „Vereinigungsvertrags" entwickelt hatte. So hatte auch der Entwurf Martini von 1791 die „angeborenen Rechte der Menschen" anerkannt, die mit dem Eintritt in die Gesellschaft nicht aufhörten und nur „eine gewisse Richtung und Beschränkung derselben" duldeten, „soweit dies zur Erreichung des oben angeführten gemeinschaftlichen Endzwecks nötig ist" (§ 79). Dies zielte vor allem auf eine Festschreibung der natürlichen Freiheitsrechte. Dann folgten 30 Artikel, die den Grundrechtsschutz von Personen, insbesondere die Sicherung von Freiheit und Eigentum auch gegenüber dem Monarchen betrafen. Diese Bestimmungen stellten den Ansatz eines auf sämtliche Untertanen bezogenes allgemeines Staatsrecht dar, die den folgenden Bestimmungen, die (ausdrücklich oder stillschweigend) an der Ständeordnung festhielten, vorangestellt wurden, das demnach die Stände nur noch als staatlich zugelassene Körperschaften, die auch eingeschränkt werden konnten, anerkannte und nicht mehr als herkömmliche gottgewollte Ordnung ansah.

[73] S. näher Barta, a.a.O., Einleitung, Anm. 27.

[74] Barta, a.a.O.Einleitung, Anm. 15.

[75] Dazu neuerdings Wolfgang Burgdorf, „Reichsinstitution und Nation". Verfassungsreformprojekte für das Heilige Römische Reich Deutscher Nation, Mainz 1998.

[76] Vgl. dazu Gerrit Walther in der Rezension von Burgdorf, a.a.O., in: Frankfurter Allgemeine Zeitung vom 20. 11. 1998, S.15.

[77] Art. 57 lautete: Da der Deutsche Bund aus souveränen Fürsten besteht, muss „die gesamte Staatsgewalt in ihnen vereinigt bleiben und der Souverän kann durch eine landständische Verfassung nur in Ausübung bestimmter Rechte (Hervorh. d. Verf.) an die Mitwirkung der Stände gebunden werden. Nach Art. 58 durften die Fürsten durch keine landständische Verfassung in der Erfüllung ihrer bundesmäßigen Verpflichtungen (z.B. zur Gestellung von Kontingenten im Kriegsfall) gehindert werden.

[78] Der Bundesbeschluss von 1824 und 1830 verpflichtete die Mitglieder, darüber zu wachen, dass durch die landständischen Verfassungen das monarchische Prinzip unverletzt erhalten bliebe. Art. 17 der Geheimen Wiener Ministerkonferenz in Wien vom 12. 06. 1834 legte fest, dass die Stände nicht über die Gültigkeit der Bundesbeschlüsse entscheiden dürfen. Nach Art. 24 fand eine Vereidigung des Militärs auf die Verfassung „nirgends statt" (nur auf den Monarchen). Nach Art. 61 war die Bundesversammlung nicht berechtigt, auf landständische Angelegenheiten einzuwirken (zit. nach E. R. Huber, Dokumente der deutschen Verfassungsgeschichte, Bd. I, 3. Aufl. 1978, S.137.

[79] Grimm, a.a.O., S.52 (der allerdings 41 Einzelstaaten nennt; die Zahl 38 ist der Bundesakte 1815 entnommen, Anm. d. Verf.).

[80] So wurde 1808 die preußische Gemeinde– und Städtereform, 1810 die Steuerreform, 1812 die Emanzipation der Juden, 1820 ein neues Bildungssystem durchgesetzt.

[81] Grimm, a.a.O., S.102 ff.

französischen Ideen von Freiheit und Gleichheit ihren Eindruck auch am Wiener Hof nicht verfehlt. Nach 1792, nach der nur zwei Jahre währenden Herrschaft Leipolds II., verbreitete sich jedoch unter der Herrschaft Franz II., der Schrecken vor den „Greueln der Revolution", die Angst vor Ansteckung der Untertanen mit „revolutionärem Gedankengut" so sehr, dass jede politische Tätigkeit, einzeln oder in Vereinen, untersagt war, ebenso die Einfuhr ausländischer Schriften; die inländische Presse unterlag der Zensur. Die Karlsbader Beschlüsse von 1819 wurden in dem mit diesem Zeitpunkt beginnenden Metternich-System hier besonders streng durchgeführt (besonders die Pressezensur), das von „Entschlusslosigkeit und Stillstand" (Th. Schieder) geprägt war. Die Forderung nach „Ruhe und Ordnung", nach Ende des Krieges gegen Napoleon verständlich, wurde zum Prinzip erhoben und bewirkte einen Immobilismus der Grundrechts- und Verfassungsentwicklung[82], der letztlich bis Anfang der 60er Jahre des 19. Jahrhunderts reichte, nur kurz unterbrochen von der Revolution von 1848. Dieser Immobilismus, besser, diese Restauration, verstärkt durch die Forderungen der Stände (Ungarn, Böhmen) nach Aufhebung der josephinischen Reformen[83], wurde zunehmend als „unerträglich", als „Polizeistatt" empfunden, weil alle Beschränkungen, die während des Krieges hingenommen worden waren, auch nach Ende des Kriegs fortgesetzt (z.B. scharfe Presszensur) und das Volk von Monarch und Bürokratie lediglich als „willenloses Eigentum" des Staates betrachtet wurde[84]. Das Bürgertum, das Mitwirkung an der Regierung, allgemeine Rechte und Pressefreiheit forderte, wurde der Sympathie mit revolutionären Thesen verdächtigt (Verschwörertheorie). Die „gute alte Zeit" zu wahren, war oberstes Staatsziel, nachdem ein nichtswürdiger Usurpator fast ganz Europa besetzt hatte und nur durch die „Heilige Allianz" der großen Mächte Europas in der Schlacht von Waterloo besiegt werden konnte[85].

Diese Identifikation von Staat und Herrscher unter Ausgrenzung des Volkes zeigt sich deutlich in der Äußerung des Grafen Franz von Hartig, dass die Monarchie entschlossen sei, vom „Widerstand gegen alle Beschränkungen seiner Souverainsrechte niemals zu weichen" und hinzufügte: Das Metternich-System sei die „Verneinung eines jeden Anspruchs der Völker auf Theilnahme an jenen Rechten"[86]. Die Devise dieses Systems war: „Legitimität, Legalität, Stabilität"[87]. Hinsichtlich der Grundrechte bedeutete dies, dass während der mehr als 40jährigen Herrschaft Franz II. (1792-1835) und auch während der 13jährigen Herrschaft seines Nachfolgers Ferdinand (1835-1848) die ständische Ordnung (die Privilegien von Adel und Kirche) in der Grundherrschaft bestehen blieb und die Erbuntertänigkeit der Bauern erst 1848[88] aufgehoben wurde. Auch die politischen Rechte des einzelnen gab es nicht. Die Stände wurden allerdings entmachtet: Der Kaiser hatte das Gesetzgebung- und Initiativrecht und war nicht, wie in Deutschland, an die Zustimmung der Stände gebunden. Die Provinzialständeversammlungen hatten Verwaltungs-, aber keine legislativen Befugnisse. Österreich hatte bis 1867, dem Inkrafttreten des Staatsgrundgesetzes, keine Verfassung. Die liberale Verfassung vom April 1848 war nur kurze Zeit in Kraft; nach der Niederschlagung der Revolution wurde im März 1849 eine neue Verfassung oktroyiert, die allen Volksstämmen Gleichberechtigung garantierte, aber keine Grundrechte enthielt. Unter Franz Joseph I. (1848-1918) wurde diese Verfassung 1851 aufgehoben: Österreich kehrte zu einem scharfen Neoabsolutismus, d.h. zur absoluten Monarchie der vor-theresianischen Zeit zurück, der keinerlei Grundrechte anerkannte. Schon der aufgeklärte Absolutismus, erst recht der Josephinismus, galten bereits als revolutionär. Österreich hatte somit für die Ausübung der Staatsgewalt keine normative Grundlage, es war und blieb keine konstitutionelle, sondern eine spät-absolutistische Monarchie[89]. In wirtschaftlicher Hinsicht allerdings hatte Joseph II. bereits 1781 die Entwicklung in Gang gesetzt, als er die „Gewerbefreiheit" verkündete; sie kam aber nur zum Teil zum Zuge, weil die Zünfte nicht aufgehoben wurden und ihre Monopole beibehielten.

Eine Weiterentwicklung der Freiheits- und Gleichheitsrechte, als Antwort auf die Französische Revolution, findet sich hingegen in den ehemaligen süddeutschen Rheinbundstaaten sowie im Königreich Westfalen, in dem Joseph I., ein Bruder Napoleons, regierte. Diese Verfassung von 1807 spiegelte ziemlich deutlich die napoleonischen Vorstellungen, aber auch die Mindestforderungen der Französischen Revolution wider. Es wurde ein berufsständisches Parlament eingerichtet und alle Standesprivilegien (kraft Geburt) sowie die Korporationen selbst aufgehoben, die Leibeigenschaft beseitigt und die allgemeine Rechtsgleichheit gewährleistet[90]. An die Verfassung des Königreichs Westfalen lehnte sich auch die (erste) Bayerische Verfassung von 1808 an (nur, dass die Zugehörigkeit zum Parlament nicht nur an den Beruf, sondern auch an „Besitz und Bildung" geknüpft war, ähnlich die Verfassung von Sachsen/Weimar 1809 und das Großherzogtum Frankfurt 1810).

In den früheren Rheinbundstaaten war das Ende der Koalitionskriege der Anlass, die in Preußen nicht gelungenen Ver-

[82] Friedrich Walter, Österreichische Verfassungs- und Verwaltungsgeschichte von 1500-1955, Wien-Köln-Graz 1972, S.114 ff., 119 f.

[83] Diese betrafen die Aufhebung der zentralstaatlichen Behörden, der die Toleranzgesetzgebung, der Wiedererrichtung der alten Provinzialverwaltungen, die von Leopold II. alten (1790-1792) zum großen ‚Teil bewilligt wurden, Walter a.a.O.; Hermann Baltl/Gernot Kocher, Österreichische Rechtsgeschichte, 9. Aufl., Leykam 1977, S.189.

[84] Walter, a.a.O., S.120.

[85] Näher Baltl/Kocher a.a.O., S.189 f.

[86] Walter, a.a.O., (S.120).

[87] Näher Baltl/Kocher a.a.O., S.189 f.

[88] Als Ablösung für die Grundlasten wurde das 25fache des Jahresertrags festgesetzt; 1/3 war von den Bauern, 1/3 vom Staat zu zahlen. 1/3 Belastung verblieb beim Gutsherrn. Die Verwirklichung der Bauernbefreiung erfolgte jedoch erst nach Inkrafttreten der sog. Staatsgrundgesetze 1867.

[89] Baltl/Kocher, a.a.O., S.185.

[90] Das Parlament war nach bestimmten Quoten zusammengesetzt und stellte gegenüber dem geburtsständischen Parlament einen Fortschritt dar, weil durch die gleichzeitig eingeführte Gewerbefreiheit der Berufszugang gewährleistet war.

fassungsreformen durchzuführen. Die Verfassungen von Baden 1818, Bayern 1819 [revidierte Fassung von 1808], Württemberg 1819 und Hessen-Darmstadt 1820 enthielten, ähnlich wie die Verfassung von Westfalen 1807, Grundrechte. So wurden Staatsangehörigkeit, Rechtsgleichheit für jeden Staatsangehörigen[91], Aufhebung der Leibeigenschaft[92] (Erbuntertänigkeit), gleiche Zulassung zu öffentlichen Ämtern, Gleichheit der Besteuerung; Freiheit der Person und des Eigentums (gegen Enteignung)[93] und des Berufs (Gewerbefreiheit), ferner freie Meinungsbildung und –äußerung (nicht aber Vereinigungsfreiheit, Anm. d. V.), Pressefreiheit, Gewissensfreiheit[94] und Auswanderungsfreiheit[95] gewährleistet; die soziale Wirklichkeit blieb jedoch völlig ausgeklammert, sowohl wirtschaftlich[96] wie politisch[97].

Diese Gewährleistungen waren jedoch erheblich relativiert, da, in Abgrenzung von den Freiheits- und Gleichheitsideen der Französischen Revolution, auch zu dem Grundrechtskatalog der Verfassung von Westfalen 1807, diese Verfassungen an der Erbmonarchie festhielten (Titel II § 1 der Bayerischen Verfassung 1818): „Der König ist das Oberhaupt des Staates und vereinigt in sich alle Rechte der Staatsgewalt“), so wie dies auch die Wiener Schlussakte 1820 formulierten sollte (Art. 57)[98]. Der Monarch war, wie bereits ausgeführt, lediglich in der *Ausübung* seiner Befugnisse an die verfassungsmäßigen Beschränkungen gebunden[99]. Die Stände hatten (lediglich) das Recht zur *Mitwirkung* an der Gesetzgebung, aber nur in den Fällen, die Freiheit und Eigentum betrafen[100]. Das Verfassungs- und Gesetzgebungsrecht selbst lag beim Monarchen, auch das Initiativrecht[101]. Der Monarch berief und entließ die Kammern. Er hatte die Gesetze zu bestätigen und zu „promulgieren“ (verkünden)[102]. Die Stände konnten dem Monarchen nur „Bitten“ um Gesetzgebung vortragen[103]. Die Grundrechte, die oben erläutert wurden, standen daher jeweils unter Vorbehalt (Abänderung) der fürstlichen Gesetzgebung, die im Wege der Verfassungsänderung[104], aber auch durch Verfassungsdurchbrechung, d.h. durch einfache Gesetzgebung mit verfassungsändernder Kraft erfolgen konnte. Dies ist gemeint, wenn die Grundrechte unter ausdrücklichen Verfassungsvorbehalt (z.B. die Rechtsgleichheit, § 21 Württembergische Verfassung) oder einfachen Gesetzesvorbehalt gestellt wurden. Die Pressefreiheit war z.B. ausdrücklich unter Zensurvorbehalt (nach besonderen Edikten) wegen „Missbrauchs“ gestellt[105]. Kraft dieses Vorbehalts überlagerten die Karlsbader Beschlüsse von 1819 fast 25 Jahre die frühliberalen Verfassungen und die Verfassungen des Vormärz.

Der zweite wesentliche Unterschied der frühliberalen Verfassungen gegenüber einem effektiven Grundrechtsschutz lag darin, dass sie zwar allgemeine Handlungsfreiheit und Rechtsgleichheit (Art. 4 und 1 der Allgemeinen Erklärung der Menschenrechte) als Prinzip anerkannten, de facto aber doch nicht gewährten, denn, wie erwähnt, wurden die Privilegien der Stände nicht angetastet, d.h. der Fortbestand der alten Ständeordnung ausdrücklich gewährleistet[106]. Nach § 6 der Badischen Verfassung von 1818 hatte das Land ausdrücklich „eine ständische Verfassung“. Die frühliberalen Verfassungen legten diese Vorbehalte im Text ausdrücklich fest[107] oder es wurden vom Monarchen Sonderedikte(-gesetze) verkündet, die der Verfassung beigefügt und als Teil von ihr betrachtet wurden[108]. „Rahmenvorschrift“ war die Deutsche Bundesakte (Art. 14), die „alle Rechte des früheren reichsunmittelbaren Adels sowie des landeseigenen Geburtsadels“, selbst die „alten Rechte der Gutseigentümer aus dem Grundeigentum“ (die die gesamte lokale Verwaltung umfasste), ausdrücklich gewährleistete[109]. Erst seit

[91] § 21 Württembergische Verfassung: „Alle Württemberger haben gleiche Rechte…, soweit nicht die Verfassung eine ausdrückliche Ausnahme enthält. Ähnlich Art. 13 Badische Verfassung; Art. 23 Hessische Verfassung § 7 Bad. Verf.; § 6 Hannov. Verf. 1833. Die Bayerische Verfassung 1818 enthält eine solche Bestimmung nicht.

[92] § 25 Württ. Verf.; § 29 Hannov. Verf. 1833 (der die Ablösung der Lehnsverhältnisse einer besonderen Verordnung vorbehielt); die Bayerische Verfassung sah nur die Ablösung „unangemessener“ Lasten der Frohnen vor (Titel IV § 7).

[93] § 33 Hannov. Verf. 1833 (unter Gesetzesvorbehalt); § 24 Württ. Verf.

[94] Art. 18 Bad. Verf., § 24 Württ. Verf.

[95] § 24 Württ. Verf.

[96] So gab es z.B. keinen staatlichen Schutz des Eigentums gegen die Zerstörung des mittleren und kleinen Besitzes durch die Freigabe des Bodens als Wirtschafsgut, näher Huber, Verfassungsgeschichte, a.a.O., S.351.

[97] U.a. durch Beibehaltung des (alten) Zensuswahlrechts.

[98] Auch die Charte Constitutionelle 1814 enthielt eine solche Bestimmung.

[99] Tit. II § 1 Bay. Verf. 1818; § 4 Württ. Verf. 1819; § 5 Bad. Verf. 1818.

[100] Vgl. § 124 Württ. Verf.; § 64 Bad. Verf. 1818; näher Huber, a.a.O., S.343.

[101] Tit. III § 50 Bay. Verf.; § 65 Bad. Verf. 1818; grundsätzlich konnten Gewährleistungen daher auch widerrufen werden, wie das Beispiel des Königs von Hannover zeigt, der anlässlich seiner Thronbesteigung 1837 die Verfassung von 1833 aufhob und sieben Göttinger Professoren, die dagegen protestiert hatten, entließ, darunter Ernst Moritz Arndt und die Gebrüder Grimm. Erst 1848 erhielten beide Kammern das Initiativrecht (z.B. Bay. Verf. 1848).

[102] § 66 Bad. Verf. 1818; Tit. VII § 2 Bay. Verf.

[103] Tit. IV § 19 Bay. Verf. 1818; § 67 Bad. Verf.

[104] So stand z.B. in Württemberg die Gewerbefreiheit unter Vorbehalt des § 31 Württ. Verf., die die Verleihung von „Handel- und Gewerbeprivilegien“ zuließ.

[105] Tit. IV § 11 Bay. Verf., § 28 Württ. Verf.

[106] Grimm, in H. Coing (Hrsg.), a.a.O., S.23 ff. spricht in diesem Zusammenhang etwas ungenau davon, dass die Grundrechte nicht universell, sondern nur kasuistisch gewährt worden seien, meint aber damit wohl den oben erörterten Ständevorbehalt.

[107] Tit. V, § 2, 3, 4 Bay. Verf.; § 28, 33 Hannov. Verf. 1833; § 23 Bad. Verf. „Die Privilegien der ehemaligen Reichsstände und Reichsritter sind Bestandteil dieser Verfassung“ in diesem Zusammenhang.

[108] So wurden zusammen mit der Bay. Verf. 10 verfassungsändernde Edikte verkündet, die als Beilage I-IX der Verfassung beigefügt waren und die u.a. die vorbehaltenen ständischen Rechte im Einzelnen regelten.

[109] So auch Tit. VII § 4 Bay. Verf. Diese Rechte betrafen u.a. die Schul-, Polizei- und Kirchenaufsicht, die Standes- und die Gutsgerichtsbarkeit.

1848 wurde allgemeine Rechtsgleichheit gewährleistet und die Ständeordnung aufgehoben (z.B. Art. 4 Preußische Verfassung 1850)[110].

Das dritte Element, das die Grundrechte als vielfach nur auf dem Papier stehende Gewährleistungen erscheinen ließ, lag in der Struktur der Gesetzgebungsorgane, die wiederum eng mit dem Wahlrechtssystem verknüpft ist und nur wenig Raum für grundlegende Reformen zuließ, wenn nicht der Monarch selbst aufklärerischen Gesetzgebungselan entwickelte. Diese, in der verfassungsrechtlichen Literatur oft nicht ausreichend berücksichtigte Struktur der Legislative, hatte darüber hinaus zur Folge, dass nur ein verschwindend geringer Anteil der Aktivbürgerschaft am politischen Prozess beteiligt war – z.T. unter 1% und die Theorie von der Repräsentation der Gesamtbevölkerung mehr als fragwürdig erscheinen musste.

Von der Charte Constitutionelle 1814 hatte die deutsche Verfassungsgebung das Zweikammersystem übernommen[111]. In der Ersten Kammer saß der privilegierte Geburtsadel, in der Zweiten Kammer saßen ebenfalls Vertreter der Stände (Adel, Klerus, Universitäten, Beamte), aber auch des Bürgertums, nach bestimmter quotierter Sitzverteilung[112], die dem Monarchen bzw. den entsendenden Körperschaften den maßgeblichen Einfluss auf die Gesetzgebung sicherten. Das Initiativrecht lag, wie erwähnt, ausschließlich beim Monarchen. Die Kammern, die als Repräsentanten der Gesamtbevölkerung galten, mussten bei allen Gesetzen zustimmen, soweit sie Freiheit und Eigentum betrafen. Auf allen anderen Gebieten hatte der Monarch das alleinige Gesetzgebungsrecht (z.B. Militärwesen). Den beiden Kammern war jeder Rechtsverkehr untereinander untersagt, der Rechtsverkehr war nur unmittelbar mit der Behörde des Monarchen erlaubt[113]. Die bürgerlichen Abgeordneten wurden nach einem indirekten Zensuswahlrecht[114] (Wahlmänner) gewählt, das von der Charte Constitutionelle 1814 übernommen worden war und das auch die Zusammensetzung der Wahlmänner nach Quoten festsetzte[115]. Das allgemeine und gleiche Wahlrecht galt als „Werkzeug der Revolution“[116]. Der Zensus knüpfte an Grundbesitz und Steuerklasse und in Baden zusätzlich für die Staatsdiener, an Einkommen/Jahr[117] an. Angesichts der Zusammensetzung der Legislativorgane und des Wahlsystems, die dem Monarchen und den Eliten den entscheidenden Einfluss vorbehielten und den größten Teil der Bevölkerung (insbesondere alle Frauen[118]) von der politischen Teilhabe ausschloss, sprach man von der „hinkenden Gewaltenteilung“[119]. Die Grundrechtsentwicklung spiegelte in diesen Konstitutionen daher nur die Forderungen des Bürgertums wider, denen der Monarch und die beiden Kammern zugestimmt hatten; sie waren ein Minimum, kein Maximum.

Betrachtet man zusammenfassend die Entwicklung der Freiheits- und Gleichheitsrechte, war die Verfassungsgebung der frühliberalen und vormärzlichen Ära in ihrem Grundrechtsverständnis von dem der französischen Gesetzgebung völlig verschieden. Es war charakterisiert durch ein merkwürdiges Nebeneinander von Grundrechten und feudalen Sonderrechten, da altständische Ordnung und monarchische Staatsform unangetastet blieben. Der Staat ging nicht, wie in Frankreich, aus den Grundrechten hervor, sondern der Ständestaat überlagerte die Grundrechte. Freiheit war außerstaatlich gedacht oder stand unter Vorbehalt der fürstlichen Gesetzgebung. Das Gesetzgebungsrecht des Monarchen, sein alleiniges Gesetzesinitiativrecht und die Macht der alten Stände, verkörpert in der Ersten Kammer der Repräsentativkörperschaft und in den ihnen vorbehaltenen (quotierten) Sitzen in der Zweiten Kammer, führten dazu, dass die deutschen Kodifikationen keine Grundrechte im heutigen Sinne, sondern nur revozierbare Gewährleistungen in engem Rahmen enthielten[120].

Die Furcht des Deutschen Bundes vor der Revolution, die nach der Julirevolution 1830 in Paris noch stärker wurde, das reformfeindliche Klima in Deutschland seit den Karlsbader Beschlüssen von 1819 und unter dem Metternich-System sowie das Fehlen eines einheitlichen Rechtsverbandes nach dem Untergang des Alten Reiches (für den der Deutsche Bund kein Ersatz war), führten dazu, dass Grundrechtsentwicklung wie auch Grundrechtsdiskussion stagnierten und eine grundsätzliche Auseinandersetzung darüber, wie sie am besten zu verwirklichen seien, sich nicht entfalten konnte. Staatsphilosophie und politische Gesetzgebung in Deutschland wollten eine Reform unter Beibehaltung der alten Ständeordnung. Die Furcht vor der Revolution verstellte den Blick für die Notwendigkeit

[110] Näher Grimm, Verfassungsgeschichte a.a.O., S.52.

[111] Und in den deutschen Einzelstaaten über 100 Jahre (bis 1918) beibehalten.

[112] So bestand z.B. in Bayern (Tit. VI § 7 der Verfassung 1818) die 2. Kammer zu 1/8 aus adligen Grundbesitzern, 1/8 aus Vertretern Klerus, L aus Abgeordneten der Städte und Märkte, zu ½ aus nichtadligen Grundbesitzern und je einem Vertreter der 3 Universitäten, so dass Adel und Klerus L, Bürgerliche I stellten, wobei jedoch die Vertreter aus dem flachen Land häufig mit dem Klerus stimmten, so dass die bürgerliche Seite geschwächt war. Näher Huber, a.a.O., S.336 ff. In Württemberg waren von 94 Abgeordneten 71 Vertreter der Stadt- und Landbevölkerung, 23 Vertreter des Adels, des Klerus und der Kirche (§ 133 Verfassung 1819), das für Bayern Gesagte gilt auch hier. Nur in Baden bestand die 2. Kammer ausschließlich aus bürgerlichen Abgeordneten der Städte und Ämter (§ 63 Verfassung 1818).

[113] § 75 Bad. Verf. 1818.

[114] Vgl. § 34 Bad. Verf. 1818; § 137 Württ. Verf. 1819.

[115] Vgl. Württ. Verf.; danach wurden 1/3 der Wahlmänner von den Steuerzahlern gewählt, 2/3 der Wahlmänner bestanden automatisch aus den Aktivbürgern der nächsten Steuerklasse.

[116] E. R. Huber, Verfassungsgeschichte, a.a.O., S.344. (Zu Unrecht, da das indirekte Zensuswahlrecht schon 1789 von der Nationalversammlung eingeführt und in die Verfassung von 1791 übernommen worden war. Anm. d.V.).

[117] Grimm, in: Coing (Hrsg.), a.a.O., S.56; alle waren über 25 Jahre angesessene Bürger (= Grundeigentümer), aber auch Staatsdiener mit einem bestimmten Einkommen/Jahr (§ 36 Verfassung 1818) wahlberechtigt.

[118] Dieser Ausschluss war so selbstverständlich, dass im 19. Jahrhundert unter „allgemeinem“ Wahlrecht nur das Wahlrecht für Männer verstanden wurde.

[119] E. R. Huber, a.a.O., S.350.

[120] Näher Grimm, Verfassungsgeschichte, a.a.O., S.52.

grundlegender Änderungen, den Joseph II. in Österreich aufbrachte, nicht aber die deutschen Staaten. Sie waren Betrachter der europäischen Ereignisse, aber nicht selbständig agierende Subjekte.

Neben diesem an der Systematik des Alten Reiches festhaltenden Zweig des Staatsrechts bildete sich allerdings in den früheren Rheinbundstaaten mit liberalen Verfassungen eine staatsrechtliche Richtung heraus, die die Einzelstaatsverfassungen kommentierte und systematisierte und aus der sich im Vormärz, d.h. seit den 30er Jahren des 19. Jahrhunderts, eine neue Staatsrechtsdogmatik herausbildete, die, wie ausgeführt, Liberalisierungen, z.B. Grundrechtserweiterung, Parlamentarisierung, richterliche Prüfung von Gesetzen, forderte, jedoch ohne die Monarchie in Frage zu stellen. Wichtigster Vertreter dieser Richtung ist Robert von Mohl[121], der zahlreiche Vorgänger hat, insbesondere in Bayern (J. Schmelzing, L. von Dresch, F. Chr. K. Schunck, C. Cucumus) und der zum Vorbild dogmatischer Prüfung des positiven Staatsrechts, so für das bayerische (J. Pözl) und preußische Staatsrecht (L. M. P. von Rönne), wurde.

Die Diskussion über die Legitimation der Freiheits- und Gleichheitsrechte wurde in den 30er Jahren des 19. Jahrhunderts erneut durch Frankreich angestoßen, das auch jetzt den Hintergrund der Entwicklung bildete, aber nicht ihr Vorbild war. Die Julirevolution 1830 in Paris löste einerseits im Deutschen Bund, vornehmlich in Preußen und in Österreich, eine Verschärfung der Repression aus, andererseits inspirierte sie die vormärzliche Bewegung, die seit dem Hambacher Fest 1832 mit neuen Forderungen nach Handlungs-, Niederlassungs-, Pressefreiheit und nach Schutz der persönlichen Freiheit und des Eigentums (H. G. Wirth[122] u.a.) an die Öffentlichkeit trat. Im Deutschen Bund bewirkten sie jedoch nur eine neue Verhärtung der Fronten und ein unbedingtes Festhalten an der Monarchie, die sich durch keine Gesetzgebung gebunden fühlte, wie sich z.B. in der willkürlichen Aufhebung der 1833 erlassenen Verfassung in Hannover anlässlich des Thronfolgerwechsels 1837 zeigte. Erst in dem Grundrechtskatalog der Paulskirchenverfassung von 1849 wurden allgemeine Freiheits- und Gleichheitsrechte nach französischem und amerikanischem Vorbild[123] verankert, die Standesvorrechte endgültig beseitigt und der Volksvertretung das Recht der Gesetzesinitiative zugeordnet. Dem folgten viele Einzelstaaten, die ihre früheren Verfassungen aus der frühliberalen Zeit nach Ausbruch der Revolution „angepasst" oder neue Verfassungen erlassen[124], jedoch diese nach dem Scheitern der Revolution durch neue sog. oktroyierte Verfassungen, wie z.B. in Preußen, ersetzt hatten; diese oktroyierten Verfahren hielten zwar weiter an der Monarchie fest, behielten jedoch einige der neuen Gewährleistungen in gewissem Umfang bei oder konstituierten sie neu, wie z.B. Art. 4 der Preußischen Verfassung 1850[125]. Diese Gewährleistungen wurden somit in einigen Einzelstaaten Wirklichkeit, während die Paulskirchenverfassung nie in Kraft getreten, aber hinsichtlich der Grundrechtsgewährleistungen für viele konstitutionelle Verfassungen Vorbild geworden ist.

Trotz vielfacher äußerlicher Übereinstimmung war das Grundrechtsverständnis der deutschsprachigen Verfassungsentwicklung von dem in Frankreich herrschenden nach wie vor völlig verschieden. Während dort durch die Entmachtung des Königs die Freiheitssicherung erreicht wurde, der Ausbau der Gleichheits- und sozialen Rechte im Vordergrund stand, war Inhalt der revolutionären Forderungen in Deutschland die Freiheitssicherung *gegen* den (monarchischen) Staat, nicht die Gleichheit *durch* den Staat. Es bedurfte formaler, verfahrensrechtlicher Garantien, die die prinzipiell als unbeschränkt gedachte Gewalt des Monarchen in Schranken hielten. Dies ist die Geburtsstunde des Rechtsstaats deutscher Prägung, der von formalen Sicherungen geprägt war, Gleichheits- und soziale Fragen jedoch ausklammerte[126], auch die übrigen materiellen Grundrechte verdrängte. Die Staatslehre wandelte sich zur Staatsrechtslehre[127]. Die Natur des „Rechtsstaats" machte ihn auch für die Vertreter des Spätabsolutismus akzeptabel. Auf diese Weise machte F. J. Stahl den Rechtsstaat „hoffähig". „Rechtsstaat ist nur Verfahren, der Inhalt ist göttlicher Natur, der Staat ist göttlicher Natur, der Monarch ist ihr Repräsentant. Daher ist er der Volksrepräsentation kraft seiner Berufung durch göttliches Naturrecht in jedem Fall zugeordnet".

Die formale Natur des Rechtsstaatsbegriffs führte dazu, dass sich in der zweiten Hälfte des 19. Jahrhunderts die Ideen der aus Frankreich stammenden vernunftrechtlich begründeten Grundrechte mehr und mehr verflüchtigten. Zwischen 1850 und 1866 lebt die Restauration wieder auf; die großen Auseinandersetzungen des Deutschen Bundes mit Österreich, die grundsätzlichen Verfassungskonflikte in Preußen und der wirtschaftliche und politische Zusammenschluss der deutschen Staaten prägten die Politik und führten innenpolitisch zur Stagnation, in Österreich sogar zur Rückkehr zum Absolutismus der vor-theresianischen Zeit. Die Grundrechtsentwicklung in Deutschland wurde dadurch um fast 70 Jahre verzögert.

Die Reichsverfassung von 1871 enthielt keine Grundrechte mehr und die Grundrechte in den Länderverfassungen (z.B. in der preußischen Verfassung von 1850) standen, wie schon in

[121] Das Staatsrecht des Königreichs Württemberg I – II, 1829.

[122] Seine Aufrufe auszugsweise in: H. Brandt, a.a.O., S.323 f.

[123] Vgl. näher Diemut Majer, Gerichtliche Kontrolle und politische Macht: Von der Paulskirche zum Bundesverfassungsgericht, in: Jahrbuch für Deutsche Geschichte, XVI/1987, Tel Aviv 1987, S.135 ff.

[124] So wurde z.B. 1848 in Bayern den beiden Kammern das Gesetzesinitiativrecht zuerkannt.

[125] Art. 4 der Preuß. Verf. von 1850, verkündete die Aufhebung aller ständischen Sonderrechte und die allgemeine Rechtsgleichheit.

[126] Gleichheit ist nicht die Gleichheit aller, sondern ist die „Gleichheit der Eigentümer" (D. Grimm), z.B. im Zensuswahlrecht.

[127] Der Rechtsstaatsbegriff mit seiner formalen Ausrichtung verdrängte auch die Fragen der Staatslehre nach dem Richtigen, Guten, Moralischen. In der sich herausbildenden Staatsrechtslehre bildeten Verfahren zum Zweck der Freiheitssicherung, Gesetzmäßigkeit der Verwaltung, das Gesetz als Richtschnur staatlichen Handelns, die Kontrolle staatlicher Akte durch die (Verwaltungs-)gerichte den Mittelpunkt und gewinnen hohe Bedeutung, so z.B. bei R. von Gneist, der Rechtsstaat und die Verwaltungsgerichte in Deutschland, 2. Aufl. Leipzig 1879.

der frühliberalen Ära unter ständischem sowie unter einfachem Gesetzes- oder Verfassungsvorbehalt der konstitutionellen Monarchie und wurden bis 1918/19 nicht wesentlich geändert. Ihre Wirksamkeit war daher äußerst beschränkt und hing vom politischen Kurs der jeweiligen Landesherren ab.

Frankreich und seine Allgemeinen Menschenrechte von 1789 sind erst wieder im 20. Jahrhundert von Bedeutung für die Grundrechtsentwicklung geworden. Zum ersten Mal in Deutschland gewährte die Weimarer Reichsverfassung vom 19. August 1919 volle politische Rechte und Rechtsgleichheit für alle Deutschen und beseitigte Monarchie und die Reste der ständischen Rechtsordnung. Erst in der Weimarer Zeit, d.h. nach über 120 Jahren, wird die Französische Revolution auch ausdrücklich Gegenstand der wissenschaftlichen Auseinandersetzung, indem, wie ausgeführt, die herrschende Geschichtswissenschaft den „Kampf der Ideen von 1914" den „Ideen von 1789" gegenüberstellte [128].

Dass auch die Nationalsozialisten ausdrücklich auf die Französische Revolution Bezug nehmen, ist „konsequent", i.S. einer destruktiven Ideologie. Der gesamte Humanisierungsprozess der Menschheit seit 1789 sollte nach den Worten von Goebbels rückgängig gemacht werden, um „die großdeutsche Nation" zu erneuern [129].

Nach 1945 sind die Allgemeinen Menschenrechte von 1789 vom „Hintergrund" zum Vorbild für die Entwicklung des internationalen Rechts geworden. Ausdrücklich beriefen sich die damaligen Akteure, auch die aus der Dritten Welt, zur Vorbereitung der Menschenrechtserklärung der UNO von 1948 auf die Ideen der Französischen Revolution, die für die Völkergemeinschaft mit Ausnahme des Faschismus und des Nationalsozialismus verbindlich sein sollten [130]. Die durch die Schrecken des Krieges erzwungene Rückbesinnung auf das gemeinsame Erbe der Menschheit wirkte auch fort in dem Kontext der Londoner Vereinbarungen der Alliierten vom August 1946 zur Einrichtung eines Internationalen Militärgerichtshofes in Nürnberg zur Aburteilung und Bestrafung der nationalsozialistischen Hauptkriegsverbrecher. Die in Art. 6 zusammengefassten Verbrechenskategorien (Verbrechen gegen den Frieden, Kriegsverbrechen und Verbrechen gegen die Menschheit) sind sozusagen die negative Folie, auf der das positive Gerüst der Menschenrechtserklärung der Vereinten Nationen von 1948 aufgebaut wurde.

3. Die Französische Revolution und die Entwicklung des Privatrechts

Bereits oben wurde ausgeführt, dass eine unmittelbare Wirkungsgeschichte der Französischen Revolution in der europäischen Entwicklung des öffentlichen Rechts nicht festgestellt werden kann, sondern dass ihr Einfluss eher mittelbar als eine deutliche Abwehr der Revolution als historisches Ereignis bestimmt werden muss.

Eine weitere Mediation erfuhr die Französische Revolution auf dem Gebiet der europäischen Privatrechtsentwicklung. Auch sie griff das Erbe der Revolution, die Ideen von Freiheit und Gleichheit auf, die sie jedoch nicht in der revolutionären Gesetzgebung der Jahre 1791 – 1794, sondern im Code Napoléon (Code Civil) von 1804 verkörpert sah. Revolution und napoleonische Herrschaft wurden „irgendwie" als Einheit betrachtet; Napoleon wurde als Erbe der Revolution gesehen. Das war insofern unrichtig, als es unter Napoleon keine (von der Revolution verkündeten) politischen Rechte geben konnte. So blieb nur das Privatrecht, für das Napoleon das „Erbe der Revolution" beanspruchte. Dies bestand in der Gewährleistung der bürgerlichen Rechtsgleichheit, sowie in der Freiheit des Handels und Gewerbes. In der Stellung zum Code Civil 1804 spiegelt sich daher die Rezeption der Französischen Revolution in der Rechtsgeschichte. Ausgangspunkt dieser Rezeption ist die grundsätzliche Auseinandersetzung mit der Aufklärung insgesamt, mit den Ideen von Montesquieu, Locke, Rousseau, vor die sich die Gesetzgebung der europäischen Staaten (die gleichzeitig das „Produkt" der Revolution – also die Aufklärung – auf das schärfste ablehnte) gestellt sah. Die großen Gesetzgebungswerke des Preußischen Allgemeinen Landrechts (ALR) von 1794 und das Österreichische Allgemeine Bürgerliche Gesetzbuch (ABGB) von 1811 sind das sichtbarste Zeugnis dieser Auseinandersetzung, die schon lange vor Ausbruch der Revolution begonnen hatte. Sie stellten der Aufklärung französischer Prägung (in Form des Code civil) ein eigenes Naturrecht der Staaten des aufgeklärten Absolutismus gegenüber.

Die Ursachen dieser zwei- und dreifach gebrochenen Mediation der aus Frankreich kommenden Ideen liegen in der bereits oben erwähnten Abschreckung, die die revolutionären Ereignisse in Frankreich ausgelöst und diese untrennbar mit dem Begriff „gewaltsamer Umsturz" (Vorläufer des Hochverratstatbestan-

[128] Vgl. die in der Einführung erwähnten Auseinandersetzungen zwischen H. Hintze und den konservativen Historikern ihrer Zeit.

[129] Zit. nach Gerhard Stuby, Universalismus versus Partikularismus: Die Menschenrechte der dritten Generation, in: aus Politik und Zeitgeschichte Bd. 46-47/98, S.27 ff., 28.

[130] „Ein soziales System bleibt natürlich ausdrücklich von der Mitgliedschaft in den Vereinten Nationen ausgeschlossen: der Faschismus, oder seine deutsche Form – der Nazismus. Für diesen Ausschluss gibt es unverkennbar gesunde philosophische Grundsätze: die faschistischen und nazistischen Philosophien beschränken nicht nur in ihren praktischen Anwendungen, sondern auch formell in ihren Prinzipien Auffassungen wie den Begriff der Menschenverbrüderung, die Anschauung, dass die menschlichen Wesen gleiche und unveräußerliche Rechte haben ohne Rücksicht auf Rasse, Farbe oder Geschlecht und alle philosophischen und geschichtlichen Errungenschaften der Demokratie und des menschlichen Geistes, wie sie im 17. und 18. Jahrhundert verwirklicht wurden". John Sommerville, Vergleich zwischen demokratischen Prinzipien der Sowjets und des Westens vom Gesichtspunkt der Menschenrechte aus, in: UNESCO (Hrsg.), Um die Erklärung der Menschenrechte. Ein Symposium mit einer Einführrung von Jacques Maritain, Zürich 1951, S.203 (zit. nach G. Stuby, a.a.O., S.28).

des[131] verbunden hatten. Die „Greuel der Revolution" hätten einen „Umschlag für die politische Literatur" gebracht[132]. Zugleich wendete man sich gegen das Naturrecht: Dieses war die „Waffe der Aufklärung, die Methode und Denksport schlechthin"[133].

Die Reformgesetze von 1794 in Preußen und 1811 in Österreich nahmen in Abgrenzung zu den aufklärerischen Ideen daher nur äußerlich die Begriffe Gleichheit und Freiheit auf, gingen aber von einem anderen Legitimitätsgrund aus: Dieser war das Naturrecht des aufgeklärten Absolutismus, der nicht durch Revolution von unten, sondern aus dem Pflichtenethos der fürstlichen Obrigkeit Rechte für die Untertanen gewährte, „verordnete", wie dies am deutlichsten im Josephinismus zum Ausdruck kommt. Der Josephinismus war die fortschrittlichste Form aller europäischen Monarchien, der nicht nur dem Individuum umfassende Rechte im wirtschaftlichen Sinne, sondern zugleich Ansätze zur Befreiung aus der Ständeherrschaft (Entmachtung des Adels) und religiöse Toleranz gewährleistete[134]. Leitfigur der Gesetzgebung war Karl Anton Freiherr von Martini (1726-1800), der erste Lehrer des Naturrechts an der Wiener Universität[135], dessen Werk in einer Festschrift zu seinen Ehren ausführlich gewürdigt wird.[136] Er hatte ursprünglich in Ablehnung der Lehre vom Gesellschafts- und Unterwerfungsvertrag (Pufendorf) eine Art Demonkratietheorie, nämlich die Theorie des *Vereinigungsvertrages* der Menschen aus Gründen des individuellen Schutzbedürfnisses für die unveräußerlichen natürlichen Rechte, Freiheit und Eigentum entwickelt, nach der eine Änderung der Staatsform nur auf der Basis eines weiteren neuen Vertrages möglich war. Unter dem Eindruck der Französischen Revolution war diese Theorie, die im Grunde an die Volkssouveränität anknüpfte, jedoch unhaltbar geworden. In der Reformgesetzgebung in Deutschland und in Österreich kehrte man zum Naturrecht alter Prägung und zum Unterwerfungsvertrag zurück, das zwar, wie die Aufklärung, natürliche Rechte des Menschen anerkannte, jedoch einem mathematischen System vergleichbar, alle Rechtsquellen aus einem obersten Satz – gleichsam als „Jurifizierung" des Unterwerfungsvertrags – herleitete[137].

Dieser staatsphilosophische Totalitätsanspruch, der den Vorteil großer begrifflicher Ordnung hatte, aber „zur Vernachlässigung der Geschichte und der Einzelheiten führte oder führen konnte"[138], wurde nun von der fürstlichen Gewalt ausgefüllt, die nicht nur *einzige Rechtsquelle* war[139], sondern zugleich *umfassende Regelungsbefugnisse* hatte.

4. Das Preußische Allgemeine Landrecht 1794 (ALR): Bürgerliche Freiheit unter Vorbehalt der monarchischen Gesetzgebung

Dieses, von von Carmer, Suarez und Klein geschaffene Werk[140] stellt die erste umfassende Kompilation der bis dahin weit verstreuten Provinzialrechte der preußischen Staaten, der Neuschöpfungen aufgrund der allgemein herrschenden naturrechtlichen Auffassungen sowie von Elementen des römischen Rechts dar, das bürgerliches, Handels-, Wechsel-, See-, Versicherungs-, Staats-, Kirchenrecht, Strafrecht, Stände- und Lehensrecht enthielt. Ausdrücklich wird aber in der Literatur vermerkt, dass Grundlage *nicht* die „fortgeschrittenen französischen Forderungen der Gleichheit und Freiheit" des späteren Code Civil, sondern die naturrechtlichen Ideen des fürstlichen Absolutismus waren, die auf Thomasius, Pufendorf und Wolff zurückgingen. Daher sei im ALR 1794 ein „ängstliches Streben" (der Aufklärung) zu beobachten, alles zu reglementieren, jede richterliche Willkür (d.h. Auslegung) durch ein möglichst genaues Gesetzbuch auszuschließen. Es sei „wissenschaftsfeindlich", da kein Spielraum für Interpretation sei[141].

---

[131] In der Definition Feuerbachs, zit. nach Stintzing/Landsberg, Geschichte der deutschen Rechtswissenschaft, 3 Bde., 3.Abt., 1.Halbbd., München/Leipzig 1898, S.115 ff.

[132] Stintzing/Landsberg, a.a.O., S.434.

[133] Stintzing/Landsberg, a.a.O., S.435.

[134] Vgl. dazu Ch. Link, Toleranz im deutschen Staatsrecht der Neuzeit, in: P. F. Barton, Im Zeitalter der Toleranz, Aufsätze zur Toleranzgesetzgebung des 18. Jahrhunderts, Wien 1981, S.17 ff. (38).

[135] Martini stammt aus Revo bei Bozen; Sohn eines K. K. Hofrates bei der Obersten Justizstelle, studierte er in Trient, Innsbruck und Wien Philosophie, Staats- und Völkerrecht und schloss 1747 sein Studium mit der Promotion zum Doktor beider Rechte ab. 1753 wurde er Professor des Kanonischen Rechts in Wien und noch im gleichen Jahr von der Kaiserin Maria Theresia auf den neugeschaffenen Lehrstuhl für Naturrecht berufen. Bald gehörte er zu den herausragenden Repräsentanten der österreichischen Rechtswissenschaft (1767: de lege naturali positiones, 1768: Positiones de jure civitatis). Martini wurde 1764 als Mitglied der Vorbereitenden Kommission für ein allgemeines Gesetzbuch berufen. Sein Entwurf wurde jedoch nicht für die Gesamtmonarchie übernommen (nur 1797 in Galizien als „Westgalizisches Gesetzbuch" eingeführt), da zu viel aufgeklärtes Gedankengut in ihm enthalten war. Näher W. Brauneder, Juristen in Österreich 1200-1980, Wien 1987, S.77 ff.; ders., Das Allgemeine Bürgerliche Gesetzbuch für die gesamten Deutschen Erbländer der Österreichischen Monarchie von 1811, in: Gutenberg-Jahrbuch 1987, 215 ff., 225 ff. Gerhard Kleinheyer/Jan Schröder (Hrsg.), Deutsche und Europäische Juristen aus neun Jahrhunderten, 4. neubearb. und erweit. Auflage, Heidelberg 1996, S.266 ff.

[136] Heinz Barta, Rudolf Palme, Wolfgang Ingenhauff (Hg.): Naturrecht und Privatrechtliche Kodifikation, Wien 1999.

[137] Stintzing/Landsberg, a.a.O., 3. Abt., 2. Halbbd., München/Berlin 1919, S.15 ff., 19 ff.

[138] a.a.O., 3. Abt., 1. Halbbd., München/Berlin 1898, S.434.

[139] So für das ALR Gerd Kleinheyer, Das Allgemeine Landrecht für die Preußischen Staaten vom 1. Juni 1794, Jur. Gesellschaft, Karlsruhe Bd. 216, C. F. Müller Juristischer Verlag, Heidelberg 1995.

[140] Zur Entstehung näher Hans Hattenhauer, Allgemeines Landrecht für die Preußischen Staaten von 1794. Textausg. einer Einführung von Hattenhauer, 3. Aufl., Frankfurt 1996; Anke Breitenborn, Randgruppen im Allgemeinen Landrecht für die Preußischen Staaten von 1794, Berlin 1994, S.60 ff., 71 ff. Eine Erschließung der Gesetzesmaterialien findet sich bei Peter Krause (Hrsg.), Carl Gottlieb Suarez, Gesammelte Schriften, I. Das Allgemeine Landrecht: die Texte. Entwurf eines allgemeinen Gesetzbuches für die Preußischen Staaten, Bd. 1, 1. Teil, 1. Abt., Stuttgart/Bad Cannstatt 1996.

[141] Stintzing/ Landsberg, a.a.O., 3. Abt., 1. Halbbd., 1898, S.465 ff., 477; so auch Gerhard Wesenberg, Neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung, 2. Aufl., neu bearb. von G. Wesener, Lahr 1969, S.131 ff.

Das ALR von 1794 ist kein modernes Gesetzbuch im eigentlichen Sinne. Es behielt die Trennung der Stände (allgemeine, aber nicht gleiche Rechte) und die Erbuntertänigkeit der Bauern bei; es beruhte auf der Lehre vom Gesellschaftsvertrag, alles Recht steht zur Disposition des Herrschers. Es verkörpert die Lehre von der öffentlichen Wohlfahrt[142] und verfestigte somit bis weit in das 19. Jahrhundert hinein das „ausgehende Wolff'sche Naturrecht"[143].

So ständestaatlich der Charakter des ALR ist, so sehr brachte es im wirtschaftlichen Bereich Erneuerung, so u.a. Gewährleistungen der Handels- und Gewerbefreiheit (soweit ständische Rechte nicht entgegenstanden), Neuordnung des Bildungs- und Schulwesens (staatliche Aufsicht), Rechtsgleichheit bei Aufopferung und Enteignung: Förderung von Landwirtschaft und Gewerbe, eine Verstärkung der polizeirechtlichen Befugnisse des Staates und liberale Tendenzen im Kirchenrecht. Darüber hinaus formulierte das ALR im deutschsprachigen Rechtsbereich als erstes die Subjektqualität des Menschen: „Der Mensch wird, insofern er gewisse Rechte in der bürgerlichen Gesellschaft genießt, eine Person genannt" (§ 1 II, 1 ALR). Es gewährleistete auch Rechtsgleichzeit, aber nur im Rahmend er ständischen Ordnung. Es formulierte auch die Gleichberechtigung von Frau und Mann, setzte aber die Geschlechterungleichbehandlung im Familienrecht fort[144], zeigte allerdings im Nichtehelichenrecht gewisse fortschrittliche Züge[145].

Im Hinblick auf diese Neuerungen galt das ALR am Ende des 18. Jahrhunderts als das Ideal der naturrechtliche-rationalistischen Epoche[146], das durch eine klare, einfache Sprache besticht und von Zeitgenossen wie Nachfahren hoch gerühmt wurde: „Ausbildung des Bestehenden… in einem nicht revolutionären Lande", schrieb der Freiherr vom Stein 1819 an Wilhelm von Humboldt[147]. Der Dichter Achim von Arnim schrieb, das ALR sei „so wichtig wie Luthers Bibel-Übersetzung"[148]. Otto von Gierke hielt das ALR für ein Werk („älteste Kodifikation des neueren Europa") „welches an schöpferisch-sozialem Geist den BGB-Entwurf bei weitem überragt"[149]. Hans Thieme („Magna Charta des zu einer gesicherten Rechtsstellung im Staat herangeführten Volkes")[150] und Erik Wolf[151] sahen im ALR einen Schritt zum bürgerlichen Rechtsstaat.

Es gab aber auch kritische Stimmen. 1784 – 1787 war der Entwurf erschienen, also noch vor Ausbruch der Französischen Revolution; er sollte am 01. 06. 1792 in Kraft treten, also zu einem Zeitpunkt, als die Revolution sich zunehmend radikalisierte. Die konservative Kritik warf dem ALR zu viele aufklärerische Gedanken vor, die in Frankreich die revolutionären Auswüchse zeitigten („Gleichmacherei", die Bauern zögen „falsche Hoffnung auf Verbesserung ihrer Rechtsstellung", es komme zu Tumulten)[152]. 1793 kam der Umschwung mit der zweiten polnischen Teilung, die die schnelle Einführung des preußischen Rechts in den neuen Gebieten verlangte. Nach Entfernung der anstößigen Bestimmungen kam es dann zur Verkündung des „Allgemeinen Landrechts", der ursprünglich vorgesehene Titel „Allgemeines Gesetzbuch" klang zu revolutionär[153]. Die Historische Rechtsschule hielt vom ALR gar nichts. Von Savigny qualifizierte die Kodifikation 1816 als „Mist der vergangenen Jahre"; als in „Form und Materie eine solche Sudeley"[154] und plädierte für eine völlig neue Kodifikation. Diese Kritik, später als „überheblich" und „ungerecht" kritisiert, war die Replik der Wissenschaft auf die Rolle, die das ALR ihr und der Justiz zugewiesen hatte, nämlich „Gesetzesbüttel" zu sein[155]. Die neuere rechtshistorische Forschung betont eher den konservativen Charakter (Sammlung des Bestehenden) des ALR[156].

5. Das Österreichische (Allgemeine) Bürgerliche Gesetzbuch (ABGB): Bürgerliche Freiheiten neben der Aufrechterhaltung der Ständegesellschaft

Als weitere Reformgesetzgebung auf dem Hintergrund der geistigen und politischen Umwälzungen durch die Französische Revolution ist das österreichische Allgemeine Bürgerliche Gesetzbuch (ABGB) von 1811 zu nennen. Dieses weitgehend von K. A. von Martini gestaltete Gesetzbuch, dessen Wurzeln im sog. Josephinismus liegen und dessen Vorarbeiten auf den Anfang des 18. Jahrhunderts zurückgehen[157], spiegelt, obwohl siebzehn Jahre *nach* dem ALR 1794 erlassen, am stärksten den Reformwillen des aufgeklärten Absolutismus wider, in Abwehr der Gleichheits- und Freiheitsideen aus Frankreich.

Das Merkmal der Stellung des Herrschers sind die im Grunde unbegrenzten Befugnisse, alles und jedes zu regeln (Omni-

[142] Stintzing/Landsberg, a.a.O., 3. Abt., 1. Halbbd., 1898, S.474 f.
[143] a.a.O., S.528.
[144] Ausführlich Majer, Der lange Weg zu Freiheit und Gleichheit, a.a.O., S.93 ff., insbes. S.111 ff.
[145] Verpflichtung des Schwängerers, zum Unterhalt und zur Versorgung des Kindes (§ 1027).
[146] Vgl. näher Gerd Kleinheyer, Das Allgemeine Landrecht für die Preußischen Staaten vom 1. Juni 1794, Jur. Studiengesellschaft, Karlsruhe Bd. 216, C. F. Müller Juristischer Verlag, Heidelberg 1995.
[147] Zit. nach Kleinheyer, a.a.O., S.1.
[148] Zit. nach Hattenhauer, Einführung zur Textausgabe des Allgemeinen Landrechts für die Preußischen Staaten von 1794, Frankfurt/Berlin 1970, S.39.
[149] Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht, Leipzig 1889, S.14.
[150] Zit. nach Kleinheyer, a.a.O., S.3.
[151] Große Rechtsdenker der deutschen Geistesgeschichte, 2. Aufl. Tübingen 1944, S.421.
[152] Näher Kleinheyer, a.a.O., S.7 ff.
[153] Kleinheyer, a.a.O., S.9
[154] Zit. nach A. Stoll, F. Carl von Savigny, 2. Bd., Berlin 1929, Nr. 319, S.210.
[155] Näher Franz Wieacker, Privatrechtsgeschichte der Neuzeit, Göttingen 1964, S.334.
[156] Nachweise bei Kleinheyer, a.a.O., S.9.
[157] Schon seit 1709 war unter Joseph I. eine Kodifikation für die Erbländer geplant, die aber nicht vorwärts kam (Gesamtentwurf 1766), weil sie zu umfangreich war. Man forderte Kürze und Befreiung vom Römischen Recht zugunsten des Naturrechts. Von Martini übernahm die Überarbeitung; der 1. Teil wurde 1786 zum Codex Theresianus, weitere Teile wurden 1796 zum Gesamtentwurf zusammengefasst, der jedoch „probeweise" nur im fernen Galizien als „Westgalizisches Gesetzbuch" 1797 in Kraft trat; näher Gerhard Wesenberg, a.a.O.

potenz des Gesetzgebers). Das ABGB fasst Böhmisches Recht, Deutsches Naturrecht, Deutsches Statutarrecht zusammen; Einflüsse von Grotius, Pufendorf, Thomasius und Christian Wolff sind unübersehbar. Andererseits werden diese Befugnisse in einigen Teilen durch das jüngere Naturrecht (Kant, Fichte) beschränkt, wonach das Recht nur regeln darf, soweit dies nötig ist, um „Rechte anderer" zu wahren. Das Recht wird inhaltlich „entleert", formale Prinzipien (des Verfassungsrechts) obsiegen[158].

Diese Widersprüchlichkeit des ABGB soll an folgenden Beispielen verdeutlicht werden. Im wirtschaftlichen Bereich und im Rechtsverkehr zeigt es durchaus moderne Züge: Es gewährleistete die Gleichheit vor dem Gesetz (ein bürgerliches Gesetzbuch für den freien Bürger, der keine Bindungen an das Mittelalter hat); das Rechtssubjekt ist rechts-, parteifähig und geschäftsfähig, es handelte vor allem als Wirtschaftssubjekt. Die sozialen Probleme der abhängigen Arbeit wurden allerdings (wie im ALR von 1794) nicht geregelt. Der Paternalismus der fürstlichen Gewalt zeigt sich andererseits in der Absicht des Monarchen, „allgemeine Grundsätze der Gerechtigkeit für die besonderen Verhältnisse der Einwohner" zu schaffen. Hinsichtlich der Rechtssubjektivität gewährleistet das ABGB beiden Geschlechtern volle Geschäfts- und Prozessfähigkeit (§ 251) (auch den Ehefrauen) und ist damit das modernste der drei Reformwerke[159]. Andererseits blieb die patriarchalische Struktur des Familienrechts (wie Gehorsamspflicht der Frau, § 91, 92, und das Verwaltungs- und Nutznießungsrecht des Mannes am Vermögender Ehefrau, allerdings mit liberalem Einschlag[160]) erhalten. Das ABGB verkörperte also das Naturrecht (alter Prägung) mit Einbeziehung frühliberaler Tendenzen und hat eine teils paternalistische, teils individualistische Grundstruktur. Diese Doppelnatur zeigt sich auch in der Rezeption des ABGB: Einerseits als „Hochburg der bürgerlichen Freiheit"[161], als das neben dem Code Civil modernste Gesetzbuch gerühmt, das auf der Schwelle vom 18. zum 19. Jahrhundert stehe, ordneten es andere Schriftsteller (wie das ALR) noch dem ausgehenden 18. Jahrhundert zu[162].

6. Der Code civil: Umfassende bürgerliche Freiheiten, befreit von feudalstaatlichen Elementen

Die Wurzeln des Code Civil von 1804[163] gehen bis ins 16. Jahrhundert zurück, als bereits Versuche einer allgemeinen Kodifikation feststellbar sind, die die von fränkischen Rechtsanschauungen beeinflussten Gewohnheitsrechte (droit coutumier) zusammenfassen sollten. In der Französischen Revolution wurde bereits am 4. 8. 1789 die Feudalordnung, die Patrimonialgerichtsbarkeit, der Adelsvorrechte und der Zünfte aufgehoben. 1790 in der konstituierenden Versammlung wurde eine Kodifikation gefordert und die Verfassung von 1791 stellte sie in Aussicht. Durch die revolutionären Ereignisse kam es jedoch nicht dazu. Das revolutionäre Privatrecht (droit intermédiaire) erging in zahlreichen Einzelgesetzen, die die Rechtsgleichheitsidee verwirklichten. Die wichtigsten Neuerungen waren: Einführung der Gewerbefreiheit, Regelung des Erbrechts (Einschränkung des gesetzlichen Erstgeburtsrechts), Einführung der Zivilehe und –scheidung, Übertragung des Jagdrechts (von Gutsherrn) auf den Eigentümer des Bodens, der von den bisherigen hörigen Bauern erworben werden konnte. 1790 erfolgten auch wichtige prozessuale Veränderungen: Die Parlamente, die Gerichtsfunktionen wahrgenommen hatten, wurden durch Bezirksgerichte ersetzt, sowie die Unabhängigkeit der Richter eingeführt. Am letzten Tag der Assemblée Nationale, am 10. 8. 1792, wurde auch das Familienrecht reformiert (Säkularisierung des Eherechts, u.a.) und dies vom Konvent später fortgesetzt[164]. Unter Napoleon wurde die Idee einer einheitlichen Gesetzgebung wieder aufgegriffen. Alle Gebiete des bürgerlichen Rechts, die bisher in 36 einzelnen Gesetzen verstreut waren, wurden zusammengefasst und durch Gesetz vom 21. 03. 1804 als Code Civil verkündet.

Der CC war nur teilweise revolutionär, teils beruhte er auf Vorarbeiten des Ancien Régime und folgte weitgehend konservativen Tendenzen. Das Droit intermédiaire (der Revolution) wurde fast gänzlich beseitigt. Immerhin war der Code Civil das erste Gesetzbuch des ständefreien Staates und sicherte zusammen mit den anderen Reformwerken (Code de Commerce 1806; Code de Procédure Civil 1807; Code Pénal 1810) die als selbstverständlich betrachteten Rechte der Revolution wie Rechtsgleichheit, Vertragsfreiheit, Rechtsobjektivität des Individuums, Freiheit der Person, des Eigentums und des rechtsgeschäftlichen Verkehrs, die unabhängig von der Staatsbürgerschaft waren[165], Säkularisierung von Ehe und Familie. Allerdings wurde das Familienrecht wieder strikt patriarchalisch gestaltet[166].

Das Positive des Code Civil wird also einmal in der einheitsstiftenden Funktion gegenüber dem Chaos der Rechtszersplitterung, ferner als die Verwirklichung der „großen Ideen" der Französischen Revolution: Freiheit der Person und des Eigentums gesehen. Der Code Civil sei durch die Revolution und „den Abglanz napoleonischer Größe beflügelt". In den Anfängen sei er ein Werk der Revolutionäre selbst, später „ihrer großen Tribunen…" geworden. Das Pathos neu errungener Volkssouverä-

[158] Zum ABGB allgemein näher Stinzing/Landsberg, a.a.O., 3. Abt., 1. Halbbd. 1898, S.383 f., 506, 511, 528.
[159] Näher Majer, a.a.O., S.120 ff.
[160] In Form einer durch anderslautende Erklärung der Ehefrau widerlegbaren Vermutung, § 1238.
[161] Wesenberg, a.a.O., S.135 f.
[162] Stinzing/Landsberg, a.a.O., S.528.
[163] Hierzu und zur Geschichte des CC vgl. näher Wesenberg, a.a.O., S.131 ff.; Grimm, in Coing (Hrsg.), a.a.O., S.26 ff.
[164] Näher D. Grimm, a.a.O., S.30.
[165] 1. Buch, 1. Tit., 1. Kap., Art. 7 („bürgerliche Rechte"). Nach Art. 8 CC genoss jeder Franzose die (inländischen) „Civilrechte", z.B. Gewerbefreiheit.
[166] Grimm, a.a.O., S.28; So z.B. der Ausschluss der Ehefrau von selbständigen Rechtsgeschäften; Gehorsamspflicht der Ehefrau; das Verwaltungs- und Nutznießungsrecht des Mannes am Vermögen der Ehefrau und der Kinder; Privilegierung des Ehemannes bei der Scheidung, Art. 212 ff., 389, 488, 1124; näher Majer, a.a.O., S.109 ff., 117 ff.

nität und Rechtsteilhabe des citoyen bestimme (seien) geistigen Ausdruck[167]. Gerade die Tatsache, dass der Code von Napoleon, dem Antirevolutionär, erlassen wurde, der das revolutionäre Recht weitgehend beseitigt hatte, gereichte ihm zum Ruhm: Napoleon und seine Werke wurden als „Erbe" der abstrakten Idee der Revolution (die somit ihres historischen Gehalts beraubt wird) angesehen. Der Code trage „den Geist der Revolution nicht in umstürzlerischen Bestimmungen an die Stirn geschrieben, sondern bekenne (diesen Geist) in seinen tragenden Bestimmungen"… Er sei darin der „vollkommene Ausdruck der Bedürfnisse des Dritten Standes, der herrschenden Klasse des 19. Jahrhunderts". Der CC wurde sogar als „une réaction contre la révolution"[168], als „glückliche Synthese zwischen droit écrit und droit coutumier…" als „privatrechtliche Garantie der Grundrechte" gepriesen.

Diese „privatrechtliche Garantie" bedeutete umgekehrt, dass, wie ausgeführt, neben der wirtschaftlichen Freiheit, die obrigkeitsstaatlichen Verhältnisse von Bürger und Staat fortbestanden und nicht etwa i.S. einer Parallelgesetzgebung – aufgelöst wurden. Nach Napoleons Willen sollten die revolutionären Ideen und Freiheit nur in der Bürgerlichen Gesellschaft verwirklicht und ein Gesetzbuch für Frankreich geschaffen werden, das für ganz Europa als Lehrmeister und Vorbild dienen sollte[169]. Er wollte ein „neuer Justinian" sein… und „die große europäische Familie, deren Bestimmung es ist, das Schicksal der Welt zu bestimmen, durch beste und dauerhafte Bande zu vereinigen, wir das Band und das Beispiel der Völker, die uns umgehen"![170] Die abstrakten Ideen von Freiheit und Gleichheit (nur) im Privatrechtsverkehr und die Aufhebung des Ständestaates machten den Code Civil zum modernsten Gesetzbuch, das von Polen bis Italien unabhängig von der Staatsform Verwendung fand[171] - ein Siegeszug, den auch deutsche Kritiker, wenngleich sie negative Formulierungen verwendeten („antifeudalistische, egalitäre und zentralistische Tendenzen des CC) widerwillig anerkennen mussten („Siegeszug des CC durch die Welt des 19. Jahrhunderts")[172].

In der zeitgenössischen Kritik spielte der CC eine merkwürdige Rolle. Er wurde einerseits als „codifizierte Vernunft"[173], als „Gesetzbuch des Jahrhunderts"[174] angesehen und wegen seiner klaren und volkstümlichen Sprache gerühmt; die Romanisten hingegen beanstandeten die „unvollständige und teilweise oberflächliche Regelung wichtiger Bereiche, wie das Besitz- und Grundpfandrecht und Erbrecht[175]. Gefährlich erschien der Code Civil vor allem aber deswegen, weil er Forderungen nach nationaler Rechtseinheit (so z.B. Thibauts Aufruf 1814) hervorrief. Langfristig, so hieß es, müsse eine echte Volksgesetzgebung geschaffen werden[176]. Die Kritik im 20. Jahrhundert sparte hingegen nicht mit Lob: Der Code Civil sei ein „Meisterwerk", die glanzvolle Ouverture des Jahrhunderts"[177], der das missionarische Ziel universeller Anwendung verkörpere[178].

7. Die weitere Entwicklung des Privatrechts

Die grundsätzliche Ablehnung der durch die Französische Revolution verkörperten Freiheitsideen und des zu ihnen führenden Naturrechts war auch für die weitere Entwicklung des deutschsprachigen Privatrechts seit Ende des 18. Jahrhunderts maßgeblich: Das monarchische Prinzip als höchste Rechtsquelle der Gesetzgebung blieb erhalten, das die Gesetzgebung i.S. des ius divinum et iur naturale zum Wohle des Staates handhaben sollte. Zwar gab es in den deutschen Ländern und in Österreich schon lange vor 1789 Strömungen, die eine einheitliche Gesetzgebung forderten und durch den Ausbruch der Revolution erheblich an Boden gewannen. Diese, von liberalem Gedankengut geprägten Vorstellungen wurden jedoch von dem aufgeklärten Absolutismus „aufgefangen", ja, „überholt". Verfassungsrecht und Privatrecht waren damals noch nicht getrennt, sondern hingen eng zusammen. In die bestehenden Kodifikationen wurden daher nach 1789 grundrechtsartige Bestimmungen aufgenommen, die eine Verrechtlichung des Verhältnisses Bürger-Staat und den allgemeinen Staatsbürgerstatus festlegten, so in dem Martini-Entwurf von 1791, die aber keine politischen Mitwirkungsrechte enthielten. Freiheit für Handel und Gewerbe wurde verkündet, politische Mitwirkungsrechte aber strikt abgelehnt. Der fürstliche Absolutismus machte hier keine Konzessionen. Dies lag daran, dass, wie ausgeführt, nach der Hinrichtung des Königs Anfang 1793 alle Reformbestrebungen auf politischem

[167] Wieacker, Privatrechtsgeschichte der Neuzeit, Göttingen 1964, S.339.

[168] Erler/Kaufmann, a.a.O., S.620 ff.; ähnlich vermerkte Wieacker, dass der CC gegenüber dem „individuellen Radikalismus der Revolution", z.B. im Grundpfandrecht, „zurückgesteckt" habe (a.a.O., S.343). Sprachen sogar von „rückschrittlichen Tendenzen", zit. nach Wieacker, a.a.O., S.343.

[169] Hans Hattenhauer, Europäische Rechtsgeschichte, Heidelberg 1992, S.515; Schulze, Französische Revolution und europäische Rechtsgeschichte im 19. Jahrhundert, in: Französisches Zivilrecht in Europa während des 19. Jahrhunderts, 1994, S.23 ff.

[170] O. Kimminich, a.a.O., S.514 ff.

[171] Der CC wurde von allen großen Reformwerken am weitesten in Europa rezipiert, mehr als das corpus iuris von Justinianus. Er war da Gesetzbuch der romanischen Völker und wurde in Belgien, Luxemburg, Holland und den Rheinbundstaaten, zeitweise auch in Westfalen und den Hansestädten eingeführt. Es galt auch in anderen Staaten als vorbildlich (so für die Zivilgesetzbücher Italiens 1865, Rumäniens 1865, Ägyptens 1875, 1889, Portugals 1867). Auch in Teilen Polens, in Italien, Spanien, Rumänien, fand es Aufnahme. In den Zivilgesetzbüchern von Südamerika (Argentinien, Chile, außer Brasilien), Mittelamerika (z.T. auch USA [Louisiana 1825 bis heute]) war der CC von starkem Einfluss. In Genf und im Berner Jura, 1804 zur französischen Republik gehörend, galt der CC; auch die übrigen Kantone wurden von ihm stark beeinflusst. In Deutschland ist der CC vor allem durch Carl Salomo Zachariä, Handbuch des französischen Zivilrechts 1837, bekannt geworden (Wesenberg, a.a.O., S.132 f.).

[172] Wieacker, a.a.O., S.343.

[173] So z.B. Thibaut, zit. nach F. Wieacker, a.a.O., S.435, Anm. 73.

[174] Wieacker, a.a.O., S.345.

[175] Näher dazu Adalbert Erler/Ekkehard Kaufmann, Handwörterbuch zur Deutschen Rechtsgeschichte, I. Bd., Köln 1971, Sp. 521.

[176] Vgl. Wieacker, a.a.O., S.345 und Anton Christ, Über deutsche Nationalgesetzgebung. Ein Beitrag zur Erzielung gemeinsamer, für ganz Deutschland gültiger Gesetzbücher und zur Abschaffung des römischen und französischen Rechts insbesondere, Karlsruhe 1842.

[177] Norbert Gross, Der Code Napoléon in Baden und sein Verleger C. F. Müller, Heidelberg 1997, S.10.

[178] Wieacker, a.a.O., S.345.

Gebiet unter Umsturzverdacht gerieten[179], nachdem sie am Anfang der Revolution ganz Europa erfüllt hatten. Die Abneigung gegen jede Änderung zeigt sich vor allem in der Ablehnung des Code Civil, der eine einheitliche Gesetzgebung nicht zu inspirieren vermochte: Er verkörperte nicht nur die verhassten neuen Ideen Freiheit und Gleichheit (Abschaffung der ständischen Privilegien)[180], sondern galt vor allem als „fremdes Recht", als Symbol der Besatzungsmacht, als Symbol der von der Nation erkämpften Rechtseinheit, die in dem in 38 Einzelstaaten zerfallenden partikularen Deutschland nicht zum Zuge kommen konnte[181]. Preußen hatte seit 1794 sein ALR und dachte nicht an Neuerungen, nachdem es Opfer der napoleonischen Heere geworden war. Auf Einzelgebieten setzte die Niederlage gegen Napoleon jedoch Reformansätze in Gang, die vorher unterstückt worden waren. Neben der Heeres-, Kommunal- und Bildungsreform war das drückendste Problem die Reform der Agrarstruktur. Die Aufhebung der Erbuntertänigkeit der Bauern 1807 und die Einführung der Gewerbefreiheit 1810 stieß auf erbitterten Widerstand des Adels, der um seine Machtposition fürchtete[182] und eine Ablösung der Grundlasten durch Verfassungsgebung verlangte, wohl wissend, dass es noch keine Repräsentationsverfassungen, nur ständische Vertretungen gab. Zu einer Verfassungsgebung kam es jedoch, wie ausgeführt, nicht, da ein ausgeformtes Bürger- und Bauerntum noch nicht vorhanden war, das die Reform hätte stützen können.

Jede einheitliche Gesetzgebung als solche galt schon als revolutionär. So wurde die Ablösungsfrage durch die Einzelgesetzgebung gelöst, aber nur halbherzig. Der Übergang des Grundeigentums an die bisherigen Pächter (Bauern) wurde von der vorher erfolgten Ablösung der Lasten abhängig gemacht und gleichzeitig die Zahlungen erhöht, so dass die Bauernbefreiung zunächst ihre Wirkung verfehlte[183].

Österreich, das unter der mehr als 40jährigen Herrschaft Franz II. seit 1792 „Ruhe und Ordnung" und die Rückkehr zum fürstlichen Absolutismus der theresianischen Zeit zum Staatsziel erklärt hatte, erlebte, wie ausgeführt, eine verfassungslose und restaurative Zeit, die über 60 Jahre dauern sollte. Ähnlich wie in Frankreich trennte sich das Privatrecht von der Politik, indem das ABGB als völlig unpolitisch ohne Rücksicht auf die Staatsverfassung betrachtet wurde[184] und die dreißig vorangestellten grundrechtsartigen Einleitungsbestimmungen in dem Entwurf Martinis von 1791 entfernt wurden. Zeiller, der Nachfolger Martinis, erblickte im ABGB gar ein „Verfassungsäquivalent", eine bürgerliche Verfassung hatte keine Chance[185]. Denn das Gesetzgebungsrecht stand nach wie vor nur dem Monarchen zu, was im ABGB freilich so nicht enthalten war; die Ständeordnung blieb bestehen, auch das sagte das ABGB nicht ausdrücklich, das gewissermaßen von der Ständeordnung „überlagert" wurde. Das Privatrecht spiegelte also eine Freiheit vor, die de jure und de facto nicht bestand. So behielt der Adel, obgleich politisch entmachtet, ähnlich wie in Preußen, durch seinen Grundbesitz und sein faktisches Monopol bei der Besetzung der einflussreichsten Stellen in Bürokratie, Armeen und Klerus erhebliches Übergewicht. Bürokratie und Monarch teilten sich die Staatsgewalt[186]. Auch der Nachfolger Franz II., Ferdinand (1835-1848) war jeder Reform abhold. Lediglich zaghafte Teilreformen durch Einzelgesetzgebung wurden verwirklicht, so z.B. die Einführung der Gewerbefreiheit (jedoch unter Beibehaltung des Zunftzwanges), so dass sie nicht zur vollen Entfaltung kam. Auch in den mittleren und kleinen Staaten fehlte es an jeder Voraussetzung für eine Reform des Privatrechts, die den sozialen und wirtschaftlichen Verhältnissen der sich entwickelnden Gesellschaft Rechnung trug. Zudem gab es nur verstreutes Reichs- oder regionales Statutarrecht (positiones), altständisches Gewohnheitsrecht und das im Usus modernus rezipierte römische Recht, die für die wirtschaftlichen und technischen Erfordernisse der Zeit nicht genügend flexibel waren.

8. Auswirkungen der Französischen Revolution in der Privatrechtswissenschaft

Die Abneigung des fürstlichen Absolutismus gegen eine moderne Privatrechtsentwicklung in den deutschen Staaten und die völlige Erschlaffung des gesetzgeberischen Elans wurde begleitet durch die Wissenschaft, die sich sowohl gegen die verabschiedeten Reformwerke, wie auch gegen einheitliche Gesetzgebung wandte. Diese Reaktion kann man als die deutsche Antwort auf die Französische Revolution bezeichnen, die der revolutionären Volksvertretung alle Macht zuerkannte und den rechtsgelehrten Richter lediglich als „Mund des Gesetzes" (bouche de la loi) (Montesquieu) verstand. Ähnlich sah der Gesetzgeber des fürstlichen Absolutismus im ALR von 1794 den (rechtsgelehrten) Richter nur als „die Stimme des Gesetzes", ohne ihm eigenen Interpretationsspielraum zu eröffnen. Gegen beide Gesetzgeber, den demokratischen wie den fürstlichen, richtete sich die von Gustav Hugo, C. F. von Savigny, Eichhorn und Jakob Grimm entwickelte Historische Rechtsschule, deren Hauptangriffspunkt in erster Linie das preußische ALR von 1794 war. Historisch wurde diese Schule genannt, weil sie Rückbesinnung auf die „eigenen Quellen" und ein Interpretationsmonopol der Juristen forderte. Als wichtigste Rechtsquelle am Anfang eines Staates

[179] D. Grimm, in: H. Coing (Hrsg.), a.a.O., S.46 f.
[180] Peter Schunck, Geschichte Frankreichs, München/Zürich 1994, S.198.
[181] Dasselbe galt für die französischen Sondergerichtsbarkeiten, die Handelsgerichtsbarkeit und die Gewerbegerichtsbarkeit, die in den deutschen Staaten (mit Ausnahme der linksrheinischen Gebiete), nicht eingeführt wurden, s. dazu: Ernst Halthöfer, Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg, Stuttgart 1997, S.89.
[182] Mit der Erbuntertänigkeit waren entscheidende Befugnisse der Gutsherren verbunden, die fast den gesamten damaligen Bereich des Verwaltungsrechts (u.a. Polizei- und Bauwesen, Gewerbeaufsicht, Schulaufsicht und der Gerichtsbarkeit (niedere Gerichtsbarkeit) umfassten.
[183] Näher Grimm, a.a.O., S.47 ff., dessen Darstellung die Untersuchung insofern folgt.
[184] Näher Grimm, a.a.O., S.49 f.
[185] Zu Recht weist Grimm, a.a.O., S.50 darauf hin, dass liberales Privatrecht sich nur dort entfalten kann, wo der Staat selbst liberal ist. Wo man der Liberalität nicht sicher sein kann oder wo sie, wie im Absolutismus, nicht besteht, muss die bürgerliche Freiheit in der Verfassung abgesichert werden.
[186] Näher Walter, a.a.O., S.122 ff.

betrachtete diese Schule – anknüpfend an die Romantik im Sinne von Herder, Fichte, Arndt etc. – die Gewohnheit und Praxis des Rechtslebens im Volk („Volksgeist"), die dann auf höherer Stufe in einem Diskurs der Juristen zum Gewohnheitsrecht entwickelt werden sollten. Recht entstehe nur durch „innere, still wirkende Kräfte, nicht durch die Willkür eines Gesetzgebers" (C. F. von Savigny[187]), Gesetzgebung sei eine viel zu stumpfe Waffe für die Rechtsfortbildung[188]. Auch im Niedergang des Staates fehle es an Fachwissen für eine Gesetzgebung. Nur im mittleren Stadium, in dem auch die Bevölkerung (Bürgertum) am Staat teilhabe, sei eine Gesetzgebung möglich, wobei das technische Fachwissen wiederum nicht beim Gesetzgeber, sondern bei den Juristen zu finden sei[189]. Die Historische Rechtsschule war aber mehr als ein Aufstand gegen das ALR von 1794; sie stellte nämlich, ohne dass dies ausdrücklich gesagt wurde, einen Aufstand der Juristen gegen das Naturrecht (Kants), gegen das natürliche Privatrecht, letztlich gegen die in der Französischen Revolution zur Wirkung gekommenen Grundsätze der Aufklärung von der Natur des Menschen und einen Rückzug in die Geschichte dar. Dies zeigt sich vor allem in den Schriften von Savignys „Das Recht des Besitzes (1803) und „Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft" (1814), in denen er seiner Zeit „den Beruf zur Gesetzgebung" absprach. Man müsse an das alte Recht, insbesondere das römische Recht, anknüpfen. Auf von Savigny geht auch die Einbringung der Grundsätze und Begriffe des Römischen Rechts in das deutsche Privatrecht zurück, dessen Grundlage (in Form des BGB) sie bis heute sind. Das Römische Recht allein, in seiner klassischen Form[190], so von Savigny, enthalte für die Gliederung des aufzufindenden Rechtsstoffes die Begriffe, außerdem könne es für die Erfordernisse der wirtschaftlichen Entwicklung nutzbar gemacht werden, sobald man die nicht industriellen Bestandteile aus ihnen entfernt habe.

Die tiefere Ursache für diesen Begriff auf das Recht einer längst vergangenen Epoche, das im Mittelalter rezipiert worden war und seitdem als „gemeines deutsches Recht" die einzige Rechtsquelle, die über eine gewisse Systematik verfügte, war, dürfte darin liegen, dass es genau den Strömungen der Zeit entsprach, in der das Alte Reich untergegangen war und die Ablehnung der Französischen Revolution den Anschluss an die moderne Rechtsentwicklung verhinderte, so dass die Wiederbelebung der alten Rechts- und Reichsideen als naheliegende „Lösung" erschien. Historisierung und „Romanisierung" der deutschen Rechtsentwicklung hatten, aber sicher auch Gründe, die in der Biographie von Savignys liegen, der neben R. Windscheid als der bedeutendste Jurist des 19. Jahrhunderts gilt[191].

Natürlich rief die Historische Rechtsschule Kritiker auf den Plan, weil sie jahrzehntelang jede Privatrechtsgesetzgebung blockierte. Die Gegner, die Germanisten (Beseler, später O. von Gierke u.a.) verfochten den Plan einer einheitlichen Gesetzgebung, gestützt allein auf deutsche Rechtsquellen, das „gemeine" Recht war in ihren Augen das deutsche, an germanisches Recht und altes Reichsrecht angelehntes Recht[192].

Die Auseinandersetzungen beider Schulen bestimmten das 19. Jahrhundert, sehr zum Schaden der Privatrechtsentwicklung in Deutschland; sie führte zum Sieg der Romanisten oder Pandektisten, Nachfolger der Historischen Rechtsschule, die ein Begriffssystem entwickelten, das allein nach der logischen Stimmigkeit i.S. mathematischer Gesetzmäßigkeit fragte, ohne Rücksicht auf die Konsequenzen. Es waren auch die Pandektisten, die die Basis für das neue Bürgerliche Gesetzbuch schufen (Windscheid, R. Jhering) und das Gedankengut der Germanisten (O. von Gierke u.a.)[193], weitgehend verdrängten.

Der Streit der Rechtswissenschaften überdauerte auch die liberale Ära und die Verfassungskämpfe von 1848/49 und lähmte die Privatrechtskodifizierung bis zur Gründung des Deutschen

---

[187] Das Recht des Besitzes, 1803, S.13.

[188] Näher Peter G. Stein, Römisches Recht und Europa. Die Geschichte einer Rechtskultur, Frankfurt/Main 1996, S.190.

[189] Stein, a.a.O., S.192 ff., insbes. S.197 ff.

[190] Römisches Recht konnte für Savigny allein das klassische römische Recht des 2. Jahrhunderts n. Chr. sein, in dem die Kaiser das Recht zur Gutachtenerstellung (aus denen die Rechtsprechung schöpfte) allen Juristen zuerkannt hatten, die damit die Verantwortung für die Rechtsentwicklung (sic!) übernahmen. überliefert war aber nur das im Mittelalter durch die Glossatoren rezipierte justinianische Recht, so wie es im Usus modernus gesammelt und in den drei Reformen in Teilen enthalten war. Für die Historische Rechtsschule war dieses rezipierte Recht jedoch nur Mittel zur Rekonstruktion des klassischen Rechts, wie Savigny in seiner „Die Geschichte des Römischen Rechts im Mittelalter" darlegte. Mit der Entdeckung der „Institutiones" des Gaius im Jahre 1816 verminderte sich die Abhängigkeit vom justinianischen Recht. Das klassische römische Recht erfuhr in der Weiterentwicklung durch die Historische Rechtsschule und ihrer Nachfolge, der Pandektisten, eine neue Blütezeit, das zur wichtigsten Grundlage der Gesetzgebungen in zahlreichen europäischen und außereuropäischen Staaten führte, weil seine Begriffe abstrakt, allgemein und daher auch „international", d.h. vom politischen System waren.

[191] Von Savigny stammte aus altem lothringischem Geschlecht und war noch ganz von der Reichsidee des Alten Reiches erfüllt; er dachte ausschließlich historisch, nicht vernunftrechtlich. Das Naturrecht (Kant), aber auch die ältere Lehre (Pufendorf, Wolff) führte für ihn nicht weiter. Sein Anknüpfungspunkt war die römische Stadt (municipium) und ihr Recht, die er – insofern a-historisch – ideell in das Mittelalter verpflanzte und aus der er die Rechtsquellen schöpfte. Recht war für ihn nicht überzeitlich, sondern Rechtsgeschichte. Der bestimmte Einfluss der Historischen Rechtsschule führte dazu, dass sie jahrzehntelang Ersatz für die Gesetzgebung war. Eine Juristenaristokratie, die durch die systematische Durchdringung des Rechtsstoffs, Gesetzestechnik und –sprache zu einer nie wieder erreichten Höhe in der Rechtswissenschaft geführt hat, bestimmte den Zeitgeist. Als Freund des preußischen Königs verhinderte von Savigny eine Gesamtrevision des ALR, das er, als „Sudeley" und übles Werk bezeichnete. Nur eine Präzisierung von Gewohnheitsrecht, auch Einzelgesetzgebung, sei zulässig, die nur der Juristenstand vorbereiten könne. Eine neue Gesetzgebung, die überkommenes Recht sichte und kodifizierte, müsse zudem früheren Zeiten überlegen sein, indem jeder Stand, jede Stadt sein individuelles Recht haben müsse. von Savignys radikaler Bruch mit den rationalistischen Naturrecht wird besonders im Hinblick auf Freiheits- und Glücksstreben des einzelnen deutlich: Während der Rationalismus Neigungen, Freiheits- und Glücksstreben als allgemein menschlich und überzeitlich auffasst, versteht die romantische Staatsauffassung diese Neigungen, ja das Naturrecht insgesamt, als nur zeitbedingte Erscheinung.

[192] Näher Wesenberg, a.a.O., S.136 f.

[193] Z.B. die Genossenschaftsidee, vgl. Wesenberg, a.a.O., S.151 ff.

Bundes 1871. Er war auch die Ursache für den späteren Aufstieg des juristischen Positivismus in der 2. Hälfte des 19. Jahrhunderts, der den Rechtsbegriff auf formale Regeln beschränkte und Freiheit und Gleichheit als tragende Ideen für die Grundrechts- und Privatrechtsentwicklung weitgehend ausklammerte. Die Entwicklung ist parallel zu der oben geschilderten Entwicklung des Rechtsstaatsgedankens in der 2. Hälfte des 19. Jahrhunderts zu sehen, der sich weitgehend auf Verfahrensregeln zur Abwehr einer als unbeschränkt gedachten Staatsgewalt beschränkte.

Der Stillstand, ja, die Versteinerung der positiven Gesetzgebung bis zum Ende des Jahrhunderts[194] führte schließlich zu einem Ergebnis, das nicht anders als „paradox" (Wesenberg) bezeichnet werden kann: Da das als gemeindeutsches Recht bezeichnete römische Recht ein System abstrakter Begriffe enthielt, die, von allen historischen Bedingungen gereinigt, dem Rechtssubjekt subjektive Rechte und Rechtsgleichheit gaben, führte dies dazu, dass die Historische Rechtsschule, ihre Nachfolger und die nationalliberalen Rechtslehrer am Ende des 19. Jahrhunderts, die das Deutsche Bürgerliche Gesetzbuch (BGB) von 1900 konzipiert hatten, doch noch zu Vollstreckern des Naturrechts wurden, das die allgemeine Gleichheit aller Menschen lehrte und im Privatrecht Gleichheit der Rechtsgenossen verhieß. Die Privatrechtsentwicklung und die Rechtswissenschaft in Deutschland fanden zur Gleichheit und Freiheit – merkwürdig genug – nicht über die Französische Revolution oder den Code Civil des Nachbarlandes Frankreich, sondern durch den Rückgriff auf die Antike und das Römische Recht.

Anschließend sei noch ein kurzer Blick auf die *Einzelkodifikationen* im bürgerlichen Recht gestattet, da diese am besten die wirtschaftlich-sozialen Bedrängungen kennzeichneten, die nicht in die allgemeine Gesetzgebung Eingang gefunden haben[195]. Die Ideen der Freiheit und Gleichheit, so sehr sie in der Wissenschaft als naturrechtliches Postulat abgelehnt wurden, waren doch Hintergrund für die Forderungen nach Abbau des Ständestaates und der bäuerlichen Lasten wie auch der wachsenden Industrialisierung. Die „Bodenbefreiung", so genannt nach den Bauernrevolten 1789 in Frankreich, die in Österreich (Aufhebung der Leibeigenschaft unter Joseph II.) begonnen, aber verzögert wurde, ist oben erwähnt worden. Sie bedeutete Bodenverkehrsfreiheit, d.h. die Möglichkeit, Land zu kaufen oder zu verkaufen. Jedoch erst in oder nach der Revolution von 1848/49 fand die Bodenverkehrsfreiheit durch vollständige Beseitigung der Bodenlasten und des Zehnten sowie in verbesserten Regeln zur Ablösung ihre Wirksamkeit.

Die Freiheit zur *Bewirtschaftung* des Bodens (da Recht, Boden nach Belieben zu nutzen) war ebenfalls ein wichtiges Desiderat. Frankreich führte sie 1791 ein, Preußen 1811, ebenso die Freiheit zur Parzellierung des Bodens (wer verkaufen darf, darf auch teilen) und zur erbrechtlichen Teilung, die der Code Civil in Art. 85 vorsah. Die Idee kam aus Frankreich nach Einziehung der Kirchengüter zugunsten des Staates, die als öffentliches Eigentum begriffen wurden und die ohne Entschädigung baldmöglich – durch Teilung – in private Hände überführt werden mussten.

Die Verkehrsfähigkeit des Bodens als Teil der bürgerlichen Freiheit führte zu weiterer Partikulargesetzgebung: Boden wurde frei handelbar, zum Wirtschaftsgut, in das der Staat reglementierend eingreift (z.B. die Enteignung gegen Entschädigung, so Einl. § 74, 75 ALR; Art. 545 CC). Weitere Regelungen betreffen genossenschaftliche Elemente, Flurbereinigungsgesetze, Abschöpfung von Parzellierungsgewinnen u.a.[196], die dem Bodenegoismus entgegenwirken sollten. Die Bodengesetzgebung, ursprünglich Ausdruck der bürgerlichen Freiheits- und Gleichheitsrechte im Privatrecht, wurde mehr und mehr unter wirtschaftlichen Gesichtspunkten, d.h. auch der Notwendigkeit der staatlichen Reglementierung, gesehen.

Seit 1830 zeigten sich auch „sozialistische" Bestrebungen der Gesetzgebung gegen Bodenmissbrauch der Eigentümer, die auch hier die Geschichte als Hintergrund hatten: Denn deren geistige Grundlagen liegen in der Aufklärung, die wiederum die Agrargesetze der Gracchen aufgriff, die zugunsten der ärmeren Bevölkerungsschichten Beschränkungen des Grundstücksverkehrs eingeführt hatten. Hintergrund dürfte auch die Bodengesetzgebung im Verlauf der Französischen Revolution gewesen sein, die verstaatlichten Kirchengütern für die ärmeren Schichten zum Verkauf zu stellen. Die Eingriffsrechte des Staates bei bestimmten Bodennutzungen, wie z.B. im Bergrecht oder im Wasserrecht, das alle Nutzungsarten unter staatlichen Genehmigungsvorbehalt stellte, beruhen auf diesen Grundlagen.

Ausprägungen des Freiheitsgedankens sind in der Partikulargesetzgebung auch in einigen Elementen des Familienrechts[197] erkennbar, die rechtlich eine Verbesserung der Stellung der Frau brachten und die Absicherung der Kinder verbesserte, die im Code Civil noch nicht enthalten war. Das Vormundschaftsrecht wurde liberalisiert, indem der Vormund selbständig und nicht mehr staatlicher Kontrolle unterworfen wurde (Preußisches Gesetz 1875). Am wichtigsten war das staatliche Eheschließungs- und Scheidungsmonopol, das direkt auf französisches Recht (CC) zurückgeht und 1848 in der Paulskirche beschlossen, in der Restaurationszeit ab 1850 allerdings wieder aufgehoben wurde. Das Güterrecht war und blieb jedoch konservativ: Der Ehemann hatte die alleinige Nutznießung und Verwaltung des Familienvermögens, die Ehefrau konnte Rechtsgeschäfte nur mit Zustimmung des Ehemannes abschließen, eine Regelung[198], die erst durch die Familienrechtsreform seit den 70er Jahren des 20.Jahrhunderts in Frankreich, Deutschland, Österreich und der Schweiz beendet wurde.

Die Einzelgesetzgebung konnte jedoch auf Dauer ein nationalstaatliches Gesetzbuch nicht ersetzen. Nachdem die Forderungen nach deutscher Einheit (und Gesetzgebung) im Vormärz (Hambacher Fest 1832) nichts bewirkt hatten und die Revolution von 1848/49 gescheitert war, dauerte es noch weitere 20

[194] Näher Wesenberg, a.a.O., 1969, S.136 f.
[195] Darstellung folgt im wesentlichen Wesenberg, a.a.O., S.160 ff.
[196] Wie etwa die Regelung in Preußen 1886 zur Abschöpfung von Gewinnen aus Grundstücksverkäufen, Wesenberg, a.a.O., S.164 ff.
[197] Wesenberg, a.a.O., S.166 f.
[198] Wesenberg, a.a.O., S.166.

Jahre, bis mit Bismarck und der Gründung des Deutschen Reiches 1871 die Voraussetzung für ein einheitliches bürgerlichen Gesetzbuch geschaffen waren und fast noch 30 weitere Jahre, bis es in Kraft trat. Zu Recht sagte Anton Menger (Wien) daher 1895: Die Rechtswissenschaft der Kulturvölker blickt auf ein verlorenes Jahrhundert zurück [199].

Zusammenfassung

Die Französische Revolution und die von ihr verkörperten Ideen von Freiheit und Gleichheit sind Hintergrund der Rechtsentwicklung in Europa, nicht ihre unmittelbare Ursache. Der Verlauf der Grundrechts- und Privatrechtsentwicklung wird nach einer anfänglichen Phase der Begeisterung (bis 1792) negativ durch den Abscheu vor den „Gräueln der Revolution" und damit vor der Französischen Revolution insgesamt als konkretes historisches Ereignis beeinflusst. Deren Ablehnung setzte sich fort im Kampf gegen die Ideen der Revolution, die unter der Flagge des Kampfes gegen die Ideen der Aufklärung geführt wurden. Die Rechtsentwicklung außerhalb Frankreichs erfolgte somit in eigenständiger Gestaltung, die äußerlich ein Spiegel des älteren Naturrechts (Pufendorf) war, das alles Recht aus einem obersten Rechtssatz herleitete, das der Omnipotenz der fürstlichen Gesetzgebung unterworfen war. Im preußischen ALR 1794 und im österreichischen ABGB 1811 fand diese Lehre erste einheitliche Ausprägung. Diese Gesetzgebung hatte jedoch die beiden entscheidenden Punkte der Legitimation der Staatsgewalt, die in Frankreich in der volonté générale des Volkes lag (die wiederum auf dem contrat social beruhte, der die natürlichen Rechte des einzelnen nicht antasten durfte), völlig anders gelöst. Die natürliche Freiheit und Gleichheit des einzelnen werden ein und für alle Mal dem Herrscher übertragen (Thomas Hobbes). Nicht das Volk, der Monarch regierte „von Gottes Gnaden"; er war der Gesetzgeber und zugleich die Spitze der Exekutive. Die Gewaltentrennung Montesquieus war in diesem Bereich nicht verwirklicht. Allerdings war der Monarch im 19. Jahrhundert unter dem Einfluss des Liberalismus nur *Inhaber* der Staatsgewalt; bei *Ausübung* derselben war er an Gesetz und Verfassung gebunden (konstitutionelle Monarchie). Die Volksrepräsentanten hatten nur ein *Mitspracherecht*, d.h. ein Zustimmungsrecht zu Gesetzen auf bestimmten Gebieten. Ein Initiativrecht stand ihnen (bis 1848) nicht zu, auch über dieses verfügte ausschließlich der Monarch. Auch das Bestätigungsrecht von Gesetzen (Vetorecht) des Königs blieb erhalten, ebenso das Recht, Gesetze anzufertigen und zu verkünden. Grundrechte und private Recht wurden vom Fürsten gewährt und waren somit de facto nicht unveräußerlich, sondern nach den Strukturen der Verfassungen widerrufbar, wenngleich dies nach dem damaligen Rechtsverständnis nur aus sachlichem Grund geschehen durfte.

Was die positive Gesetzgebung betrifft, wurde in der Restaurationszeit des 19. Jahrhunderts jede nationale, einheitliche Gesetzgebung von der herrschenden Historischen Rechtsschule, aber auch von den Fürsten abgelehnt. Die Reformwerke des preußischen ALR 1794 und des österreichischen ABGB 1811 hatten im Privatrecht Freiheits- und Gleichheitsrechte im Rechtsverkehr verbürgt, die ständischen Vorrechte blieben jedoch weitgehend erhalten, so dass jene nur beschränkt zum Zuge kommen konnten. Lediglich im Code Civil 1804 konnten sich die privaten Rechte entfalten, weil mit der (bereits 1791 erfolgten) Aufhebung der ständischen Gesellschaft die Hemmnisse für den bürgerlichen Rechtsverkehr entfallen waren. Eine Reform der Gesetzgebung im deutschsprachigen Bereich unterblieb jedoch. Der Deutsche Bund und das seit 1819 dominierende Metternich-System mit seiner politischen Repression wollten die Monarchien erhalten, und möglichst nichts bewegen, aus Furcht vor jeder Reform schlechthin, die bereits als revolutionär galt. Die politische Romantik lieferte die Basis für die sog. organische Staatslehre, die die Monarchie stützte. Die Entmachtung der staatlichen Gesetzgebung entsprach der herrschenden wissenschaftlichen Lehre (Historische Rechtsschule). Der Staat sollte das Feld den Juristen überlassen, er ist nicht Rechtsfinder und Gesetzgeber, sondern die Juristen finden die in dem „Volksgeist" ruhenden allgemeinen Rechtsgrundsätze, die sie unter Zuhilfenahme des Systems des Römischen Rechts in allgemeine Begriffe gießen und sie somit universell verwendbar machen (Begriffsjurisprudenz).

In dem Zeitraum, in dem andere Staaten ihre Gesetzgebung an die Veränderung der Verhältnisse in politischer und wirtschaftlicher Hinsicht anpassen konnten, stagnierte daher in Deutschland die Entwicklung. Besonders deutlich wird diese Verzögerung im Bereich der *Grundrechte*. Während im Bereich der wirtschaftlichen Grundrechte Gewerbefreiheit und Freizügigkeit sich seit der 2. Hälfte des 19. Jahrhunderts mit dem gleichzeitigen Abbau des Ständestaates durchsetzten, stagnierte die Grundrechtsentwicklung im politischen Bereich (Meinungsfreiheit, Pressefreiheit etc.), da die Verfassungsreformgesetzgebung der Jahre 1806-1819) Grundrechte nur enumerativ und stets unter Vorbehalt der Gesetze, vor allem aber unter Vorbehalt der ständischen Rechte gewährleisteten. Die revolutionäre Paulskirchenverfassung von 1849 mit dem ersten umfassenden Grundrechtskatalog ist nicht Wirklichkeit geworden. In der 2. Hälfte des 19. Jahrhunderts, im Zeitalter der Nationalstaaten wurden die Grundrechte noch weiter zurückgedrängt. Während die Reichsverfassung von 1871 keine Grundrechte mehr enthielt, verharrten die Länderverfassungen großenteils auf dem Stand der Gesetzgebung des Frühliberalismus (mit einigen Konzessionen, die 1848 infolge der revolutionären Ereignisse eingefügt wurden) oder wurden nach Niederschlagung der Revolution neu oktroyiert.

Im *Privatrecht* stagnierte die Entwicklung ebenfalls im gesamten 19. Jahrhundert, da die Historische Rechtsschule, das Fortbestehen des fürstlichen Absolutismus und des Ständestaates in einer Zeit, in der die Nationalstaaten sich ökonomisch, wissenschaftlich und technisch voll entfalteten, jede grundlegende Reform verhinderten (von Einzelbereichen abgesehen). Die wirtschaftliche und technische Entwicklung überlagerte den Ständestaat, ohne dass ihr eine adäquate rechtliche Gestaltung zuteil geworden wäre. Man war wirtschaftlich liberal,

[199] Zit. nach Wesenberg, a.a.O., S.165.

geistig-politisch glaubte man an das Absolute (die Monarchie von Gottes Gnaden) – eine Dichotomie, die gefährlich war, weil sie zu Unsicherheit und Anfälligkeit für das Extreme neigte[200]. Über das von der Historischen Rechtsschule wiederbelebte römische Recht und seine Begriffe wurde schließlich am Ende des 19. Jahrhunderts doch noch eine Durchsetzung der Freiheits- und Gleichheit des bürgerlichen Rechtssubjekts im Bürgerlichen Gesetzbuch von 1900 erreicht. Frankreich hatte seit Anfang des 19. Jahrhunderts eine im Code Civil und in der Charte Constitutionelle und ihren Nachfolgeverfassungen verkörperte rechtliche Rahmenordnung, die trotz des ständigen Auf und Ab der politischen Entwicklung (zwischen republikanischen und autoritären Kräften) eine gewisse Kontinuität gewährleistete, ebenso wie Österreich sein ABGB hatte, während in Deutschland die politische Herrschaft und ihre Grundlagen im Grundsatz unverändert blieben, die Rechtsentwicklung seit Anfang des 19. Jahrhunderts zersplittert war und keine Sicherheiten bot. Das Bürgerliche Gesetzbuch von 1900 und die Weimarer Reichsverfassung vom 19. August 1919 mussten fast 100 Jahre Gesetzgebungsstagnation „nachholen".

[200] Otto Flake, Freiheitsbaum und Guillotine, Frankfurt 1976, S.182.

"The Free Conviction, Rising from within": Julius Glaser and the Establishment of Trial by Jury in Liberal Austria*

*Philip Pajakowski***

Abstract

This essay examines the reform in criminal procedure promulgated in 1873 under Minister of Justice Julius Glaser. An aspect of the constitutional reforms associated with the establishment of the dual monarchy of Austria-Hungary, the introduction of trial by jury served to promote a sense of citizenship among the public. Glaser emphasized the centrality of the individual conscience of jurors in determining the verdicts in criminal trials and implicitly applied liberal values in evaluating the proper qualification of a well-developed conscience. The study relies on Glaser's published writings and Austrian official documents.

Key words: *Julius Glaser, liberalism, jury trial, criminal procedure, conviction intime.*

On one side stands a physical person, whose fate depends on the outcome of the trial to the degree that it can result in that person's moral or even physical annihilation; guilty or not guilty, the accused has a decisive interest in avoiding conviction and punishment… On the other side stands the most powerful collective person, which an effective system of criminal justice must recognize as an absolute necessity, but which has an interest in a specific case by virtue of the relationship of the individual to the whole, and whose interest would be harmed as much by unjust punishment of the innocent as by a mistaken acquittal of the guilty.[1]

For Julius Glaser the power to punish criminal acts provided the scene of a blatant demonstration of the relationship between state power and individual rights. Trials presented a clear example of the delicate balance between the desires for liberty and order that comprised the central tension in liberal thought. Because the legal exertion of punitive force was integral to state authority, Austrian liberals regarded the reform of the criminal justice system inherited from the absolutist state as a priority. As minister of justice, Glaser achieved the reform of the code of criminal procedure that was among the most prominent legislative achievements of the liberal administration of the 1870 s. By introducing public trial by jury and clearly delineating the rights of the accused, Glaser sought to embed concepts of citizenship and individual rights in the legal system. An aspect of the constitutional reforms initiated in the 1860 s, the revision of criminal procedure marked a clear effort to confine the arbitrary power of the state and ensure the dignity of citizens before the law.

Glaser's statement also suggests his view of criminal trials as dramatic, fascinating events. Besides marking a clear delineation of rights and authority, jury trials presented a public demonstration of reasoned discourse on a matter crucial to social order: the defense of justice and determination of the innocence or guilt of suspected criminals. The explication of the best means to decide such weighty matters revealed the liberal approach to resolving fundamental questions of public policy. Criminal trials often presented uncertainties of interpretation that could not be avoided, yet courts needed to reach unequivocal decisions crucial to the fate of the defendant and to public perceptions of justice. For Glaser trials were, further, instruments of public edification in the workings of the state and responsibilities of the citizen. Jury trials thus represented a clear example of rule by consensus reached by reasoned conviction. As such, the reform of criminal procedure reflected the centrality of defining authority in liberal thought, which was closely connected to a social epistemology that defined means of finding consensual perception of public matters. In the evaluation of conflicting interpretations of evidence, Glaser relied on the individual conscience of the jurors, whose decisions thus reflected well-formed character and commitment to established public values. Criminal trials thus became demonstrations of the responsibility, self-restraint, and individual reflection that characterized the enlightened citizenry the liberals hoped to promote. As such, the trial embodied the liberal conception of properly formed individual conscience as the prerequisite for legitimate authority.

* Research for this essay was supported by a Jeanne D. Smith award from the New Hampshire Institute of Politics at Saint Anselm College. I would like to thank Charles Grau and Sean Perrone for their comments on a draft of this paper.

** Philip Pajakowski, Ph.D., Professor of History, History Department, Saint Anselm College, Manchester, NH, USA.

1 Glaser, Julius, *Handbuch des Strafprozesses*, vol. 1 (Leipzig, 1883), p. 14-15.

Glaser and the Reform of Criminal Procedure

As both the author of the reform legislation and eventually cabinet minister responsible for its passage and implementation, Glaser played a crucial role in establishing trial by jury in Austria. His demands for and justification of the reform of criminal procedure reflected the broader liberal ideology he espoused. An examination of his thought thus reveals liberal attitudes toward the origin of crime and justification of punishment, the responsibilities of citizens before the law, and the significance of criminal trials as instruments of public policy and enlightenment. An elucidation of his views thus touches on fundamental issues of authority and participation in the era of high liberalism of the 1860 s and 1870 s. Glaser's reform further elucidates general developments in legal history as concepts of legal responsibility evolved from the passive role of the subject of the absolutist state to the participation of citizens in the institutions of the more representative political systems of the nineteenth century.[2]

The Austrian code of criminal procedure underwent several revisions beginning with the state-building reforms of the late eighteenth century. For the first half of the nineteenth century, the fundamental document governing criminal procedure was the *Österreichische Gestezbuch über Verbrechen und Schweren Polizeyübertretungen* issued under Francis I in 1803. Based primarily on the criminal procedure decreed by Joseph I in 1787, the ordinance also reflected the overriding concern for public security that characterized Francis's reign. Following an inquisitorial procedure, the code authorized magistrates to investigate crimes following strict guidelines for evaluating evidence. The magistrates then rendered a verdict of innocent, suspension of inquiry due to lack of evidence, or guilty. The most compelling evidence was a confession on the part of the accused, and, although torture had been abolished in 1776, inquisitors were allowed to employ mental duress to attain what was regarded as the most successful outcome of an investigation. A verdict of innocent could be pronounced only if the accusations against the subject were disproved beyond question.[3] Punishment included the death penalty, as well as incarceration, which could be exacerbated by hard labor and by shackling the offender. In their deliberations magistrates prepared written statements that comprised analysis of evidence and the final disposition of the case; no oral trial was held, and defendants never had the opportunity to confront their accusers or witnesses. Although scholarship has found the magistrates of Vienna to have been fair-minded and conscientious officials, the closed nature of criminal procedure seemed to correspond to the arbitrary, secretive nature of absolutist government in general. Indeed the authors of the criminal code of 1803 stressed the defense of order as its primary function and defined crime as actions harmful to public security.[4]

For liberal critics of the Austrian state, the establishment of a code of criminal procedure suitable for citizens of a participatory government, rather than subjects of arbitrary authority, emerged as a potent symbolic as well as political issue. The existing system offended the liberal ideals of openness, participation, and the primacy of reason over force in government, and the advance of consensual adherence of the rule of law defined the liberal vision of progressive politics.[5] *Vormärz* liberals called for a thorough revision of the criminal justice system, and the introduction of trial by jury was the centerpiece of their proposals. In the revolution of 1848 liberals won acceptance of their plans for reform, and a new criminal procedure embodying their views, including the right to trial by jury, was established in 1850. As an aspect of the establishment of neoabsolutism under Emperor Francis Joseph, however, the procedure was again amended by the code of 1853, which abolished jury trials and returned to inquisitorial procedure.[6]

The reintroduction of trial by jury stood among the first issues addressed by the government as the empire undertook constitutional reforms in the 1860 s. Shortly after the promulgation of the February Patent in 1861, liberal ministers in Gustav Schmerling's cabinet insisted on the establishment of jury trials as a political necessity and an instrument of social progress, though only in provinces of "advanced culture," to the exclusion of Dalmatia, Galicia, and Hungary. After the cabinet voted to introduce legislation providing for jury trials for serious criminal offences and political offences, Justice Minister Julius Pratobeverra appointed Glaser to draft a proposal for a new code of criminal procedure.[7]

An acknowledged expert on British and French as well as German criminal law, Glaser was a logical choice for this task, and he played the principal role in carrying forward the reform

---

2 Hildebrandt, Mireille, "Trial and 'Fair Trial': From Peer to Subject to Citizen," in Antony Duff et al., eds., *The Trial on Trial*, vol. 2, *Judgment and Calling to Account* (Oxford, 2006), p. 23-25;Lacey, Nicola, "Responsibility and Modernity in Criminal Law," *The Journal of Political Philosophy*, 9/3 (2001): 255, 266-68; Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory," *Modern Law Review*, 64/3 (2001): 362; Farmer, Lindsay "Criminal Responsibility and the Proof of Guilt," in Marcus D. Dubber and Lindsay Farmer, eds., *Modern Histories of Crime and Punishment* (Stanford, 2007), p. 43-45.

3 Glaser, *Handbuch*, vol.1, p. 121.

4 On criminal procedure as practiced by the Vienna courts, see Hartl, Freidrich *Das Wiener Kriminalgericht: Strafrechtspflege vom Zeitalter der Aufklärung bis zur österreichischen Revolution* (Wien, 1973), p. 168, 181-196; on Austrian inquisitorial procedure in general, see Glaser, *Handbuch*, vol. 1, 121-123, and Ogris, Werner "Die Rechtsentwicklung in Österreich, 1848-1918," in Adam Wandruszka and Peter Urbanitsch, eds., *Die Habsburgermonarchie, 1984-1918*, vol. 2 *Verwaltung und Rechtswesen* (Wien, 1973), p. 555-557.

5 On liberal attitudes toward law, society, and progress, see Franz, Georg,*Liberalismus: Die deutschliberale Bewegung in der Habsburgermonarchie* (Műnchen1955), 255-259; Judson, Pieter M., *Exclusive Revolutionaries: Liberal Politics, Social Experience, and National Identity in the Austrian Empire, 1848-1918* (Ann Arbo, 1996), p. 49-52; Kammerhofer, Leopold "Einleitung," in Leopold Kammerhofer, ed., *Studien zum Deutschliberalismus in Zisleithanien, 1873-1879: Herrschaftsfundierung und Organisationsformen des politischen Liberalismus* (Wien, 1992), p. 10, 12-13.

6 Ogris, "Rechtsentwicklung," p. 557-559.

7 Malfer, Stefan, ed., *Die Protokolle des österreichischen Ministerrates, 1848-1867*, part 5, *Die Ministerien Erzherzog Rainer und Mensdorff*, vol. 2, *1 Mai 1861-2. November 1861* (Wien, 1981), p. 15-19; on Schmerling's cabinet, see Judson, *Exclusive Revolutionaries*, p. 75-83.

effort through the lengthy negotiations and delays that ensued. Joshua Glaser was born in Postelberg, Bohemia, in 1831 and came to Vienna as a Gymnasium student. In 1847, at the age of sixteen and with the consent of his father, Glaser converted from Judaism to Roman Catholicism and was baptized Julius Anton. As motivation for his conversion, Glaser provided the rather formulaic statement that his new faith arose from his religious studies in Gymnasium. After brief involvement in revolutionary activity, he moved to Zurich to continue his studies in law and received a doctorate there in 1849. He continued his legal studies on his return to Austria and was appointed *Privatdocent* at the University of Vienna in 1854. His publications included a highly praised work on the English jury system, as well as essays advocating the introduction of jury trial in Austria. Beginning in the 1860 s, his career alternated between university and government work. He was elevated to the post of ordinary professor of criminal law in 1860; he served as minister of education in 1868 and as minister of justice from 1871 to 1879; from 1879 to his death in 1885, he served as attorney general in the Vienna court of cassation. Glaser's friends described his temperament as mild and scholarly but also highly determined to achieve the goals he set himself, qualities he clearly displayed in his protracted efforts to reform criminal procedure.[8]

For Glaser, criminal law formed an integral aspect of any political system, and, clearly, liberal social progress presupposed a reformed code of criminal procedure. His theoretical approach to the law combined an appreciation for the historical understanding of the derivation of the law with a practical insistence on social utility. Glaser maintained close friendships with Josef Unger and Rudolf von Jhering, who were advocates of Pandect science in their study of civil law. As Pandectists, Unger and Jhering sought to establish a logical, internally consistent legal system and yet insisted that law must relate to social reality and serve human needs.[9] In his inaugural lecture at the University of Vienna, Glaser similarly posited that an understanding of the historical basis of Austrian law in the German, canon, and Roman traditions constituted the basis for formulating guiding principles for interpretation that served the needs of the state and the legal consciousness of (Rechtsbewustsein) of the people.[10] Further, in modern times common understanding of criminal law had emerged in Europe, and legal scholarship extended beyond state borders. "Careful study, conscientious exposition of the law, attentive inquiry into historical development, consideration of the doctrines of other countries, scholarly research into legal precedents are the factors that must collaborate in the determination of every aspect of Austrian criminal law." [11] In proposing the reform of procedure, Glaser particularly referenced the experience of the British and French jury systems and the political utility of criminal procedure to the construction of liberal citizenship.

Glaser sought to address the deficiencies he perceived in the existing code of criminal procedure. Under inquisitorial procedure, he argued, the confession by the accused marked the most successful outcome of an investigation. To replace torture as the means of extracting a confession, individual inquisitors were empowered to pursue a wide range of means to gather evidence and exert pressure on the suspect. Because inquisitorial trials took place behind closed doors, the drafting of written documents detailing evidence and testimony and summarizing the case against the accused comprised the essential aspects of the magistrates' work. The documents, however, reduced the material facts of the case to formal statements and thereby abstracted the deciding judge from direct contact with the evidence, witnesses, and the accused.[12] Such a procedure could have highly detrimental consequences for suspects, who were treated solely as objects of inquiry. "So it came to pass that, sometimes only a few steps away from the jail in which the accused was held, without having seen him or heard his defense, a panel of judges determined his fate on the basis of documents prepared by a single magistrate or rather on the basis of a scarcely supervised report based on these documents and perhaps an accompanying defense statement." [13]

To address these deficiencies, Glaser based his proposal on four principles that were widely accepted among liberal jurists: adversarial process, oral procedure, public trial, and judgment by a jury. The introduction of adversarial procedure, which Glaser regarded as essential to improvement of the judicial process, served to protect citizens' rights and enhance the efficiency of courts. The combination of the roles of prosecution, defense, and judge in a single individual or panel of judges under the inquisitorial system undermined impartiality and threatened the civil rights of the accused. Glaser therefore stressed the centrality of the prosecuting attorney in presenting the case against the defendant. Under the reformed procedure the trial opened with the presentation of formal charges by the prosecutor, rather than with a statement of suspicion against the defendant by the court. Thus the adversarial relationship between prosecution and defense was immediately made clear, as well as the court's role as arbiter between the two sides. Although Glaser regarded that balance as the primary motive for the reform, establishment of a state's attorney's office would further enable greater vigor in the prosecution. Able to follow their conscience

[8] *Neue Freie Presse*, December 27, 1885, nr. 7662; Edmund Benedikt, "Glaser, Julius," in *Allgemeine Deutsche Biografie*, vol. 49 (1904): p. 372-80; on Glaser's character, see Heinrich Lammasch, *Julius Glaser: Eine Charakteristik* (Vienna: Alfred Hölder, 1887), p. 4-12; Unger, Josef, *Glaser: Ein Nachruf* (Wien, 1885), p. 1-12; on Glaser's conversion, see Staudacher, Anna L., *Jüdische Konvertiten in Wien 1782-1868*, vol. 1, (Frankfurt am Mai, 2002), p. 5, 95.

[9] Lasaffer, Randall, *European Legal History: A Cultural and Political Perspective* (New York, 2009), 470-471; Elemer Pölay, *Ursprung, Entwicklung und Untergang der Pandektistik* (Szeged, 1981), p. 78-81.

[10] Glaser, Julius, "Ueber Aufgabe und Behandlungsweise der Wissenschaft des österreichischen Strafrechts," *Gesammelte kleinere Schriften über Strafrecht, Civil- und Strafprozess*, 1st ed., vol. 1 (Wien, 1868), p. 11-17.

[11] Glaser, "Aufgabe und Behandlungsweise der Wissenschaft," p. 18.

[12] Glaser, *Handbuch*, vol. 1, p. 120-21; Glaser, Julius "Die Aussage des Beschuldigten, "*Allgemeine österreichische Gerichtszeitung*, September 4, 1884 (71): 1-2; Glaser, Julius, "Ueber Mündlichkeit," *Gesammelte kleinere Schriften über Strafrecht und Strafprozess*, 2d. ed., vol. 1 (Wien, 1883), p. 701-702.

[13] Glaser, "Ueber Mündlichkeit," p. 701.

as independent agents of the court, prosecutors could better protect the state's interest in an adversarial trial, under the principle that "order is so closely bound together with freedom." [14] In fact he regarded enabling all parties to act according to their convictions as a major task of judicial reform and a guarantee of the independence of the courts.[15]

The public and oral natures of the trial were intimately linked. Glaser regarded public observation of trials as the least essential of the four principles but as the aspect of the reform that was of greatest interest to the general citizenry.[16] An obvious precondition of a public trial, oral procedure was also a corollary of the adversarial system: the accused required the right to confront their accuser. Glaser insisted that the oral trial constituted the central element of the criminal process. In all cases involving crimes whose punishment entailment at least a five--year prison sentence, the main trial (*Hauptverhandlung*) followed a preliminary investigation (*Voruntersuchung*), conducted by an investigating magistrate. The preliminary investigation maintained the essential features of inquisitorial procedure: the magistrate prepared documents based on research into the case, and the evidence gathered was intended to serve both the prosecution and the defense. Clearly subordinate to the oral trial, the preliminary investigation did not assess the proof of the facts of the case but only presented evidence to be evaluated in open court. For Glaser the oral procedure afforded the court the great advantage of providing for direct confrontation with the elements of the case and thereby enhanced confidence in the accuracy of the verdict. A "life or death issue" (*Lebensfrage*) for the reform, the immediacy of direct interaction with the accused, witnesses, and evidence in open court ensured a simple, energetic, and quick legal process that best fulfilled the aims of criminal procedure.[17]

The most contentious aspect of the reform proposal, and the issue that most clearly defined the liberal conception of citizens' participation in the courts, was the introduction of trial by jury. The jury system aroused the concern of conservative critics and contributed to the lengthy debates that delayed passage of the reform to 1873.[18] Under Glaser's proposal, and as enacted by the Reichsrat in that year, political offenses and criminal offenses that carried a penalty of at least five years' imprisonment were to be tried before juries composed of twelve men, who required a two-thirds majority vote to convict the defendant. Jury service was limited by essentially the same criteria as the right to vote under the February Patent of 1861: jury lists were drawn from literate men of at least thirty years of age, who paid at least ten Gulden per year in direct taxes, held doctoral degrees, or practiced the profession of attorney, notary, university professor, or middle school teacher.[19]

Advantages of Jury Trials

For Glaser juries served multiple purposes, political, educational, and judicial. Because of the participative nature of the jury trial, it was the form of procedure most compatible with constitutional government. Both in England, the model of that political system, and in Continental states that enjoyed representative government, jury trials demonstrated the advance of liberal principles and achievement of the proper relationship between the rights of subjects and state authority. Conversely, juries constituted a "school of public life" that would raise legal consciousness among the broader public.[20] By bridging the gap between the learned world of the law and the life of the people, juries would awaken popular respect for the criminal justice system and a sense of connection to the state. "Whoever precisely observes contemporary conditions in Europe, including Austria, will find it is high time that the people again regard the implementation of the law as something in their interest, not as something alien that stands opposed to them, but rather as something with which they must cooperate, with which they have an interest and a right to cooperate." [21]

Beyond enhancing respect for the law in the postabsolutist state, jury trials were technically superior to the inquisitorial system. Glaser found that twelve jurors were more likely to reach a correct verdict than was a single judge; certainty lay in numbers. Moreover, by freeing judges from the responsibility to weigh the guilt or innocence of the accused, jurors would allow them to concentrate on the technical legality of the trial. The jury system made for a more logical division of responsibilities than did the inquisitorial or even an adversarial trial in which a judge or panel of judges decided the case. As in parliamentary proceedings, the superiority of the jury lay not in the greater expertise of the participants, for imperial officials and professional jurists possessed unquestioned expertise, but rather in the collective participation of specialists and lay people in their appropriate roles. Jurors, like parliamentary delegates, brought to their work an appropriate skepticism as well as the independent perspective of people so far uninvolved in the matter at hand.[22] Thus, "a trial before a jury court is more thorough, careful, proper, and comforting than that before a panel consisting solely of

[14] Glaser, Julius, "Zur Reform des Strafprozesses," *Gesammelte kleinere Schriften über Strafrecht, Civil- und Strafprozess*, vol. 2 (Wien, 1868), p. 99-100, 167-168.

[15] Glaser, "Zur Reform des Strafprozesses," p. 108-10.

[16] Glaser, *Handbuch des Strafprozesses*," vol. 1, p. 209.

[17] Glaser, "Zur Reform des Strafprozesses," p. 115-119; "Ueber Mündlichkeit," p. 706-707; *Handbuch*, vol. 1, p. 212-13.

[18] On the course of debates over the introduction of jury trials, see Hautmann, Hans "Der Kampf um die Geschworenengerichtsbarkeit in Österreich, 1848-1873," in Erika Weinzierl and Karl R. Stadler, eds., *Justiz und Zeitgeschichte VI: Symposion zur Geschichte der richterlichen Unabhängigkeit in Österreich* (Wien, 1987), p. 251-263.

[19] Mayer, S., *Entstehungsgeschichte der österreichischen Strafprocessordnung vom 23, Mai 1873 und der damit zusammenhängende Gesetze* (Wien, 1876), p. 317-318, 1087.

[20] Glaser, Julius, *Schwurgerichtliche Erörterungen* 2d. ed. (Wien,1875), p. 72-77.

[21] Stenographische Protokolle der Sitzungen des Herrenhauses des österreichischen Reichsraths, Session 7, meeting 25, February 18, 1873, p. 339.

[22] Glaser, *Schwurgerichtliche Erörterungen*, p. 81, 146-148.

professional judges." [23] In turn the greater accuracy of jury trial would enhance public confidence in the courts and thereby further the political, educative function of the legal system.

For Glaser the four elements of the reform of criminal procedure constituted an integrated system, no part of which could be altered or eliminated without distorting the others. Thus, for instance, he rejected any possibility of appeal of the jury's decision, for, he argued, appeal would undermine the integrity of the oral trial on the basis of which the jurors had reached their verdict.[24] The procedural reform Glaser proposed best addressed the roots of criminal activity, the basis of the law, and the task of criminal justice as he understood them.

Consistent with his affinity for pandectism, Glaser was a legal positivist. Law was defined by statute alone, and, as the source of the law, the state provided the concept of legality, without which human freedom was impossible. Without the social order that the state guaranteed, people would be subject to the threats of natural and human predation. Only the state provided the security necessary for individuals to lead truly human lives, and thus the ordinances of government provided the basis for justice. Crime represented a failure of individual wills to conform to the needs of a free society. Criminals generally acted from passion aroused by physical needs that overrode the rational commitment to the common good. Thus, sloth, avarice, lust, or other vices led to actions that threatened the social order the state had established.[25] The state derived the authority to punish criminals from the necessity of upholding the social order that was the precondition of freedom. Punishment provided a tangible sign of the restoration of just order as well as "the resistance to the psychic effect that has necessitated the ruling of the criminal justice system." [26] Having place the defense of liberty in the hands of the state, its subjects had thereby authorized punishment, and the state was compelled to resist crime as encroachment on the victim's freedom.[27]

Glaser pointedly rejected theories of punishment based on deterrence, either directly as in the thought of Caesare Beccaria, or through psychological pressure, as proposed by Anselm von Feuerbach. Glaser based his critique of Beccaria on the dignity and self-worth of the incarcerated. For Glaser, as for Kant, no one, not even a convicted criminal, could be used as a means to another's ends, and no one could accept the possibility of being instrumentalized as the basis of the social order. Thus, Beccaria's notion of the punishment of offenders through public forced labor as a deterrent to others violated the basis of the social contract. Further, Feuerbach's more refined vision of the threat of punishment as a psychological counterweight to criminal impulses struck Glaser as artificial and reliant on the faulty assumption that any threat of punishment could successfully negate the drive to criminal behavior.[28]

Rather, Glaser located the right to punish in the responsibility of the state to restore the sense of justice that crime violated. Clearly rejecting natural law arguments or any sense of justice based on abstract concepts, he found the basis of the ability to judge human actions in the sense of right (Rechtsgefuhl) that arises from within each individual's consciousness. This psychological fact must be recognized and fathomed as the basis of norms of behavior, both habitual and legal.[29]

Again Kantian in its fundamentally retributive in nature, Glaser's theory of punishment argued for jury trial as the most effective means of determining guilt and counterbalancing the psychological basis of crime. Judgment, he argued, must not merely be but also appear to be the negation of all aspects of crime. Because subterfuge and arbitrariness led to self-aggrandizing, illegal acts, trials must be public demonstrations of openness, consensus, and respect for rational norms. "If one were to imagine methods that correspond to these considerations, one could think of none that would be better suited than that offered by the jury. Twelve men, drawn from the most disparate walks of life, as independent from the government as possible… poised between the accused and the punitive power of the state; before this powerless association of peaceful men, the entire might of the state stands still until they themselves bind over their fellow citizen as guilty. The calm impression, which, through the meticulous search for truth and justice, through the quietly serious course of procedure, through the equal attention accorded the prosecution and defense, a well-ordered trial makes, reaches its greatest impact in that fascinating moment when the state, represented by its judges, accepts the pronouncement of the jury, which the state itself has declared the irremissible precondition of punishment." [30]

Notably, Glaser identified a primary purpose of jury trial as justifying the state's authority to punish. Whereas the Continental jury system had its origins in the French revolution, which placed the power to judge crime in the hands of citizens rather than state officials as an act of rebellion against royal sovereignty, Glaser considered the jury "an unsurpassable means for strengthening justice in the state." The participation of lay jurors complemented rather than challenged the authority of

[23] Glaser, *Schwurgerichtliche Erörterungen*, p. 88.

[24] Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsraths (from here, SPA), Session 7, meeting 37, May 25, 1873, p. 765-767; Glaser, "Ueber Mündlichkeit," p. 711.

[25] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 17; Glaser, Julius, *Vergeltung und Strafe: Beitrag zur Philosophie des Rechts* (Horgen, 1849), p. 29-37; on legal Positivism, see Marmor, Andre, "Exclusive Legal Positivism," in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (New York,2002), p. 104-24.

[26] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 1-3; *Vergeltung und Strafe*, p. 33.

[27] Glaser, *Vergeltung und Strafe*, p. 38-39.

[28] Beccaria, Caesare, *Ueber Verbrechen und Strafen*, translated by Julius Glaser, (Wien, 1851), p. xvi; Glaser, Julius, "Anselm Ritter von Feuerbach: Eine rechtsgeschichtliche Biographie," *Gesammelte kleinerer Schriften*, vol. 1, p. 36-39; Shuster, Arthur, "Kant and the Role of the Retributive Outlook in Moral and Political Life, *Review of Politics* 73 (2011): 430.

[29] Glaser, Julius,"Ueber Notwehr," *Gesammelte kleinerer Schriften*, vol. 1, p. 196-197.

[30] Glaser, *Schwurgerichtliche Erörterungen*, p. 91-92; Shuster, "Kant and the Role of the Retributive Outlook," p. 429-39.

professional jurists in trial proceedings. The presence of the state's attorney, defense counsels, and judges ensured the proper guidance of the lay element, and, moreover, the judges' bank could, by a unanimous vote, overrule a jury's guilty verdict and ordain a second trial.[31] The liberty of citizenship found expression through participation in state functions and conscious approbation of the legal duty to punish transgression.

Glaser's emphasis on the dignity and drama of the proceedings underscored the psychology and civic educational value of the trial. In contrast to inquisitorial procedure where the trial consisted of written statements gathered and produced by a magistrate, oral, adversarial trials took place in the minds of jurors and the public. Evidence was weighed as produced in testimony and cross examination. Jurors thus formed judgments by means that could not be repeated. Thus, maintaining the attention of lay jurors was essential to producing just verdicts. Glaser stressed the need for clear, orderly procedure and dramatic atmosphere to enable jurors to concentrate and to produce an edifying effect on the general public.[32] Such qualities would enhance the value of jury trials as "schools of public life" that would build respect for legality among the lower social orders. Glaser's view of the educational contribution of active participation in trials corresponded to contemporary liberal pedagogical theory, which stressed enhancing students' powers of concentration through providing dramatic styles of class presentation and participatory learning experiences. Education built on these principles would create the foundation for engaged, self-motivated citizenship.[33]

Formal Standards of Legal Proof or *Conviction Intime*?

Throughout his proposed criminal procedure, Glaser emphasized the freedom of participants to act according to the dictates of conscience. Prosecutors were to develop their case and pursue charges independent of the courts, whose integrity in turn was shielded from connection to the police or state's attorneys. Jurors, especially, were granted extensive latitude in carrying out their duties, culminating in the formula chosen for the articulation of the verdict; the jurors, the foreman was to declare, had deliberated in accordance with their "oath and conscience." In contrast to French practice, under which jurors ruled only on questions of fact and answered a series of particular questions from the court in the affirmative or negative to determine degrees of culpability, Austrian juries were charged with applying the law to their cases and could alter the charges from those brought by the prosecution.[34] The emphasis on the free conscience of the jury in determining its verdict constituted a sharp break from the previous system of weighing evidence and judging accusations.

Glaser's procedure rejected the fundamentally inquisitorial process reestablished in the code of criminal procedure of 1853, which set forth legal proofs required for conviction. Under the "negative theory of proofs" by that system, defendants could not be convicted unless the evidence produced against them met precise standards of validity. If the defendant denied the accusation, the court normally required three proofs of guilt, including such specifics as eyewitness testimony, identification by the victim, testimony of accomplices, possession of weapons or tools used in the crime, possession of stolen articles, and so on. The code included provisions for evaluating this evidence. Confession by the accused was valid only if explicit, clearly articulated, and offered free of duress. Hearsay evidence, speculation, or conclusions drawn by witnesses were inadmissible. On the other hand, the defendant's past record of convictions of, or even investigations into, crimes similar to that under review, as well as association with suspicious persons, could be considered by the court. In fact the presence of these factors could reduce the requisite number of legal proofs from three to only one. Finally, the code included criteria for establishing the degree of culpability of the accused, so that malice aforethought was defined by evidence that the accused had prepared for the crime or removed hindrances from its commission. According to the negative theory of proof, judges were not compelled to convict if these factors were present; they were only prerequisites to conviction that judges could override if they remained unconvinced of the suspect's guilt.[35]

In the view of the primary author of the code of 1853, Anton von Hye-Glunek, the application of legal proofs provided for objective justice. Only such standards protected the public from subjective, arbitrary verdicts based on the feelings and impressions of judges. Instead, the established system of proofs clarified the evaluation of evidence in the trial process and guaranteed the application of the law according to objective, clearly stated norms. To consider a phenomenon as proven, whether in legal discourse, historical explanations, or everyday experience, one must be able to demonstrate the application of rational values of discourse that must be explicable as general principles. Moreover, Hye-Glunek identified further advantages in the establishment of legal proofs. Only a clearly articulated explanation of the evidence used to reach a verdict allowed for the judicial review of the court's findings. Further, rules of evidence provided guidelines for relatively unsophisticated judges in the less culturally advanced regions of the empire and ensured the equal application of justice, regardless of the class, confessional, or national identities of the parties to a trial.[36]

In Glaser's view the assertion of objective judgment through established standards of proof and rules of evidence rested on

[31] Glaser, *Schwurgerichtliche Erörterungen*, p. 84, 92; Hautmann, "Der Kampf um die Geschworenengerichtsbarkeit," p. 234-236; Donovan, James. M., *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries* (Chapel Hill, 2010), p. 28-29.

[32] Glaser, "Ueber Mündlichkeit," p. 708; *Zur Reform des Strafprozesses*, p. 130.

[33] Glaser, *Zur Reform des Strafprozesses*, p. 87; *Schwurgerichtliche Erörterungen*, p. 73; on liberal educational philosophy, see Coen, Deborah R., *Vienna in the Age of Uncertainty: Science, Literature, and Private Life* (Chicag, 2007), p. 39-40; 58-60.

[34] Donovan, *Juries*, p. 14, 31; Glaser, *Zur Reform des Strafprozesses*, p. 110, 173-175, 188.

[35] Reichsgesetzblatt für das Königtum Oesterreich, 68, August 5, 1853, p. 870-873, 906-911.

[36] Hye-Glynek, Arthur Ritter von, *Die leitenden Grundsätze der österreichischen Strafprocessordnung vom 29. Juli 1853* (Wien, 1854), p. 281-284, 286-288.

a false application of universalist, a priori reasoning to the legal process. Misled by the methods of attaining certainty in the natural sciences and especially mathematics, adherents of objective standards of proof ignored the realities of criminal cases, in which circumstances were unique and experimentation or reasoning from first principles were impossible. Thus, Glaser rejected established standards of proof, and they were not included in the reformed code of criminal procedure.[37]

According to Glaser, the sort of apodictic certainty possible in mathematics or in a philosophical proof could not be achieved in a criminal trial, as they could not in most aspects of human experience. Nonetheless, he believed that courts could establish guilt or innocence with certainty. In part plural decision making, in which the complementary intellectual strengths of a group overcame individual subjectivity, could compensate for the limitations of legal judgment. The degree of certainty thus attained amounted to a greater or lesser degree of probability rather than unquestionable truth. In so far Glaser's reasoning approximated the probabilistic epistemology discussed by Deborah R. Coen in her recent work on liberal scientific thought.[38]

More fundamentally, though, Glaser sought clarity of judgment in the conscience of each individual juror. Here, as in his foundation of legal norms on a feeling of right innate to each person, he located the ability to make judgments in individual psychology. The mental states of conviction, supposition, and doubt were not arbitrary conditions but rather facts that arose by necessity. In arriving at legal judgments as well as in evaluating the impressions of everyday life, the individual consciousness reached conclusions by rejecting highly improbable explanations and self-critically questioning thought processes. "The establishment of conviction in a person is not arbitrary. One has only to ask one's consciousness, one's conscience, to ascertain whether one is convinced of a fact, and… in normal circumstances, this conviction is itself an indication of truth… conversely, it is impossible for laws and legal norms to induce a person to acknowledge a truth that is not the product of internal mental processes." [39]

In reaching their verdicts, jurors or judges were to arrive at a sense of certainty that arose freely from within (*conviction intime*). In so far Glaser followed the logic of French jury trials, in which rules of evidence and legal proofs had been abandoned in favor of jurors' judgment by conscience. Whereas French jurors, however, were presumed to be ignorant of the law and therefore reached verdicts only of fact, Glaser insisted that jurors apply the law to their findings. Rather than an expression of citizens' independence from state authorities, Austrian jury trials were to be means for building legal consciousness.[40] Operating without the luxury of working within a closed conceptual system or delaying judgment until all possible date were collected, law courts needed to reach verdicts based on the imperfect evidence at their disposal. Thus, Glaser argued the only recourse was to rely on the individual's power of judgment.[41]

Glaser defended the validity of such judgments against assertions they represented only subjective verdicts based on opinion. He did not accept the distinction between empirical and moral certainty, which was made in regard to French practice based on the *conviction intime*. Rather, he argued, the system of legal proofs provided no true objective judgment, for no evaluation of evidence was self-evident; all required the active decisions of jurors and judges. "Ultimately, there is no other measure of human certainty than that something is certain to persons who do not lightly form an opinion but rather submit themselves to the generally recognized laws of thought; this conviction, arising from examining the evidence available for a particular case, which can only be peculiar to that case, must also be indicated by any abstract rule that is not to be shown to be clearly false." [42] The application of "the generally recognized laws of thought" entailed the ability to categorize factual assertions as certain, probable, or doubtful and then establish an internal mental resolution of these tensions through a process of critical examination. Glaser implied that not all people were capable of this process, at least not to the extent necessary to sit in judgment of criminal trials, and, as further discussion will show, he restricted participation in jury trials to qualified groups. Thus, rather than abstract standards, the application of conscience by properly selected individuals ensured fair judgments. Such absolute personal conviction constituted the highest level of certainty an individual could achieve, and facts so established were proven. If the presentation of evidence attained this effect among the requisite number of jurors, then legal certainty had been reached.[43]

Despite his rejection of the doctrine of legal proofs, Glaser advocated the establishment of rules of evidence. He credited the "sober, quiet" character of English trials to the careful application of such rules. This admirable dignity was too often lacking in Continental systems based on the French model, which allowed the free introduction of evidence by both parties. In one of his last works, a study of the nature of evidence published in 1883, he supported the power of judges to rule on the relevance of evidence submitted to criminal proceedings. The lack of this power allowed the parties to the trial to play on the emotions of the jury and disrupt the orderly evaluation of evidence. Nonetheless, he was forced to admit that the Austrian code of procedure guaranteed the prosecution and defense the right to introduce the testimony of any witness or expert without restriction.[44]

---

[37] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 346-347.
[38] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 343, 347; Coen, *Vienna in the Age of Uncertainty*, p. 5-15.
[39] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 342; *Schwurgerichtliche Erörterungen*, p. 80-81.
[40] Glaser, *Handbuch des Strafprozesses*, vol. 1,p. 342; Ranouil, Pierre Charles, "L'intime conviction," in Renée Martinage and Jean-Pierre Royer, eds., *Les destinées du jury criminel* (Lille, 1990), p. 89-90; Donovan, *Juries*, p. 30-31.
[41] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 347.
[42] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 349; Ranouil, "L' intime conviction," p. 86; Donovan, *Juries*, p. 31-32.
[43] Glaser, *Handbuch des Strafprozesses*, vol. 1, p. 350.
[44] Glaser,Julius, *Beiträge zur Lehre vom Beweis im Strafprozess* (Leipzi, 1883), p. 67-70.

The Liberal Conscience

Despite the reservations implied about the ability to jurors to evaluate evidence without firm expert guidance, Glaser remained committed to the centrality of conscience in determining the outcome of a trial. He did not, though, explicitly define conscience or explore the means by which it reached maturity. We may draw some inferences on his understanding of this key term through his stipulations on what sort of person was eligible to serve on juries and circumstances under which jury trials would be inappropriate. Moreover, Glaser's conception of conscience stood in a complex relationship to that of Roman Catholicism, his adopted faith, for which the concept was crucial to the moral life of the individual.

Since the Counter-Reformation the church had developed clear methods of refining the consciences of German Catholics. Frequent Confession, preceded by a careful examination of recent deeds under the instruction of guidebooks for self--investigation, enabled the believer to achieve an ever more sensitive moral focus. Such systematic, routine, guided self--examination led to the gradual elimination of sin and the encouragement of behavior that conformed to church teaching. The sacrament of Confession was a private, introspective matter that enhanced self-understanding and conformity to church guidance. A well-developed conscience enabled the lay person to achieve self-discipline, restraint, and prudence as the basis for an active life of participation in worldly matters. Catholic teaching on conscience, then, stressed habitual acceptance of church moral instruction through self-examination and internalization of Christian standards as the basis for conduct.[45]

Although as a liberal Glaser was unlikely to look to the Catholic church for moral guidance, his understanding of conscience suggests some commonalities with church teaching. In particular he shared the emphasis on self-mastery through the assertion of intellectual discipline that marked the Catholic conception of conscience. He differed, though, in his understanding of the means to and manifestations of that achievement.

As the property and educational qualifications for jurors suggest, service on juries required substantial income, higher education, or achievement in the professions. Adequate reflective powers for jury service were thus demonstrated by worldly experience and career success, rather than by guided introspection. The reform legislation further limited jury service to people of sound reputation and good standing with judicial authorities. In each district jurors were chosen by lottery from lists drawn up by commissions of judges and trusted lay people (*Vertrauensmänner*), which further suggested the symbiosis Glaser favored between official and public participation in the legal system.[46] Glaser's image of the qualifications for jury service connoted successful engagement with worldly matters, a reputation for respect for state institutions, and analytical ability sufficient to question one's own assumptions and thought processes. His understanding of conscience approximated the definition of "political education" put forward by his younger colleague on the University of Vienna law faculty, Adolf Exner. In a public address held as university rector in 1891, Exner defined a "political sense" as openness to the world around one, the ability to see beyond immediate circumstances, and an understanding of political structures.[47]

Such persons needed to be free from political passions and shielded from circumstances that undermined public faith in the integrity of the jury process. In conjunction with the reform legislation, Glaser introduced a measure granting the government the power to suspend jury trials in regions undergoing political or social trauma. In such areas, he argued, jurors, guided by their political, national, or confessional identities could be tempted to render judgments that betrayed their true convictions and denied the facts of the case at hand. To uphold the public authority of jury trials, the government required the power to impose trials by professional jurists until the ebbing of "terrorism" again allowed members of the public to act according to their oaths and consciences. In his discussion of the introduction of the jury system, Hans Hautman emphasizes Francis Joseph's insistence on this measure as a precondition for his acceptance of the reform of criminal procedure, but the restriction is consistent with Glaser's idealization of dispassionate, orderly procedure. In the coming decades the government make frequent use of this prerogative and repeatedly suspended the right to jury trial in various provinces; during most of World War I the jury system was suspended for all of Austria.[48]

Glaser further held that in some regions national passions or cultural backwardness were so prevalent that introduction of the jury system would be inappropriate. Thus, in his initial proposal, Galicia, Dalmatia, and Venetia were excluded from jury trials; in these crownlands tribunals formed of professional judges would function within the otherwise reformed criminal procedure. Glaser believed the populations of these provinces either lacked sufficient educational standards to take on the responsibility of jury duty or could be assumed to misuse jury duty for political purposes. Only where no fundamental opposition divided the populace from the government could jury trials be established. Ultimately, this restriction was dropped, and all Austrian crownlands were included in the reform of 1873. Nonetheless, Glaser's initial reservation suggests his conviction that the empire's Polish, Italian, and Croatian subjects lacked the refined sense of justice that was enjoyed by the Germans. He did not wish for the less developed regions to hold back the progress of the Germanic regions. Moreover, Glaser, a nationalist who advanced Austrian claims to leadership in the German Confederation, regarded the introduction of jury trials as a means to set Austria at the forefront of legal progress in the German lands. In this sense the inclusion of the Slavic and Italian regions in the reform could detract from the advantages thereby gained in the rivalry with

[45] Meyers, W. David, *"Poor, Sinning Folk": Confession and Conscience in Counter-Reformation Germany* (Ithaca, 1996), p. 173-202.
[46] Mayer, *Entstehungsgeschichte*, p. 318.
[47] Exner, Adolf, *Über politische Bildung*, 3d. ed, (Leipzig, 1892), p. 9-14; Coen, *Vienna in the Age of Uncertainty*, p. 137-144.
[48] SPA, Session 7, meeting 14, February 16, 1872, 180-81;Hoke, Rudolph, "Strafrechtspflege und Terrorismus im alten Österreich: Betrachtung zum Gesetz betreffend did zeitweise Einstellung der Geschwornengerichte vom 1873," in Holfried Valentinitsch, ed., *Recht und Geschichte: Festschrift Hermann Baltl zum 70. Geburtstag* (Graz, 1988), p. 328-329; Hautmann, "Der Kampf um die Geschworenengerichtsbarkeit," p. 264-270.

Prussia for supremacy in Germany. After Austria's military defeat by Prussia in 1866 such concerns were moot.[49]

In introducing his reform proposal, Glaser recalled the benefits achieved by the short-lived experience with jury trials from the code of procedure of 1850. "The confidence of the populace in the just, dignified, and humane conduct of criminal procedure rose in the same degree that the public attained insight into the workings of justice, and with this confidence grew also respect for the law and the courts and the willingness to submit oneself to the former and to aid the latter in carrying out their difficult task. In particular, the imposing ceremony of a jury trial, the calm and conscientious collaboration between the panel of judges and the laymen called to the jury box, contributed not a little to enhancing the moral impact of sentences and to mitigating the corrupting indifference of the populace to the effectiveness of the law and the success of public officials in its enforcement." [50] Glaser's concern for the substance and appearance of legitimacy in criminal trials suggests the centrality of establishing authority for liberal thinkers.

Historians have well documented the social and political values of Austrian liberals of the 1860 s and 1870 s. In discussions of the tensions between their progressive spirit and their sense of social isolation and insecurity, scholars have made clear the liberals' fears of social revolution or the reassertion of traditional authority based on what they regarded as the irrational norms of the church, the military, or the aristocracy. In response liberals associated political maturity and full political rights with property, education, and German nationality.[51] Examination of Glaser's thought on criminal procedure affords insight into liberal understanding of the relation between citizens and the state and thereby into the concept of proper authority.

In this regard the distinctions made by R. B. Friedman on the means of perceiving authoritative power may help illuminate the modes of understanding legitimate authority in nineteenth-century Austria. Friedman distinguished the idea of being "an authority" from that of being "in authority." [52] The former concept suggested a traditional communal ideal in which no dissension obscured a clear sense of the correctness of the views of those in power. In such a community the recognized expertise of state officials justified their ability to give orders and make judgments. In the Austrian context this view corresponded to the inquisitorial power of the magistrates under the system of justice introduced by Joseph II and defended by Hye-Glynek. When no such consensus exists, the populace must resort to placing people "in authority," by which some order is established among the welter of conflicting opinions and identities within a polity. Although no absolute standard for proper judgments will be attained, a consensus may be reached by participants in the political process. Notably, subsequent critics of the jury system focused on the inadequate expertise of jurors to reach credible decisions. In a study conducted by the justice ministry in 1907, prominent jurists recommended the abandonment of the jury system based on arguments that lay people were poorly prepared to judge modern crimes, including complex financial speculation, or to comprehend the psychological theories of reduced mental accountability.[53]

In place of expertise Glaser advanced a mode of authority achieved by the participatory interaction of individual citizens in state functions that would advance the internalization of governing norms. The prerequisite for the success of the process was the possession of a well-developed conscience among the participants, which for Glaser implied the ability to transcend ethnic, confessional, or social identities, grasp the general interest of the community, and apply a self-critical sense of justice. Glaser's emphasis on conscience marks the essential character of individual cultivation in this process. His views then suggest an exception to the liberals' preference for probabilistic reasoning that Deborah Coen has recently argued posed a rejection of the certainties taught by the Catholic church.[54] Ironically, Glaser's conception of conscience suggests a lingering influence of Catholicism on liberal thought: the centrality of self-mastery to shaping behavior that conformed to a rational investigation into motives and actions. Moreover, Glaser's confidence in the efficacy of the jury system indicates his faith that commitment to public duties could enhance authority throughout the empire. Despite his initial reservations about the performance of Slavs and Italians in the jury system, their ultimate inclusion in the reform underscores Glaser's belief that a participatory criminal justice system could help integrate the subjects of the multinational empire.

In his emphasis on the political instrumentality of the trial for instruction in civic virtue, Glaser concentrated on the benefits derived from the jury system for the public rather than for the accused. Clearly, the establishment of fair and participatory process was of a concern to him to ensure the rights of the defendant, but his writings place primary emphasis on the responsibilities and judgment of the jurors. His approach corresponded to his retributive sense of justice. In a recent article on the development of the concepts of the legal responsibility and autonomy of the accused in nineteenth-century Britain, Lindsay Farmer argued that the elaboration of these concepts in judicial practice served rather to enhance institutional authority than to promote defendants' active participation in trials.[55] Similarly, Glaser emphasized the efficacy of transparent, participatory procedure in enhancing state authority; his reform underscored Austrian liberals' equation of citizenship with legitimate public order.

---

[49] Glaser, *Schwurgericthliche Erörterungen*, p. 96-98; *Zur Reform des Strafprozesses*, p. 90-91; for Glaser's views on nationality issues in the empire, see Glaser, Julius, *Zur Sprachenfrage in Oesterreich: Eine Rede, gehalten im Abgeordnetenhaus des österreichischen Reichsrathes* (Wien, 1871).

[50] Glaser, *Zur Reform des Strafprozesses*, p. 87.

[51] For a concise summary of scholarship on the liberals, see Kammerhofher, "Einleitung," p. 9-19; for a recent attempt to define Central European liberalism that stresses the importance of property rights and education, see Hlavačka, Milan, "On the Concept of 19th Century Liberal Civil Society in Bohemia: An Attempted Definition," *Historica: Historical Sciences in the Czech Republic* 14 (2010): 187-91.

[52] Friedman, R. B. "On the Concept of Authority in Political Philosophy," in Joseph Raz, ed., *Authority* (New York, 1990), p. 72-85.

[53] *Stenographische Protokoll über die Beratungen zu Strafrechtsreform, Justizministerium, Mai 1907* (Vienna: K.K. Hof- und Staatsdruckerei, 1907), p. 305-311.

[54] Coen, *Vienna in the Age of Uncertainty*, p. 6-8.

[55] Farmer, "Criminal Responsibility," p. 57-58.

The Silent Revolution in Methods of Advocacy in English Courts

Andrew Watson *

Abstract

George Keeton wrote, in 1943, about "a silent revolution in methods of advocacy as practiced by the English Bar over the last fifty years" [1]*. Changed standards of etiquette, professional rules and greater control exerted by judges over these years led to a vast increase in courtesy in interactions with judges and between counsel. The conduct of prosecutions had also improved. They were generally no longer carried out in a sneering hectoring manner with witnesses mercilessly browbeaten or bullied. Dramatic types of 19th Century advocacy, in which counsel was prepared to use mannerisms, tricks of speech and gestures to heighten the effects of their pleas to juries, was replaced by a conversational and matter of fact tone. The idea that to cross-examine meant to examine crossly had almost vanished. Appeals to juries were now to reason combined with a controlled, subtle and focused appeal to emotion. Jury trials in civil cases had continued to decline. Advocacy before judges was concerned with facts and the law, not oratorical flourishes. Fewer criminal trials before juries took place as the jurisdiction of the magistrates had widened further. The more restrained and conversational style of advocacy before criminal juries may have been to some extent influenced by that of the civil courts, where the leaders of the bar appeared more often and increasingly without juries. Two dominant members of the bar during the first half of the 20th Century were Patrick Hastings and Norman Birkett. Their styles, because of triumphs linked with them, were influential on those of other barristers. Hastings was a master of direct forcible speech without any embellishments or ornamentation and prized brevity. Unlike Hastings, Norman Birkett believed that the advocate ought to use the full range of English speech. Other factors lay behind the mainly conversational and matter of fact advocacy that had become established. These include a widely held suspicion of rhetoric and, very importantly, better informed and greater educated juries. Jurors were less susceptible than their predecessors to theatrical gestures and melodrama, which had largely been replaced in literature and on the stage by introspection and realism, references to God and the Bible, elegant and flowery, but empty, speech and appeals to strong emotion and prejudice. In a more scientific age jurors expected more of an appeal to reason. The success of barristers such as Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, during the closing decades of the previous century, may have been because they appreciated early on the changes that were occurring to juries. Attempting to catch the eye of the press to help create a reputation, useful to generate work, was an important factor behind the emotive, vividly worded and aggressive advocacy of the early Victorian period and afterwards. The later decline of court reporting in the newspapers, removing much of the gallery from the stage, may well have contributed to the more subdued form of speech.*

Key words: *England; Advocacy.*

The silent revolution

In 1943, during wartime Britain, G. W Keeton, then Professor of English Law and Dean of the Faculties of Laws in The University of London and at the University College, London, wrote about *"a silent revolution in methods of advocacy as practised by the English Bar"* [2] that had taken place over the previous 50 years. He observed that changed standards of professional etiquette and steadily greater dignity of the judiciary [3] had led to a vast increase in courtesy between the court and counsel and

* Andrew Watson, LLB, MA, MPhil (Cantab), PhD., Department of Law and Criminology, Sheffield Hallam University, United Kingdom.

1 G. W. Keaton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10.

2 G. W. Keeton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10.

3 Certainly by the latter part of the Nineteenth Century most judges exerted authority over advocates in court, something not all of them had been able to do sufficiently earlier. (See George King, *Lawyers and Eloquence,* In William Andrews ed, *The Lawyer in History, Literature and Humour,* William Andrews and Co, 1896, page 264.). Contributing to deference and courtesy shown to judges by barristers was greater respect for their intellectual and practical abilities as lawyers. Beginning in the 1860's both Conservative Lord Chancellors (Cairns) and Liberals (Hatherley and Selborne) sought to professionalise the judiciary and to make merit the consideration for appointment to the bench. (Robert Stevens, *The English Judges,* Hart Publishing, Oxford and New York, 2005, Chapter One) The movement towards meritocracy was to some extent impeded by Lord Halsbury (Hardinge Giffard) in the seventeen years he was Lord Chancellor between 1885 and 1905. His appointments were much criticised on the grounds *"he appointed to the High Court, and to a lesser extent the county court,men of little or no legal learning whose previous career in public life had been largely in the service of the Conservative Party or else were relations of his own ".* (R. F. V. Heuston, *The Lives of the Lord Chancellors 1885-1940,* Oxford: Clarendon Press, 1987, page 36.). From Lord Haldane's Chancellorship (1912-15) legal and professional qualifications firmly became the criteria, though at first the change was not extended to the most senior appointments. However, a little later, Lord Sankey, Lord Chancellor from 1929 to 1935, when resignations occurred, replaced five Law Lords who had political backgrounds by others whose reputations rested on their professionalism as lawyers. (J. A. G. Griffiths. *The Politics of the Judiciary*, Fifth Edition, 1997, Fontana Press, Page 16. Also see, Shimon Shetreet, *Judges on Trial*, 1976, North Holland Publishing Company, pp. 70 – 71.)

between counsel. Quarrels in court were rare and when they did occur was regarded as a departure from professional good manners rather than a normal incident of litigation[4]. All barristers who practised in the common law courts were required to choose a circuit in which to work and by convention to dine frequently in the circuit mess. In the last decades of the 19th Century messes grew stronger in maintaining accepted professional standards of behaviour; the expulsion of Dr Kenealy, for his conduct in the criminal Tichborne Claimant case, from the Oxford Circuit Bar mess in 1874 is an early example of their willingness to take severe sanctions if necessary. Institution of a bar mess at the Old Bailey in 1891, a step spoken about since the 1840's to improve standards, may well have contributed to better behaviour there[5]. The conduct of prosecutions had also improved. Unlike in the previous century, they were no longer carried out in a "*sneering hectoring manner with witnesses mercilessly browbeaten and bullied if the occasion warranted*"[6]. The idea of the prosecutor acting as a minister of justice, and therefore not striving for a conviction at any cost, was now firmly part of the etiquette of the Bar. This limited, if it did not eliminate, appeals by prosecutors to jurors' emotions.

It was widely held that Sir Richard Muir (1857-1924) was responsible for much of the improvement, especially at the Old Bailey - practice there influencing other courts - and introduced an atmosphere of fairness and impartiality in prosecutions which had never been seen before[7]. Underhandedness or trickiness in the task was said to be alien to him[8]. As a prosecutor he was regarded as the greatest of his time and represented the Crown in every trial of note in the Old Bailey from 1901 until his death. Born in Scotland, the son of a shipping broker from Greenock, he went to London with intentions of becoming an actor but, after a period working as a parliamentary reporter for *The Times*, abandoned his earlier ambition, turned to law and was called to the Bar at Middle Temple, where he later became a Master of the Bench. Muir was known to be hard working with little apparent need for conviviality. He usually spent half the night preparing for his cases and made notes on small cards with coloured pencils- one colour for examination in chief, one for cross-examination and another for possible re-examination. It was reported Muir could check up in a moment upon any contradiction or alteration between evidence given by one witness and another at the trial and what he had said when at the police court[9]. These cards were noticed in court and became known as Muir's "playing cards". He asked for painstaking thoroughness from the police in obtaining evidence. When presenting cases he placed much weight on physical evidence and little on eye witness testimony, except if it would bolster more concrete evidence. It was Muir who conducted the first prosecution involving finger print evidence in 1902[10]. Whilst Richard Muir deliberately avoided raising the emotional temperature, it was said that the "*lucidity of his argument and the clarity with which he stated the facts in his opening speeches wove a net so tightly round the prisoner in the dock that he could never afterwards escape from it*"[11].

Such was his reputation for meticulousness and great diligence that Dr Crippen, on hearing that Muir was to prosecute him, said "*I wish it had been anybody else… I fear the worst*". Muir's cross-examination of Crippen, before Lord Chief Justice Alverstone in Court No 1 at the Old Bailey, was a masterpiece of clear, direct and polite questioning, in simple language, each question dealing with one fact at a time, which conveyed to the jury the strength of the case for the prosecution. Characteristically, he saved all comment on the answers until his closing speech[12].

Dramatic types of 19th century advocacy, in which counsel was prepared to adopt mannerisms, tricks of speech and gestures, parodied in Gilbert and Sullivan's *Trial by Jury*, to heighten the effect of their plea, Professor Keeton reported in 1943 had become almost obsolete:

"A visitor straying into our courts (with the possible exception of the Central Criminal Court) might be forgiven if he imagined himself to be witnessing some unusual kind of company meeting. The tone of counsel

---

[4] Great shock was felt when two barristers fought in court in 1907. The incident is described by David Pannick, Advocates, Oxford, 1993, page 54.

[5] Allyson May, *The Bar and the Old Bailey,* 1750-1850, University of North Carolina Press, Chapel Hill and London, 2003, page 242.

[6] William Cornish, *The Jury,* Penguin Books, 1971 (revised edition) page 168. See also Leo Page *First Steps in Advocacy,* Faber and Faber, 1943, pp.127-128: "*Years ago the name "Old Bailey lawyer" was a term of reproach. It indicated the man who was out to get a conviction even if it meant that he had to descend to any trick or unworthy expedient for the purpose…There has been a complete revulsion from those days when conviction was the object and the methods by which it was gained were immaterial".*

[7] Richard DuCann, *The Art of the Advocate*, Revised Edition, 1993, Penguin Books, page 115.

[8] See Travers Humphreys, who knew him well, *Criminal Days*, Hodder and Stoughton, 1946, page 81.

[9] Travers Humphreys, *ibid,* page 80.

[10] Harry Jackson was found guilty at the Old Bailey of a charge of burglary of a house and stealing billiard balls. He received seven years penal servitude. The implications of the new technique were quickly realized in prosecutions. The attitude of some judges to fingerprints was one of distrust, but the value of this evidence was placed beyond doubt when, in 1910, the Court of Criminal Appeal upheld a conviction based solely on fingerprint evidence (R v Castleton (1909) 3 Cr App R 74).

[11] Richard DuCann, *The Art of the Advocate,* Revised Edition, 1993, Penguin Books, page 72.

[12] Richard DuCann, *The Art of the Advocate* Revised Edition 1993, Penguin Books, pp. 126-128. For that part of Muir's cross-examination of Dr Crippin which concerned whether the human remains found in his house were those of Mrs Crippen, a vital question for the jury, see E.W. Fordham, *Notable Cross –Examinations,* Constable, 1951, Chapter XI. The influence of Edward Muir endures. Nearly a hundred years later his cross-examination of Crippin is still held, by authors of text books on acquiring the skills of advocacy, to be a model of cross-examination techniques for both prosecution and defence. See, David Ross QC (*Advocacy,* Cambridge University Press, 2007, pp.69-70.), who quotes passages from it and Robert McPeake (*Advocacy Manual*, Oxford University Press, 2009, pp.179-188.), who reproduces a sizeable part. Richard Muir's preparatory notes for his prosecution of Crippin, commended by David Ross as " *an example to us all",* page 18, were found and published. They appear in Louis Blom-Cooper, *The Law As Literature*, The Bodley Head,London, 1961, pp.14-33. Also see a commentary on them by Mr Justice JH Phillips, *Practical Advocacy*, (1988) 62 Australian Law Journal 627-629.

is conversational and matter of fact. There is a somewhat misleading air of casualness about the proceedings" [13].

Sir Norman Birkett, an eminent advocate of the first half of the last century, in an address delivered in Gray's Inn Hall said of the altered style of advocacy: "*There may have been days when a flowery speech was effective, but it is no longer effective. Times change; manners change; all things change. Though the advocate of today does not seek to commend himself by flowery speech, he does seek to be persuasive"* [14]. Advocates now sought to be persuasive by a conversational matter of fact advocacy making points earnestly, and if necessary, with persistence but rarely indulging in rhetoric in its pejorative sense of artful bombast and verbal chicanery, and normally avoiding the sorts of tricks and effects that were used previously [15].

Giving the Haldane Memorial Lecture, in the same year that Keeton wrote about advocacy in court, Sir Gervaise Rentoul, the Chief Stipendiary Magistrate of London, stated "*… anything in the nature of theatricality should be avoided,* although, *in a criminal trial some dramatic licence may be permissible when the emotions of the jury are highly charged"* [16]. On cross-examination he said: "*The old idea that to cross-examine means the same as to examine crossly has long disappeared. The successful advocate nowadays no longer thumps the desk with his brief; the rapier has taken the place of the broadsword: Sergeant Buzfuz is dead"* [17].

In 1917 the governing body of the Bar, the Bar Council, adopted a number of rules to control barristers when faced with making suggestions of fraud or dishonesty or attacking the credit of witnesses they had to cross examine. Subject to minor amendments they continue today.

Under the rules barristers could not suggest that a witness, or other person, is guilty of a crime, fraud or misconduct of which their client is accused unless such allegations go to a matter in issue (including the credibility of a witness) which was material to their client's case and which appeared to them to be supported by reasonable grounds [18]. Also they were prohibited from asking questions which were merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person [19].

Serjeant Buzfuss's spirit of heavily belabouring witnesses in cross –examination had not entirely expired and appeared in a case before a High Court judge and a jury in 1934. The higher judiciary, however, showed a determination to send it on its way. The chief protagonists on either side of the cause, Mr Lehwess and Sir Herbert Austin respectively, were cross-examined. Measured by the shorthand note Mr Lehwess's examination occupied 80 pages; his cross - examination 265 pages. The examination in chief of Sir Herbert Austin occupied 39 pages and his cross-examination 148 pages. On matters of law, the case went to the Court of Appeal and on further appeal to the House of Lords [20]. The Lord Chancellor, Viscount Sankey, agreed with the censure of Lord Hanworth, Master of the Rolls, in the Court of Appeal, who had said "*There is a tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters trivial in relation to the main issues. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted in the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon witnesses. We desire to say that in our opinion the cross-examination in the present case did not conform to the above conditions, and at times it failed to display that measure of courtesy to the witness which is by no means inconsistent with a skilful, yet powerful, cross-examination"* [21].

The Lord Chancellor then went further in his criticism:

"It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the Court are taking part in the great task of doing justice between man and man" [22].

---

[13] G.W. Keeton, *Harris's Hints on Advocacy*, Stevens and Sons, 1943, page 10. Nearly three decades before, in 1915, in the Foreward to *Illustrations In Advocacy by Richard Harris K. C*, Fifth Edition, a book mainly for aspiring and newly qualified barristers, George Elliot, K.C. wrote: "*It is said by many that eloquence is not now encouraged in the courts, that the artifices of advocacy are discouraged, that a plain brief statement of fact, as concise and succinct as the nature of the case will permit, is the style which best commends itself to the Bench, and the exigencies of time, whether in civil causes or in criminal trials, do not permit of those methods of advocacy which were so effective in days gone by".*

[14] July 1st, 1957, entitled *"The Advocate"*, published in Graya, No 46, pp. 89-96. Viscount Simon, in his forward to Leo Page's *First Steps in Advocacy*, Faber and Faber, 1943, pp. 7- 8, wrote: "*A plain accurate statement arranged in the right order is worth tons of rhetoric. Juries, no less than magistrates and judges, want to do right; they are not impressed, any of them, by blather and pomposity, but are grateful for clear exposition".*

[15] Leo Page, *First Steps in Advocacy*, Faber and Faber, 1943, pp.20-27, considered advocates would most likely achieve success by "*simplicity*, *sincerity* and *moderation"* in manner and matter and that persuasiveness would be much assisted by audibility, clear articulation, inflection to avoid monotony and for emphasis and absence of studied gesture (Chapter 5).

[16] On eschewing theatricality, Leo Page, *First Steps in Advocacy*, Faber and Faber, also published in 1943, page 24 wrote: "*A law court is seldom a fit place for stage business. Incidentally, the highly dramatic manner is a treacherous tool in inexpert hands. A first-class tragedian moves us with horror and emotion, but a second – rate performer excites only our ridicule. So it is in court".*

[17] Sir Gervais Rentoul,*The Art and Ethics of Advocacy,* Haldane Memorial Lecture, 1943, page 9.

[18] Now contained in Bar Code of Conduct para 708(j) and Written Standards para5.10(h). Also, concerning advocacy by solicitors see Law Society's Code for Advocacy, Part VII para 7.1 (h).

[19] Now embodied in Bar Code of Conduct para 708(h) and Written Standards para 5. 10. See also Law Society's Code for Advocacy PartVII par7.1 (e).

[20] *Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co*. [1935] A.C. 346.

[21] *Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co.* [1935] A.C. 359.

[22] *Ibid*, page 360.

In the course of a lecture on advocacy at Gray's Inn in 1938, Sir Malcolm Hilberry, then a King's Bench judge, considered the place of emotion in jury trials. In contrast to blatantly emotional advocacy, often short on analysis of the facts - or indeed sometimes almost completely replacing it- which was much heard in the preceding century, he observed that triumphant jury advocacy now made an appeal to reason combined with a subtle, restrained and focused appeal to emotion:

"You will notice… that the successful jury advocate always gives his address to a jury in the form of a well built argument, while the emphasis and appeal are all the time strongly emotional. The facts are marshalled to form the steps of the argument leading to the conclusion that is sought, but the nervous force of a controlled emotion passes all the while from the advocate to the jury, first to arrest their attention, then to hold it, and finally to dominate their judgment. It is in such work that rhetoric has its place and the sense of the dramatic"[23].

In a small profession where, until the end of the 1980's, there was very little formal instruction on it, the views of judges on advocacy, and their ability to act on them by the way they received advocates in court, and those held by senior barristers, were influential, especially on newly called members of the bar, whose main method of learning was studying more senior barristers -watching *big men* in court[24], following the techniques of the successful and avoiding those of the unsuccessful.

Continued decline of jury trials

In addition to changes in professional etiquette and rules and readier acceptance by the Bar of judicial control over legal proceedings, already mentioned, a number of other reasons also account for the transformation in style that had occurred. Continued fall in civil jury trials undoubtedly played a significant part. Reduction in the use of civil juries begun in the 19th century (by the end of that century only half of civil trials in the High Court were by a jury) gathered pace during the first half of the 20th century. After 1935 it could be asserted that the jury trials in county courts had practically ceased to exist.

At High Court level, the judicature commissioners and a departmental committee which reported in 1913 favoured a more restricted right to trial by jury in civil cases. No changes were made until the Juries Act 1918, which was principally enacted because of shortages of jurors in wartime. The Act provided that all cases in the High Court should be before a judge without a jury unless the Court saw fit to order one, subject to the right to jury trial in cases alleging fraud, libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry, contested matters in divorce and heir - ship in probate actions. The pre - Juries Act 1918 position regarding juries was, however, restored by the Administration of Justice Act, 1925. Complaints about the cost and delays in proceedings at common law led to the re-introduction of restrictive legislation in the form of the Administration of Justice Act (Miscellaneous Provisions) Act 1933[25]. This Act, which encountered very little public opposition, removed an absolute right to jury trial in the King's Bench Division of the High Court. Trial by jury was to be ordered in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage unless the court was of the opinion that the trial required any prolonged examination of documents or accounts or any scientific or local investigation which could not be conveniently made with a jury. In other cases the Court had a discretion to order a jury. This was applied narrowly[26]. Jury trial became more and more of a rarity as litigants, forsaking the traditionally rehearsed arguments in its support, increasingly opted for trial by judges alone to avoid delay and expense. Indeed seeking trial by jury came to be regarded with suspicion: it suggested the hope of confusion in a weak case, or the expectation of exorbitant damages in cases involving distressing details or high feelings[27]. Decline of trial by jury amounted to *a revolution in practice*[28]. Persuasiveness in front of Judges with no jury needed advocates to concentrate clearly on the facts in issue, an ability to argue relevant law, and a brisk unrepetitious delivery. It did not require oratorical embellishment. A view from the judiciary on this point was clearly put by Mr Justice Hilberry in his address on advocacy at Gray's Inn Hall in 1938:

"A Judge is rendered uneasy by oratorical flourishes. Let the language there conform to the standards of the best prose. In the words of Robert Louis Stevenson "Beware of purple passages". Wed yourself to a cold 'austerity". Continuing, Hilberry then told an amusing story about Mr Justice Swift[29]:

"A counsel, much given to emotional rhetoric began to open a case before the learned Judge sitting alone. He had not gone far before he was giving full rein to his oratory. Mr. Justice Swift tapped his desk; "Mr. Blank", he said, "there is no jury." There came the appropriate apology but again counsel was soon indulging in rolling periods and high-flown

---

[23] *Duty and Art* in *Advocacy*, a lecture delivered at Gray's Inn in Hilary Term 1938, Graya NoXX, Easter, page 11. Largely reproduced in Sir Malcolm Hilberry, *Duty and Art in Advocacy*, Sweet and Maxwell, 1946. Concerning the use of controlled emotion, Leo Page, *First Steps in Advocacy*, Faber and Faber, 1943, pp. 128-129, wrote*: "It is legitimate for defending counsel to use pathos in order to move a jury in the interests of his client. But it is not considered to be the duty of counsel for the prosecution to be vindictive or to attempt to excite the indignation of a jury against a defendant by rhetoric".*

[24] As regularly observing the performance of distinguished barristers in court was described by Leo Page *First Steps in Advocacy*, Page 73.

[25] For a closely contemporary analysis of the Act's provisions for civil jury trials see R. M. Jackson, *Incidence of Jury Trial During the Past Century,* Modern Law Review, Volume 1, No 2, Sept. 1937, pp. 141 – 142.

[26] Under the present law, Section 69 of the Supreme Court Act 1981, the right to jury trial is limited to only four specific areas: fraud, defamation, malicious prosecution and false imprisonment (Similar provisions are contained in the County Courts Act 1984.) Even in these matters, the right is not absolute and can be denied by a judge, under Section 69 (i) where *the case involves any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.*

[27] The temporary prohibition on civil jury service in the Second World War was a later blow from which civil juries never recovered. J. H. Baker, *An Introduction to English Legal History,* Butterworths, 2002, page 92.

[28] A. H. Manchester, *A Modern Legal History of England and Wales 1750 – 1950,* Butterworths, 1980, page, 95.

[29] For more on Rigby Swift see E. S. Fay, *The Life of Mr. Justice Swift*, Methuen, 1939.

declamation. For some time the judge suffered it, then there came the tap of his pencil on the desk. "Usher", he said, "switch on the light over the jury box - Mr. Blank does not believe me" [30].

Opportunities for criminal trials before juries lessened in 1925 when the Criminal Justice Act of that year brought a large number of offences previously triable only by a judge and jury within the jurisdiction of magistrates at petty sessions [31].

Impact of leading members of the bar

G. W Keeton saw the more restrained and conversational advocacy that had emerged in criminal jury trials to have been influenced by the style of advocates in civil cases: "*In as much as the most influential members of the bar who set fashions in advocacy appear most frequently in civil cases, the methods followed by them tend to become general* [32]. As an example of this, he mentions the effect of Rufus Isaacs, the great majority of whose cases were civil. When he was a Law Officer and appeared in criminal cases, Sir Rufus was never rude to the prisoner in his cross-examination. Rather, he was courteous, almost deferential, but the effect of his questions was to build up a case of deadly significance, as was clearly seen in his prosecution of the poisoner Arthur Seddon in 1912. Keaton saw these traditions being carried over to the present day and "*being firmly established in our advocacy*".

Two influential and fashion setting members of the Bar during the first half of the 20th Century were Patrick Hastings and Norman Birkett, each will now be discussed.

Sir Patrick Hastings and his effect on advocacy

Sir Patrick Hastings (1880-1952), who was made a King's Counsel in 1919, became one of the leading barristers of his time, and, at the top of his profession, earned very considerable fees [33]. In 1912 he led for the defence of John Williams in the Eastbourne *"Case of the Hooded Man"*, which made national headlines. Although Williams was convicted, Hastings's highly intelligent and focused defence strategy was much admired. His practice afterwards was almost completely in the civil courts in divorce, libel and fraud cases, often before juries. Mostly unlike other barristers, his style of advocacy, may, to some extent, have followed Charles Russell and Edward Carson, at least in cross-examination [34]. He was known to be contemptuous of the passionate appeals made to juries by advocates like Marshall Hall. Hastings was a master of direct forcible speech without any embellishments or ornamentation and recognized the immense value of brevity. According to Sir Norman Birkett, a friend and who frequently opposed him in court, Patrick Hastings was not a great speaker in the conventional sense:

"*He was certainly not in the tradition of Sheridan, Charles James Fox and Edmund Burke. He was not a great reader and his mind was not stored with the riches of English literature or the great speeches of orators in ancient and modern times"*. (This may, partly, have been because of an interrupted public school education at Charterhouse. When the Second Boer War, 1889-1902, broke out he had enlisted in the British Army) " *It was quite characteristic of him that he should affect to be scornful of forensic oratory of the flamboyant range because it was quite alien to his style of advocacy, and really outside his range; for in all that he did he seemed to want to put himself in a category of his own"* [35].

In his openings, whether for the plaintiff or the defendant, he was never long and rarely stylish. In print, the words chosen would appear to be random. Such an impression would have been entirely false as they were selected with great care to bring the case within the limits that Hastings wished to be set for it. He was able to do this by having complete mastery of his brief [36].

Hastings stood straight and still in court, kept his eyes fixed on whoever he was speaking to, very rarely gestured with his hands, and avoided distractions, sometimes made deliberately by other barristers, such as jangling coins in his pockets, fiddling with the ribbon on a brief or taking numerous drinks of water from a tumbler. He always spoke in a good clear voice. Great preparation ensured he was in complete command of his brief, had no need to refer to papers during trial and could carefully observe the jury for small but significant signs [37].

His examination in chief, much resembling that of Sir Frank Lockwood earlier, appeared to be a conversation with the witness. Hastings would smile at some answer as though it had come to him by surprise, when it was really the answer he wanted and expected.

---

[30] In similar vein, though from the perspective of the Bar, Sir Patrick Hastings wrote: "*The judge has been at the game too long. His every instinct struggles against the possibility that he may be influenced against the true letter of the law by a speech however artistically or impressively it may be phrased. The decision is to be his and his alone; he knows the law, and he desires to know the facts; and after that he infinitely prefers to be left alone".* Patrick Hastings, *Cases in Court*, William Heinemann 1949, page 10. Lord Bingham, before his retirement as Senior Law Lord, in *The Role of the Advocate in a Common Law System*, The Inaugural Birkenhead Lecture Given in Gray's Inn Hall in 2008 (seventy years after Mr Justice Hilberry's lecture on advocacy), *Graya,* No 122, Hilary 2009, pp. 17-24, said whilst " *an advocate might reasonably hope to touch the heartstrings of the jury more readily than those of a judge… even judges were not the unfeeling decision-making machines they might sometimes appear; they responded to considerations of justice and injustice, right and wrong, human frailty and human need; there was often treasure there, which understated eloquence could unlock".* When interviewed at the House of Lords on 23rd October, 2007, Lord Bingham said it would be wrong to think that judges in earlier times were never influenced by such considerations, carefully and subtly put by advocates.

[31] Sir Thomas Skyrme, *The Changing Image of the Magistracy*, MacMillan Press, London, 1979, page. 5. See, also, R. M. Jackson, *Incidence of Jury Trial During the Past Century,* Modern Law Review, Vol. 1, no 2, September, 1937, page 137.

[32] G.W. Keeton*, Harris's Hints on Advocacy*, Stevens and Sons, London.1943, page 11.

[33] Hastings's biographer, H.Montgomery Hyde*: Sir Patrick Hastings. His Life and Cases*, Heinemann, 1960, stated that for many years he earned more than Ł 40,000.

[34] N. Birkett*, Six Great Advocates*, Penguin, page 23.

[35] Birkett, *ibid*, pp. 23-24.

[36] Richard DuCann, *The Art of the Advocate*, Penguin, Revised Edition, 1993, pp. 84-85.

[37] Brian Gibbens QC, who, early in his career, watched Patrick Hastings in court, compared him with other advocates who *perpetually turned to the jury* when they were examining witnesses. He recounted that the intensity of Hastings's gaze and manner towards hostile witnesses was devastating. Brian Gibbens, *Elements of Modern Advocacy,* New Law Cassettes, Butterworths, London, 1979.

The outstanding strength of Hastings was in cross-examination. His frequent opponent, Sir Norman Birkett, recalled:

"*He could destroy a witness with quite shattering power with his direct, incisive and penetrating questions that came with the precision and speed of a machine gun. Remorselessly and relentlessly he broke down all defences, and when the triumph was complete he would make the briefest possible speech and sit down*"[38].

Hastings regarded cross-examination as "*the great, perhaps the final, test of advocacy*". Although he said that he selected the one essential element, *without which all others are completely useless,* he wished to deal with, Hastings claimed that he did not prepare specific questions beforehand. He preferred to wait until such time he had carefully decided, by listening to examination in chief, whether a witness*, "was truthful or dishonest, stupid or cunning, intelligent or foolish"*[39]. The ability to assess accurately and almost instantaneously the personality and mentality of the witness facing him was to him the key skill in cross-examination; very different to the indiscriminate and loud "blunderbuss" approach in cross-examinations, much heard in Victorian times and earlier.

On his experience of being cross-examined by Hastings, in the libel case of *Laski v The Newark Advertiser and Parlby* in 1946[40], in which he sued the Nottinghamshire paper in libel for a report that he advocated violence to achieve socialism at a public general election meeting in Newark, in 1945, Harold Laski wrote:

"He performs his war dance about you like a dervish intoxicated by the sheer ecstacy of his skill in performance, ardent in his knowledge that, if you trip for one second, his knife is at your throat…He moves between the lines of sarcasm and insult. It is an effort to tear off, piece by piece, the skin which he declares no more than a mask behind which any man of understanding could have grasped the foulness of your purpose. He treats you not as a human being, but as a surgeon might treat some specimen he is demonstrating to students in a dissecting room"[41].

Like Sir Edward Carson, whose style may well have consciously or sub-conscientiously shape his own, Patrick Hastings excelled in the arts of denigration, especially ridicule[42].

Writing in the 1960's, the eminent barrister and writer on advocacy Richard DuCann QC (1929-1994) considered Patrick Hastings was the finest cross-examiner before the English Courts in the 20th Century. Nonetheless, he strongly criticized him for ruthlessness and gross discourtesy which was unfair to witnesses and on occasions led to courts drawing the wrong conclusions[43]. Concerning this behaviour, which went unrebuked wherever he practiced, DuCann gives the example of Hastings's cross-examination of Air Marshall Sir Hugh Vivian de Crespigny, who had been the Labour candidate for Newark and present when Laski spoke at the meeting. DuCann. presents the whole of the short cross-examination[44]:

Hastings: "*Do you recognize this expression: 'It did not lie in the mouth of any member of the Tory party, who helped to organize the mutiny in the British Army over Home Rule in 1914, to discuss the question of violence? Do you remember anything like that being said by anyone"?*

Sir Hugh*: "No I do not. That does not mean it was not said".*

Hastings: "*Many things may have been said that you did not hear?"*

Sir Hugh: "*Sir Patrick…"*

Lord Chief Justice Goddard: "*Will you try and answer the question Yes or No. We really must try and get on with this case".*

Sir Hugh: "*There was nothing vital that I would not have heard*".

Hastings: "*If you did not hear it, how did you know whether it was vital or not?"*

Sir Hugh: "*I must ask your permission to elucidate this so as not to give the wrong impression…"…*

Hastings: "*No thank you"* (sitting down)

Slade: "*I have no questions in re-examination"*[45].

In effect, Hastings had refused to let the witness give the evidence he wanted to and also, of course, the jury the opportunity of hearing it[46]. Remarkably, Gerald Slade KC, leading counsel for Laski, and later a Judge of the High Court, did not seek to rectify this in re-examination, nor did Lord Chief Justice Goddard intervene.

Sir Patrick Hastings was invariably short in cross-examination, partly, perhaps because of a realization that a jury may quickly spot an advocate's failure to undermine a witness and as a result attach a disproportionate importance to his or her evidence. He also had the gift, possessed by Sir Edward Carson with whom he had worked, of crystallizing in a few questions the whole of the case he wished to advance and the bravery to do so:

"The ability to pick out the one real point of a case is not itself enough; it is the courage required to seize upon that point to the exclusion of all others that is of real importance. Painstaking solicitors will place before counsel perhaps fifty different points, all of them prepared with skill and care; it must indeed cause bitter disappointment to find them disregarded and the whole trial proceeding as though there was only one solitary element that was really worthy of consideration. It

---

[38] Norman Birkett, Address to the Holdsworth Club of the Faculty of Law, University of Birmingham, 7th May, 1954.
[39] Sir Patrick Hastings, *Cases in Court,* Pan Books, 1954, pp. 252 – 254.
[40] Unreported in the law reports, but see a verbatim account published by the Daily Express London, 1947.
[41] Richard DuCann, *The Art of the Advocate*, Revised Edition 1993, Penguin Books, 1993, page 21.
[42] Marshall Hall, from whose style and approach Hastings wished to distance himself, employed this weapon only very infrequently.
[43] At one point DuCann describes his style as *brusque and tyrannical, The Art of the Advocate, Penguin, 1993,* page 154.
[44] DuCann*, ibid,* pp.116-117.
[45] For a verbatim account of the case see *Laski v Newark Advertiser Ltd and Parlby.* Published by the Daily Express, London, 1947.
[46] Richard DuCann, *The Art of the Advocate*, Penguin, 1993, pp. 116-117.

requires some courage in an advocate to stake his own opinion perhaps against that of all who are assisting him; it is a great risk. But in a proper case he must be prepared to take it"[47].

Infelicitous or inappropriate replies of witnesses were quickly seized upon. A distinctive feature of Hastings's style of cross-examination was use of comment after a witness had answered a question. Many of his contemporaries refrained from any comment on answers given in cross–examination until their closing speech. Sir Edward Carson, who Hastings greatly admired and was said to be influenced by, almost always put his comments within the framework of his questions. Hastings was different and showed this clearly, in 1913, soon after being made a Kings Counsel, when he was called upon to cross-examine Bob Sievier who had brought an action in libel against Richard Wootton, a race horse owner and trainer[48]. Sievier, a pugnacious, witty and flamboyant character, represented himself. Carson, who had been leading Hastings, was called to Ireland in the middle of examining the plaintiff. In cross-examining Sievier, Hastings matched every jest with biting comment as this brief extract shows:

Hastings: "*Did you marry your first wife in 1882"?*

Sievier: "*Unfortunately for me, I did".*

Hastings: "*Unfortunately for her, too. Did she divorce you in 1886, four years later?"*

Sievier*: " She did".*

Another vivid example, much later in his career, is provided by Hastings's treatment of one of the witnesses in the Harold Laski libel case:

Hastings: "*Did you hear anything of this sort: Great changes were so urgent in this country that if they were not made by consent they would be made by violence?' Did you hear him* [Laski] *say that"?*

Witness: "*No, not in those words".*

Hastings: "*Dear, oh dear, Mr Laski seems to be so unfortunate. He must have been very good at hearing himself; he said that is what he did say…".*

Richard DuCann considered the "*modern fashion"* for advocates to include comment either direct or indirect in cross-examination was largely due to the influence of Hastings style[49]. Hastings, almost without exception, made his last question in cross-examination a comment. This, too, was copied by other barristers.

In his closing speeches to juries, Hastings spoke in a simple conversational narrative, no tortuous sentences or elegance of expression, analysed the facts and made no attempt at passionate persuasion. At all times he was able to convey to jurors he was in earnest, not merely playing a part, and that he respected their independence and judgement. Lecturing, cajoling or flattery were never resorted to. The closing speech was the main place for him to use his great ability to capture the essence of a case in just a few words.

It was a device of Hastings, before juries, to lay claim to the virtues of plain speech, straightforwardness and brevity. This is prominently illustrated in his closing speech in the Laski case when he began by saying:

"*May it please Your Lordship: Members of the Jury, I can start what I have to say to you with perhaps the only bit of good news you have heard so far. That is that I only going to address you for a few minutes. I want to explain why, because I do not want you to think, and I hope you will not think, that the value of anything that is to be said to you is to be measured by the number of words".*

In order to create the impression that he was about to make an appeal to their reason, rather than the sort of emotional address which had once been popular in courts, he continued:

"You may remember in the old days it was the habit of advocates sometimes to make long and eloquent speeches on all sorts of subjects, including comments on the Goddess of Justice who sits with scales above the court…".

The technique of emphasizing to jurors, early in a closing speech, that reason would be engaged became much used, especially after the triumphs of Hastings and other leading advocates who employed it. The reality, though, is that emotion is frequently disguised by advocates as reason.

Three quarters through his speech Hastings said:

"I told you I was only going to be a few minutes. I have been fifteen, and I am afraid that is too long. I wish you good luck that Mr Slade will not be four times as long. Whether you will get that good luck or not, I do not know. I doubt it".

In the event Slade spoke for two hours. In contrast to the tight, well constructed and stylish speech of Hastings, his was spiritless, diffuse and very repetitive. Given the jury's decision against Laski, which left him with enormous costs, Slade's performance came to be seen as a lesson how not to make a closing speech[50].

Whilst the rather cheap gibe against opposing counsel was not widely used, the practice of promising to be brief, keeping it, thus creating the impression of a reliable guide through the evidence, and drawing a comparison, usually implicitly, with the greater length of an opponent's closing speech, hoping to create resentment for the time taken, was a well tried method and one that was reinforced by Hastings's successes in major cases.

A further tactic, frequently employed by him, to gain advantage over opponents by blunting the effect of theirs, was to claim (falsely) that final speeches had little or no effect on the outcome of cases. Again this is illustrated in Laski, when towards the start of his speech, Hastings told the jury:

"I may say after long experience that I have never known a case in which anything I have said has had any affect on a jury one way or another, and therefore I have come to the conclusion that the shorter the time I take in saying it the better for everyone".

---

[47] P. Hastings, *Cases in Court,* William Heinemann London, 1949*,* page 252. An indication of Patrick Hastings's attitude in court towards solicitors' views on how cases should be run was given in an interview with Angela Delbourgo, a barrister and a lecturer at the College of Law in London. She had known an elderly solicitor who, in his youth as an articled clerk, once accompanied Hastings in court and sat in front of him. The young man was told by Hastings he had one, and only one, function – to push a big pile of precariously balanced books onto the floor when given a dig in the shoulders, so as to make sure the judge was awake when he put his best point. Interview on 31st October, 2007.

[48] Sievier v. Wootton, 1913. 3 KB 499. See also H. Montmomery Hyde, 1960, *Sir Patrick Hastings,his life and cases,* London, Heinemann, pp. 76-77.

[49] *The Art of the Advocate,* Penguin, Revised Edition, 1993, page 128.

[50] Richard DuCann, *The Art of the Advocate,* Revised Edition, 1993, Penguin Books, London*,* page 201.

According to Richard DuCann, an unfortunate legacy of Hastings was that many modern advocates took him seriously in doubting that closing speeches had any effect on the outcome of cases. They treat it as "*the advocate's eleventh commandment that* they do not and *stumble through the odious task of addressing the Judge or jury, boring themselves almost as much as their audience"* [51].

Whilst Patrick Hastings did much to distance himself from the forensic approach of Marshall Hall they shared, despite being supremely good jury advocates, not being especially learned in the law [52]. In this he was not seen as a model at the bar. Nor was he for his occasional losses of temper and display of personal sensitivity; traits also in common with Marshall Hall. This is perhaps best illustrated by another passage from the Laski trial. During his cross-examination of Laski, then the Chairman of the National Executive Committee of the Labour Party, Hastings, who had been appointed Attorney General in the first Labour Government in 1924, but left active politics a few years later, broke off in the middle of a question:

Hastings:"*…are there any privileged in the Labour Party?"*

Laski: "*Why indeed, Sir Patrick, when you were a member…"*

Lord Chief Justice Goddard: "*No, Mr Laski".*

Hastings: "*Do not be rude".*

Laski: "*That is the last thing I want in the worl".*

Hastings: "*It may be difficult for you to be courteous, but do not be rude".*

Laski: "*Not in the least".*

Hastings: "*You are rude to everyone are you not?"*

Laski*:"I do not think so".*

Sir Patrick Hastings, in the introduction to his memoirs, published in 1949, wrote: [53]

"For my part, the greatest change that I have noticed during the past 40 years lies amongst members of my own profession. Ponderous oratory, once so popular, and based undoubtedly upon Cicero's orations, has completely disappeared. Just as Gerald du Maurier sounded the death knell of the old time school of thunderous declamation from the stage [54] *so Edward Carson put an end to forensic platitudes and passionate but irrelevant perorations from the bar. That such a change is an improvement no wearied juryman would deny".*

There can be little doubt that Patrick Hastings, through his numerous triumphs at the Bar, influenced advocacy in a number of ways including: the practice of cross-examination and closing speeches: the need for carefully chosen words, to support a well thought out strategy, and to use them with economy and without unnecessary repetition; forcible and direct delivery without adornment; and an emphasis on an appeal to reason, rather than apparent emotion. His plain,conversationa land highly concentrated, rather than diffuse, form could well be seen as taking advocacy further than had been begun by Edward Carson, Rufus Isaacs, and F E Smith. The success of Hastings before juries, it is argued, indicates not only how he was able to speak in the language of his time but also his ability to understand the sensibilities of jurors, who were now so very different, for a variety of social factors, from those in earlier times. It is possible to speculate that his association with drama criticism and writing plays himself may have aided his comprehension of the contemporary mind.

Norman Birkett

Lord Birkett (1883-1962), more widely known during his lifetime as Norman Birkett, K. C. was called to bar in 1913, took silk in 1924 and became a judge in the Kings Bench Division in 1941. He was one of the British judges at the trial of major war criminals at Nuremberg. Afterwards, he was made a Lord Justice of Appeal. When at the Bar he established a great reputation as an advocate in the civil and criminal courts and was much in demand [55]. Notable civil clients included Lady Gladstone, Lady Mountbatten and Mrs Wallace Simpson. He appeared either for the prosecution or the defence in a number of murder trials and sensational criminal cases. Shortly before his appointment to the High Court Bench, as was the custom, at least until the 1960's, for eminent QCs about to be elevated to the judiciary to be given a notorious murder case, he was presented in 1931 with the brief to prosecute Rouse [56], a motorist alleged to have murdered his passenger and then set fire to his car to destroy the body and the evidence. An expert engineer for the defence gave evidence about the fusion of two bits of metal, thereby establishing a powerful point for the accused. Birkett rose to cross-examine.

"What" he asked in his precise, musical way," *is the co-efficient of brass?"*

The witness replied "*I do not know".*

The question had taken the expert completely unaware. It made him so wary of Birkett, that when he was asked: "*You are an engineer, aren't you?"* he said "*I suppose so!"* Quickly and devastatingly, Birkett had destroyed his credibility entirely [57].

---

[51] DuCann, *ibid,* pp. 191-192.

[52] Richard DuCann, *The Art of the Advocate*, Revised Edition, 1993, Penguin Books, page 199.

[53] *Cases in Court*, London: Heinemann, pp. xi- xii.

[54] To support himself through his studies at the Middle Temple Hastings worked as a journalist specializing in theatre gossip and reviews and in 1925, whilst contemplating an alternative career as a playwright, wrote *The River*, which was produced in London that year.

[55] Whilst as KC, his income averaged Ł 30,000 annually: H. Mountgomery Hyde, *Norman Birkett*: *The life of Lord Birkett of Ulverston*, Hamish Hamilton, 1964.

[56] At Northampton Assizes commencing on the 21st November, 1931.

[57] Birkett's destruction of the engineer's credibility in *R v Rouse* (Unreported), by asking a very basic question an expert may not remember, became famous at the Bar and the technique subsequently emulated, with varying degrees of success, in cross-examining experts in numerous fields. Indeed it is still influential. Keith Evans, in his book, *Advocacy in Court*, Blackstone Press, 1995, which is widely read by bar students, and recommended reading at a number of colleges where the Bar Vocational Course is taught, uses it as an example of how to challenge a witnesses' expertise by making an in-depth study of just one tiny area on which to question at the beginning of cross-examination: "*Nobody – perhaps not even the ultimate leader in the field- knows everything about his subject",* pp.165-166.

Birkett and Hastings were regularly pitted against each other much in the same way as Edward Carson and Rufus Isaacs in the previous generation and more recently Edward Marshall Hall and Henry Curtis Bennett had been. Birkett's biographer, H. Mountgomery Hyde, described how differences in forensic methods employed by the two advocates were reflected in their respective styles of cross-examination, each equally effective and produced similar results:

"Hastings, with his beetling eyebrows, would fix an unfortunate witness with a severe look. ' Now, let me see, Mr A.' he would say and proceed to fire questions at him in such quick succession that he sometimes laid himself open to the charge of bullying. His friend Roland Pertwee, with a euphemistic touch, has described his manner in handling witnesses in court as 'cool, concise and gently cynical'. Birkett on the other hand, had a more sauve and polished approach, as well as perhaps a deceptively friendly one. 'I wonder if you can help me, Mr. A.?' he would usually begin. But the admissions which he gradually and eventually elicited…, could pulverize a prevaricating or untruthful witness as completely as Hastings's more robust methods of questioning" [58].

Later in his life he lectured, broadcast and wrote about advocacy. It can be said with certainty that he too influenced other advocates in the first half of the 20th Century and beyond.

In an address to the Holdsworth Club of the Faculty of Law in the University of Birmingham in 1954 [59], Lord Birkett outlined much of his views about the advocacy he had delivered and liked to hear as a judge. He acknowledged the vast importance of: mastering the facts of the case; knowledge of the relevant law; the special qualities needed for examination in chief [60] and cross-examination and re-examination; the selection and formulation of the arguments; the widely differing styles of advocacy required for particular tribunals, whether they be judge alone, or judge and jury, or appellate courts; and the construction and arrangement of opening and closing speeches. However, Birkett considered the over-riding quality to be – command of language:

"If the argument of the advocate is presented in clear and choice language which seems to come naturally and easily from the speaker,and if in addition the advocate can make use of what appears to be quite natural gesture, the very argument itself seems more persuasive".

Differing somewhat from Sir Patrick Hastings, who spoke forcibly without elegance of expression, ornamentation and embellishment, Birkett believed that:

"in the main task of advocacy, the exposition, the narrative, the summing-up, the persuasion, the advocate may use, and I think ought to use, the full range of our wonderfully flexible English speech. *For there is no speech to equal it in its amazing richness of expression…".*

Therefore, he held the advocate should be a student of words, knowing something at least of their history, sound, meaning, associations and, above all, the use that great masters of the tongue have made of them. In this respect Birkett considered it well to know the Authorised Version of the Bible, the Book of Common Prayer, and have a knowledge of "*the great triumvirate, Chaucer, Dryden and Shakespeare – who did so much to mould the fashion the language",* and of writers like Swift, Sterne and Defoe," *the great stylists".*

To him, even in casual conversation, natural and graceful English was a desirable accomplishment, which most people found pleasant and a surprising number secretly wished to attain themselves *"And how much more is it to be desired when the whole purpose of the advocate is to gain the ends he seeks by the impression he creates upon the particular tribunal before which he appears".*

Factors influencing the style of advocacy that had become established

Other, deeper reasons, contributed to the mainly conversational and matter of fact advocacy that had become established. Taste for melodrama, strong sentiment and froth, much represented in Victorian drama and literature, had waned in the late 19th Century and was displaced by a more restrained and reflective aesthetic with an emphasis on realism. In the 1890's drama in Britain, through George Bernard Shaw and others including Henrik Ibsen, the pioneer of modern realistic drama, became a forum for considering moral, political and economic issues [61].

Almost since rhetoric began in ancient Greece there was disagreement between those who saw it as a means of authenticating truth and those who saw it as a method of deception, sometimes termed "false rhetoric". Although the 19th Century was a deeply oratorical age, as the century wore on, rhetoric came to be popularly seen in a negative light. Two instances perhaps best illustrate this. As early as the 1860's, Thomas Huxley ("Darwin's Bulldog") accused the opponents of Darwin's theory of evolution of hiding behind rhetoric. In a famous speech in 1879, Disraeli, in possibly an example of the pot calling the kettle black, said of Gladstone, then the Prime Minister, that he was:

"A sophistical rhetorician, inebriated with the exuberance of his own verbosity,and gifted with an egotistical imagination that can at all times command an interminable and inconsistent series of arguments to malign an opponent and to glorify himself" [62].

Drawing from drama, and indicative of feeling towards rhetoric at the beginning of the 20th Century, Harley Granville-Barker, in his 1905 play, *The Voysey Inheritance*, about the effects of corruption in a family firm of solicitors, has the bluff army major, Booth, say on a number of occasions, *Do not speak rhetoric to me!,* when he thinks others are not being straight forward with him.

---

[58] H. Montgomery Hyde, *Norman Birkett; The Life of Lord Birkett of Ulverston,* London, Hamish Hamilton, 1964, page 221.

[59] Delivered on7th May, 1954.

[60] Birkett excelled in the ability to obtain convincing evidence from witnesses by speaking to them plainly and in simple sentences. Edgar Lustgarten, Sir Norman Birkett, BBC Radio 4, broadcast in 1970.

[61] In an address, entitled *Advocacy and Acting*, to the Oxford University Law Society, delivered in 1966, Sir James Stirling, then a High Court Judge in the Probate, Divorce and Admiralty Division, saw changes in styles of advocacy paralleling styles of acting: in both spheres the grand manner and the purple patch becoming unfashionable at roughly the same time. However he does not develop his thesis further. *Verdict*, VOL. 2. NO. 1. 1966. pp. 7-9.

[62] Quoted in The Times, London, July 29th, 1879.

Dramatic types of advocacy, in which counsel adopted mannerisms, tricks of speech, gestures, aggression and sometimes insults, became seen as a part of rhetoric, in the pejorative sense of artful bombast and verbal chicanery, and for that reason were widely disapproved. Jurors became far better informed than before, capable of seeing through it and resentful when empty rhetoric was tried on them. It may well be that the success of men such as Hardinge Giffard, John Holker, Charles Russell, and Edward Clarke was partly because they recognised the change in the mood of the public towards rhetoric and altered their advocacy accordingly in the later 19th Century.

As a consequence of 19th Century reforms, education was available to more people[63]. Universal elementary school education, with its emphasis on the "3 Rs" (reading, writing and arithmetic), was introduced in the 1860's. Although teaching ended at an early age, the basic literacy and numeracy provided by it gave many the means of obtaining further knowledge[64].

Parliament's decision in 1857 to create public lending libraries provided an important source. The growing number of national and municipal museums and galleries helped stimulate intellectual curiosity. Working class self improvement, though unevenly spread, was another significant cause of increase in overall educational standards[65].

Dozens of new private schools, often modelled on Thomas Arnold's Rugby School, to cater for the sons, and some daughters, of the growing middle class were opened in the latter part of the Nineteenth Century. These added to the general level of education in society.

Beyond elementary education, the content of many school curriculums expanded to encompass the burgeoning sciences with their rational enquiry. Increasing amounts of knowledge were disseminated in newspapers and, in the next century, by wireless. By the 1880's Darwin's theory of evolution had entered popular culture[66]. Religious certainty, because of scientific explanation - succinctly put, *Darwin's books drove a cart through an older book* - began to lessen from mid Victorian times. For this and other reasons, it diminished still further in the remaining part of the century and after[67]. The sort of impassioned appeal before juries to the deity, quotations and stories from the bible, so much used earlier, could no longer be relied upon. In short, jurors with broader perspectives expected more of an appeal to reason from advocates in a conversational and matter of fact manner, rather than one histrionically directed at their emotions and faith[68]. From the 1920's it has been suggested that distaste for the continental European demagogues, such as Hitler, Mussolini, and Franco, with their power by oratory and theatre to move audiences in terrible directions, may also have contributed to jurors suspicions of obvious rhetoric[69]. The advent of radio broadcasting led to widespread abandoning of grand declamatory forms of public oratory in favour of a more personal "fireside" approach. It may be reasonable to suggest that this further helped the cause of conversational, rather than declamatory, advocacy before juries.

In the first capital defence case he conducted on his own, that of Marie Herman in 1894, an Austrian prostitute charged with killing a client, Marshall-Hall, with tears streaming down his face, told the jury in his peroration: *"Remember that these women are what men made them; even this woman was at one time a beautiful and innocent child".* Flinging an arm in the defendant's direction in the dock he continued*:" Look at her, gentlemen of the jury. Look at her. God never gave her a chance - won't you?".* Just a few decades later, because of jurors' different expectations, this approach would have been received with embarrassment rather than anything else: no longer dazzlingly effective oratorical pyrotechnics; at best a damp squib[70]. Along similar lines, J Alderson Foote recounted how Montagu Williams defending

---

63 See Michael Hyndman, *Schools and Schooling in England and Wales*, *a documentary history,* Harper and Row, 1978, especially Chapter 10, with a chronology of principal educational reforms in the 19th and 20th Centuries.

64 In assessing factors which led to a general improvement in educational standards in the 19th Century, Professor Rosemary Ashton (University College London, Department of English Language and Literature, interviewed on 13th November, 2007) considered publication and wide circulation of pamphlets, magazines and books, with the purpose of educating persons of modest learning, was of significance. Such works were produced cheaply by commercial publishing houses, including *John Murray*, exploiting contemporary advances in printing technology and distribution. Informative and sometimes entertaining, works were also published by non commercial organisations whose aim was to promote education amongst the masses. Prominent amongst these was the Society for the Diffusion of Useful Knowledge which operated during the first half of the century.

65 Jonathan Rose, *The Intellectual Life of the British Working Classes*, Yale University Press, 2001, based upon the evidence of almost two thousand published and unpublished memoirs from 19th and 20th Century Britain, portrays a picture of a working class determined to achieve self-education by reading literature, including the Roman and Greek classics, going to concerts and the theatre - Shakespeare and other classical dramatists attracted enthusiastic and rowdy working class audiences, learning to play musical instruments, setting up mutual improvement societies and establishing the Workers Educational Association in 1903. In an interview, held at the Royal Society, London, on 2nd July, 2010, Professor Rose agreed with the thesis that jurors drawn from a more educated society than previously could reasonably be supposed to have expected more of an appeal to reason and to examine evidence more closely than before. He saw working class and lower middle class self – education contributing to this.

66 *On the Origin of Species by Means of Natural Selection* (1859), *The Descent of Man and Selection in relation to Sex* and *The Expressions of the Emotions in Man and Animals* (1872) were read by a large section of the public. Many more people would have absorbed Darwin's key ideas from reports in the press.

67 See J. F. Von Arx, *Progress and Pessimism: Religion, Politics and History in late 19th Century Britain.* Harvard University Press, 1985.

68 Touching on this subject, George Elliot K.C., in his Forward to *Illustrations in Advocacy by Richard Harris K.C. Fifth Edition, 1915,* a work intended mainly as a guide to effective court advocacy for newly qualified barristers, wrote: *Further it may also be remembered that the development of education amongst all classes of the people has rendered juries much less susceptible to mere tricks of advocacy and less easily diverted from the real issues before them.*

69 See Andrew Watson, *Changing Advocay, Part Two*, Justice of the Peace, Vol.165, 13th October, 2001, page 808.

70 Very much to the surprise of counsel for the co- defendants in the much publicised Mary – Ann Leneghan case, which took place in 2005 and involved the murder by a gang of a teenage girl and an attempt to kill her friend, Gilbert Gray QC used the words *God never gave* him *a chance – won't you?* in his closing speech for a defendant. He was convicted. Interview with Anthony Arlidge QC, who represented another defendant, held on 30th October, 2007.

a prisoner charged with fraud in1877 (Chapter Four), said of two witnesses against his client:

"Excellent in vice and exquisite in fraud – the cunning of a cat teeming from the eyes of one; the oily soft serpent-like treachery of deceit trickling from the mouth of the other". Foote, speculating on how jurors would react in 1910, said:

"*Few indeed are the advocates nowadays who could venture upon such flights without exciting derision*"[71]. In 1921, Bernard Kelly explained how juries now seemed to have a higher appreciation of facts, usually little regard for mere graces of language and almost none for sentimental appeals: "*… cynical yawns, and not higher emotions, more often than not greet the most pathetic efforts of counsel to create a sentimental leaning towards their clients at the expense of actual fact*"[72].

Amusingly, drawing on recollections from his career, A W Cockburn Q C described a case when "grandiloquence" and " idle histrionics" did not commend itself to a jury; the implicit message being that a more conversational style might have done so:

"I cannot forget hearing an extraordinary peroration in a very ordinary case some years ago which finished up with, 'Members of the Jury, the moving finger writes, and having writ moves on…' Then came a slight misquotation, and with a flourish of his coloured handkerchief, the exhausted orator sat down. It had all been very moving; and after a short breath-taking pause, came the summing up, in which the empyrean level was not even aimed at; and in a few seconds an earth-bound jury were in their own simple way recording what they thought about coloured handkerchiefs and moving fingers"[73].

By changing their style of advocacy before juries towards the conversational and matter of fact, barristers consciously, or subconsciously, followed Cicero's cautionary advice given centuries ago and avoided the "*very cardinal sin in oratory*; that is *to depart from the language of everyday life and usage approved of by the sense of the community"*[74].

A possible further explanation for the transformation to a more conversational and matter of fact advocacy may have been the reduction of court reporting in newspapers, removing much of the gallery from the stage. Attempting to catch the eye of the press for words spoken in court, aiding a barrister's reputation, (sometimes also very useful to fulfill political ambitions) was an important contributory factor behind the emotive, theatrical, florid, and aggressive advocacy of the early Victorian period and after[75]. As late as the 1930's proceedings in court were still much reported, making barristers household names[76]. For instance in a popularity poll organized in 1935 by William Hickey, the Daily Express columnist, who invited readers to write to the newspaper naming the public personalities they most liked reading about, Norman Birkett got into the first twenty[77].

After the War there were fewer reports from the courts, partly because of a shortage of paper and newsprint which led to cuts in the size of papers generally (For a time newspapers were restricted to only eight pages). Sir Patrick Hastings, in 1949, compared the situation with *"not very long ago when every trial of the slightest importance was reported in the public press"*. He continued: "*Morning papers had a page devoted to Law reports; evening papers displayed posters announcing every detail of so-called important trials and possibly even of the persons mainly concerned; there were murder cases, libel cases, cases about old ladies disputing over garden walls, even breach of promise cases. Every tribulation known to human life was brought before us and its appropriate remedy displayed. When the Courts were closed, the papers were half empty, and people knew that the silly season had arrived; something was missing from their daily lives"*[78].

The decline in volume of reports from court, and hence attention given to the efforts of advocates, appears to have continued throughout the 1950's. Reduced press interest in the courts was noted by Lord Birkett at the start of the 1960's[79].

The thesis continues by considering alterations in advocacy before juries in the second half of the 20th Century and what has accounted for them (Chapter Ten). Changes scrutinized include: the falling away in the use of Aristotle's ancient order of closing speeches, which usually ended with an emotive peroration; the enormous expansion of eligibility to serve on juries, a *democratisation,* brought about by the Juries Act 1974,

---

71 *Piepowder,* J. Murray, 1911, page 176.

72 *Famous Advocates And Their Speeches*, London, Sweet and Maxwell, London, Sweet and Maxwell, 1921, page 27. Thirty eight years before, certainly not followed then by all barristers in criminal trials, more a call for it to be so, Sir James FitzJames Stephen, wrote of advocacy: "*It is impossible to be eloquent in the sense of appealing to the feelings without more or less falsehood, and an unsuccessful attempt at passionate eloquence is of all things the most contemptible and ludicrous, besides being usually vulgar. The critical temper of the age has exercised an excellent influence on speaking in the courts. Most barristers are justly afraid of being laughed at and looking silly if they aim at eloquence, and generally avoid it by keeping quiet".* Sir James FitzJames Stephen, *A History of the Criminal Law of England,* MacMillan and Co, London, 1883, page 454.

73 *In Limine*, An Address on advocacy to the Christ Church, Oxford, Law Club, May 15th, 1952, Published by the Faculty of Law, University of Southampton.

74 De Oratore (translated by E W Sutton and H Rockman, Loeb edition, 1942) 1.iii.12.page 11.

75 J R Lewis, *The Victorian Bar,* Robert Hale, London, Chapter 1. A tradition of courting the press appears to have survived until the late Twentieth Century. A senior judge, interviewed on 11th July, 2007 (Lord Justice Sedley), spoke of how some barristers, at least up until the end of the 1970's, would try to cultivate interest amongst journalists in their achievements by drinking and dining with them in public houses in Fleet Street, then the centre of the newspaper industry, or sending their clerks to do so.

76 In the one man show he performed in the years before his death in 2009, John Mortimer would reminisce about how his father, Clifford Mortimer, a blind divorce barrister who freely quoted poetry in court, drawing on a vast store, would demand that his wife read out detailed news reports of current divorce trials when they were traveling together in crowded railway carriages, often to the embarrassment of other passengers.

77 Daily Express, February 1st, 1935. Lloyd George headed the list closely followed by Winston Churchill and Lord Beaverbrook. The other popular favourites included Gracie Fields, Bernard Shaw, Franklin Roosevelt, Mussolini, Rudyard Kipling, Greta Garbo and the Aga Khan, with whom Birkett tied for the final place amongst the first twenty.

78 P. Hastings, *Cases in Court*, Heinemann page 12.

79 *Six Great Advocates*, Penguin, 1961, page 9.

leading to great adjustments in the way jurors were addressed and to different allusions and references made by advocates; the reduction, and eventual abolition, by the Criminal Justice Act, 1988, of peremptory challenge of jurors; the removal of certain offences from Crown Court jury trial; prosecutions conducted in more measured tones and more methodical and less aggressive defences, although the latter was not always being seen in sexual offences cases; decline in weight attached by juries to police evidence; less heavy drinking by some barristers and the positive effects of this on their performance in court; the rise of plea bargaining and the need to mitigate effectively after guilty pleas; the introduction of Social Enquiry Reports and their effect on pleas in mitigation; the need to make, and respond to, submissions arising out of key changes in evidence and procedure concerning exclusion of confessions, when adverse inferences can be drawn from silence to questions put to the accused and from admission of a defendant's bad character; increased employment of expert witnesses in trials; the use of special measures for vulnerable and intimidated witnesses and of witness protection orders in trials of serious and violent offences; submission of written skeleton arguments on complex questions of law; and victim impact statements. The prospect of trials without juries in complex frauds and where there is a danger of jury tampering is also looked at.

Roman and Neo-Babylonian Private Law in a Comparative Legal History Perspective

Alessandro Hirata *

Abstract

The Neo-Babylonian period is a period that was marked by an outstanding development of Babylonian society. Of course, the legal phenomenon is marked so, so many examples can be found of this legal development. This period corresponds to almost a thousand years, from the beginning of the first millennium Bc. until the end of the Neo-Babylonian Empire. On the other hand, there is a stock of thousands of documents from the Neo-Babylonian period, which have not yet been published in their great majority. These documents, however, show that it was a question of a legally and economically developed society. To understand this period, it is plausible to analyse the sources in a comparative legal history perspective, specially with the Roman Private Law. Thus, we understand that the concepts and Roman Private Law institutions should be used as a communication element in scientific research in history of ancient law. Even with losses as the terminological precision, there dogmatists common elements sufficient for such use modern terms, suiting also the economic purpose of these legal forms.

Key words: *comparative legal history; Neo-Babylonian period; ḫarrânu societies.*

1. Introduction

The Roman Private Law is, by its reception in the European continental law, the basis of our current private law system. For the study, and understanding of the Roman Private Law, is necessary to interpret the scriptures of classical Roman jurists (from 1st century BC to 3rd century AC), which make up the Corpus Iuris Civilis. In addition, the Corpus Juris Civilis is the means by which such scriptures come to us.

Furthermore, through the comparative legal history method, whether synchronous or diachronic, we want to search the identification of socio-economic phenomena, and last analysis, legal phenomena in many legal cultures, especially ancient and cuneiforme law. Thus, our purpose is far beyond a simple historical research with eyes to modern law.

Applying a comparative legal history perspective, especially in our main search field, the cuneiform and babylonian law [1], it must be asked if these cuneiform sources are legal. Moreover, these documents bring situations typically governed by the law. Such situations are everyday economic activities of a primitive society of agricultural base.

2. The methodological question

By studying the cuneiform sources that have come down to us, we have a mass of several texts, and the vast majority (about 70%) presenting a legal content. There are contracts, codes, procedures and other documents protocols that describe the economic and social daily life in Mesopotamia in the second millennium before Christ [2].

The first question that arises is whether the object of such documents is „law“; that is, if we are facing legal content documents, or, even more, how to determine whether it is a kind of legal system or not. It is not the object of this little paper to define what is law or its contents, but we need to draw some methodological parameters for the analysis of this material in cuneiforme writing.

In Rome, clearly we have to call the presence “science of law”, “ius” which will reveal what was considered “law” for the Romans. This characteristic of Roman law and the study of Roman law, which, incidentally, is responsible for its importance to modern scholars of the matter, is crucial to the understanding of Roman sources and consequently the law in Rome [3]. This fea-

* Prof. Dr. Alessandro Hirata, Department of the Roman Law and the Legal History, Faculty of Law, University of Sao Paulo – Ribeirao Preto, Brazil.

1 The german term “Keilschriftrecht” (cuneiform law) was suggested by P. Koschaker, Zeitschrift der Deutschen Morgenländischen Gesellschaft 89 (1935), p. 25, and also accepted by V. Korošec, Handbuch der Orientalistik 1-III – Orientalisches Recht, Leiden-Köln, 1964, pp. 49ss. Howerer, because of the numerous differences among the different juridical cuneiform cultures, the term “Keilschriftrechte” (cuneiform laws), in plural, is more adequated. See also, with the term in plural: G. Cardascia, Les droits cunéiformes, Paris, 1950, pp. 17ss.

2 See for general informations about cuneiform laws: W. von Soden, Einführung in die Altorientalistik, Darmstadt, 1985, J. N. Postgate, Early Mesopotamia – Society and Economy at the Dawn of History, London-New York, 1992, pp. 275-291, and R. Westbrook, A history of ancient Near Eastern law, vol. 1 and 2, Leiden, 2003.

3 M. Kaser, Das römische Privatrecht I – Das altrömische, das vorklassische und das klassische Recht, 2. ed., München, 1971, pp. 5ss. See also: M. Talamanca, Il diritto fra giuristi e legge, in Harmonisation involves history?, Milano, 2004, pp. 3-21, T. Mayer-Maly, Juristische Reflexionen über ius I, in SZ (Savigny Zeitschrift) 117 (2000), pp. 1-29, and Juristische Reflexionen über ius II, in SZ 119 (2002), pp. 1-28.

ture, however, is not common to Mesopotamia. You cannot find in cuneiform documents so far found no right of study activity signal (known documents reveal a vocational training activity of scribes, who were responsible for production contracts, procedural protocols etc.)[4]. Thus, we found in Mesopotamian society the activity of the „lawyer", the „cultivator of law", which would be an argument against the classification of documents to be legal content.

Moreover, these documents bring situations typically governed by the law. Such situations are everyday economic activities of a primitive society of agricultural base. Exchange of goods for a certain amount of precious metal or other goods, property use taking into consideration payment of precious metal and delivery of goods by the bride's father to the groom to the marriage union celebration are just a few examples of everyday situations.

The determining factor to consider these as legal documents is their link to a competent authority. These documents were provided, in most cases, witnesses and a seal of authority. Therefore, such contracts on clay could be made to a competent authority (depending on the case, the temple or the king)[5], that in case of non-compliance with the provisions of any of the parties could apply the appropriate sanctions. These aanctions were often already provided in contracts, by determination of the parties and may include hot asphalt in the head of the party defaulted the contract or the leg of death[6]. In other words, we have binding obbligations that must be respected by the parties. Thus, we would have an argument in favor of the legality of these sources.

Moreover, we have the major pieces of legislation. The so-called large legislative documents, such as the Laws of Ešnunna and the Laws of Hammurabi[7], despite constant discussion can be classified as codes are unequivocally rules that prescribe behavior and sanctions, with the duration guaranteed by the constituted authority of the king[8].

So we have enough information to classify this writing material cuneiform of Mesopotamia as legal content. Therefore justified interest and the study of this material by lawyers, not causing injury, however, the historical aspects naturally intrinsic to matter.

Thus, we present the next problem for the study of these documents; this problem closely related to a Comparative Legal History Perspective: the study of private institutions of Roman law, taking as a base the Institutes of Gaius and Justinian, the dogmatic structure of Roman law studies. In the Institutes, together with the Digest, we have the main source of Roman law, and also the names of legal forms that make up the continental European private law.

For the cuneiform laws, however, there is no document that has the same character of the Institutes of Gaius, ie no manual of legal institutions, which hinders the work of the researchers.

3. Presentation of a case

Take the example of practical private documents on the Neo-Babylonian period underlying the establishment of business partnerships.

The Neo-Babylonian period is was marked by an outstanding development of Babylonian society. Of course, the legal phenomenon is marked so, so many examples of this legal development can be found. This period corresponds to almost a thousand years, from the beginning of the first millennium BC until the end of the Neo-Babylonian Empire. On the other hand, there is a stock of thousands of documents from the Neo-Babylonian period, which have not yet been published in their great majority. These documents, however, show that it was a sure legally and economically developed society. To understand this period, it is plausible to analyse the sources in a comparative legal historical perspective, especially with the Roman Private Law.

The characteristic expression search object in these documents is the word "ḫarrânu". This term meant before, as evidenced old Babylonian sources, "way street" and also "trip caravan." In the Neo-Babylonian period, such term shall have the meaning of "business venture". The word is written with the Sumerian cuneiform ideograms KASKAL showing crossroads[9].

Sources on ḫarrânu societies are composed of contracts and legal protocols. Not surprisingly, there is no legal provision on this subject, since, in contrast to the oldbabylonian period, only one law fragment the Neo-Babylonian period[10] came to us. Chronologically, such ḫarrânu documents belong to the period between the reign of Assurpanipals until the beginning of Xerxes's reign. The last phase of the Babylonian history, also called later persian and Seleucid eras, did not have any ḫarrânu document[11].

The corporate constitutional documents ḫarrânu were presented in detail by H. Lanz, in his monograph „Die neubaby-

4 See also about the formation of scribes: M. Civil, Assyriological Studies 16 (1965), p. 6 nt. 21, and J. Klíma, Reallexikon der Assyriologie und Vorderasiatischen Archäologie I (1928), pp. 251-252.

5 See about the justice system in cuneiform laws: G. Lautner, Die richterliche Entscheidung und die Streitbeendigung im altbabylonischen Prozessrechte, Leipzig, 1922, pp. 3ss., A. Falkenstein, Die neusumerischen Gerichtsurkunden I, München, 1956, pp. 32ss., P. Koschaker, Hammurabi's Gesetz VI, Leipzig, 1923, pp. 147-148, and W. F. Leemans, King Hammurabi as Judge, in Symbolae David II, Leiden, 1968, pp. 107 ss.

6 G. Ries, Reallexikon der Assyriologie und Vorderasiatischen Archäologie V (1976), pp. 391ss.

7 See about legislative documents: M. T. Roth, Law Collections from Mesopotamia and Asia Minor, Atlanta, 1997.

8 G. Ries, Prolog und Epilog in den Gesetzen des Altertums, München, 1983.

9 H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen, Berlin, 1976, p. 139 nt. 947.

10 See about the New Babylonian law fragment: F. E. Peiser, Sitzungsberichte der Preußischen Akademie der Wissenschaften (1889), pp. 823ss., B. Meißner, Sitzungsberichte der Preußischen Akademie der Wissenschaften (1918), pp. 280 ss., E. Ebeling, Altorientalische Texte zum Alten Testament, Berlin, 1970, pp. 422-423, T. J. Meek, Ancient Near Eastern Texts Relating to the Old Testament, 3. ed., Princeton, 1969, pp. 197-198. G. R. Driver-J. C. Miles, The Babylonian Laws II, Oxford, 1955, pp. 324 ss.; H. Petschow, Reallexikon der Assyriologie und Vorderasiatischen Archäologie I (1928), pp. 276 ss.

11 H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., p. 1.

lonischen ḫarrânu-Geschäftsunternehmen", and can be divided into two distinct groups: companies with share capital hold by the two parties or share capital hold by only one of the parties.

As a ḫarrânu document case with equity participation of both parties, we have the certificate of the year 595. C., the tenth year of the reign of Nabû-kudurri-uṣur (or Nabukodonosor) of Babylon:

Nbk 88 Babylon, 595 BC

1	2 MA.NA KÙ.BABBAR *šá* ^{Id}NÀ.ŠEŠ^{meš}.GI	2 silver mines , which Nabu - a??ê - šullim ,
2	A-*šú šá* ^{I}*re-? e-e-tú* A ^{Id}EŠ.PAP	Rê?êtu son of the son of syn - Nasir ,
3	2 MA.NA KÙ.BABBAR *šá* ^{Id}ŠA.DU A-*šú šá*	2 silver mines , which Kudurru the son of
4	^{I}BA^{šá}*.a* A ^{I}*e.gi.bi it-ti*	Iqîšâ son of Egibi , employed
5	*a-? a*^{meš} *a-na* KASKAL^{II} *iš-ku-nu*	together for a business ventur e. (In) everything that he / they work / work in the
6	*mim-ma ma-la ina* URU *u* EDIN	city and the countryside, they will have the same plot .
7	*ip-pu-šu a-? a-ta šú-nu*	The rent of the house will be given to him of its
8	*i-di* E *ina* KASKAL^{II}*šú-nu i-nam-di-in*	business assets . (Witnesses and date)
9	^{lú}*mu-ki-nu…*	

Here, both Nabu-ahhe-Sulim as Kudurru gave each two silver mines and aims one ḫarrânu venture. The profits of that company will be shared equally between them. In line 5 is present the term "ana harrâni": the parties invested capital "ana harrâni" - that is in a business venture. This clause is characteristic for this type of document.

In line 8, we have a clause on the fruits of a property: "It will give the rent of your estate business." It is unclear, however, if "inamdin", the "give" verb, refers to the partner who does not manage the society. One cannot also know if the house belongs to a party or a third party. Lanz [12] suggests the interpretation that the clause refers to one partner who rented the property of a third party.

It is also not clear in this document if only one is working in this type of society or if both partners do. The profit sharing clause in line 6 uses the verb form "ippušu" which can either be the 3rd person singular present subjunctive ("it works"), as well as the 3rd person plural ("they work in"). If the first alternative is correct, it would have to admit that the member mentioned last - Kudurru - work alone. Therefore take would be to question why one of the partners would work alone, if we have a joint company with equal participation of two silver mines of both partners, and also that the two will receive the same share of the profits. Such a scenario would be possible if the partner that not work had given in addition to the capital something else of interest to the project (such as a customer or working tools, such as in a text Dario period [13]). In our document, there is no mention of something similar, which is a strong argument for the common work of both partners. It is, then, here, a society with common participation of both parties in the capital and profits.

As mentioned, it is also possible a partnership in which both parties invest capital, but only one of them works. This kind of society presentes peculiarities in the equity investment. It is possible that the partner who will work invest less than his partner, thus having a society with an economically stronger partner and a worker or the non-working brings some special conditions, as in the cited document of Darius the period.

Furthermore, it should be mentioned that the profit-sharing clause is always present in the constitution document of a ḫarrânu society. In the above document, we have a simple clause, dividing profits equally between the partners, which is typical in a society with equity participation of the two partners. On the other hand, we also have other types of ḫarrânu partnerships with capital of only one of its partners [14].

An example for this type of ḫarrânu partnership is the document of the year 611 a. C., first published by Lanz:

Babylon, 611 BC (Lanz 191)

1	5 MA.NA 16 GÍN KÙ.BABBAR *ul-tu*	5 mines 16 silver s hekels of
2	ITI.DU$_6$ *šá* MU 13.KAM *šá* ^{I}DI	Tašrit of 13 year, Šullumu ,
3	A ^{Id}ŠEŠ.KAK-*ma-an-sum*	son of Nusku - mansum ,
4	*ina mu?? i* ^{Id}NÀ.SE.PAP *ù*	the position of Nabu - nadin - ahi and
5	^{Id}NÀ.ŠEŠ^{meš}.GI	of Nabu - a??ê - šullim ,
6	A^{meš} *šá* ^{Id}NÀ.KAR	the children of Nabu - ušêzi ,
7	A^{meš} ^{I}KAK.*a.šá*.ID.GÁL.*ia*	son of Bana -shan - Ilija ,
8	*a-na* KASKAL^{II} *a-? i ina ú-tur*	for a business venture. An equal share of the profits
9	^{Id}NÀ.SE.PAP	Nabu - nadin - ahi
10	*u* ^{Id}NÀ.ŠEŠ^{meš}.GI	and Nabu - a??ê - šullim
11	*it-ti* ^{I}DI *ik-kal-lu*	take advantage with Šullumu .
12	^{lú}*mu-ki-nu…*	(Witnesses and date)

[12] H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., pp. 86 ss.

[13] Dar. 280.

[14] In such partnerships are also common where a fixed amount is paid to one of the partners. That is, there is no profit-sharing, but the predetermined value payment.

In this document, Šullumu gave five mines and 15 silver schekels the brothers Nabu-nadin-ahi and Nabu-aḫḫe-šullim, with the purpose of a ḫarrânu, ie a business venture. The three partners share the profits equally. This is a typical ḫarrânu partnership with share capital of only one of the partners, while the other partners, in this case, two partners, only work. A invests the capital and do not take part in the administration; the other partners work and manage the company without having invested anything. The division of profits is made by means of the verb "akālum" which primarily means "to eat". In that document, however, it translates to "akālum" as "to profit". Therefore, it has the meaning that the partner "participates in the profits"[15].

This document contains only the terms of formation of the enterprise and profit division. Moreover, there are documents that are even simpler, containing only the capital of training clause. Therefore, it is quite difficult to imagine that only such an undertaking the training clause is sufficient to regulate it, as can be found in various documents. Thus, it is plausible that there were legal rules on the subject, which would complement this simple training clause, or customary rules that treat this type of development, when the parties have not stipulated any special accessory clause. However, we do not have any traces of such rules.

More interesting is a document of the Bēl-eṭēri-Šamaš, published by M. Jursa[16], from the reign of Nabonidus or Kyros[17]:

Nbn/Kyr

1	[x M]A.NA 50 GÍN KÙ.BABBAR [*šá* ^{Id}AG-A-MU]	[X] mine (s) 50 silver shekels [of Nabu - Aplu - iddin]
2	[A]-*šú šá* IMU-GIN A ^{lú}ŠITIM *[ina] m[u? -?]i*	son of Sumu - ukin of Itinnu family, [the position of]
3	^{Id}EN-KAR-^{d}utu A-*šú šá* ^{I}A-*a*	Bēl-eṭēri-Šamaš, son of Aplāja ,
4	[*u*] ^{Id}AG-A-MU A-*šú šá* ^{I}MU-GIN A ^{lú}ŠITIM	[And] Nabu - Aplu - iddin son of Sumu - ukin family Itinnu
5	*[a]-na* KASKAL^{II} *mim-ma ma-la ina* URU	for a business venture. In all they in the city
6	[*u*] EDIN *ina mu? -? i ip-pu-šu-u*	or field work ,
7	*a-? i ina ú-tur* ^{Id}EN-KAR-^{d}UTU	
8	<<*[*^{I}*]*^{d}EN-KAR-^{d}UTU>> (Rasur) *it-ti*	Bēl-eṭēri-Šamaš
9	^{Id}AG-A-MU *ik-kal e-te-qa*	split with Nabu - Aplu - iddin . Expenses
10	*ina lib-bi ul it-ti-iq*	They will not be paid by any of them.
11	1-*en pu-ut* 2-*i na-šu-ú*	They are spinners each other .
12	4 GÍN KÙ.BABBAR ^{Id}AG-A-MU *ul-tu* KASKAL^{II}	Four silver sh ekels Nabu - Aplu - iddin took the business assets
13	*šá la* [x] *i-te-et-qa il-te-qé*	without [receipt?] as expenses .
14	^{Id}AG-A-MU *na-áš-par-tu*$_4$ *šá* KASKAL^{II} *il-lak*	Nabu - Aplu - iddin participate in the management of the company .
15	^{lú}*mu-ki-nu…*	(Witnesses and date)

Nabû-aplu-iddin makes available at least nearly two silver mines[18] with purpose of a company in charge of himself, Nabû-aplu-iddin, and Bēl-eṭēri-Šamaš. The profits of this enterprise were divided between them and they guarantee each other. It is notable that Nabu-Aplu-iddin also participates in the management of the company. Thus, it is plausible that this is a model of society in which only one party invests capital, but both parties participate in the management of the company.

This is a certificate of debt, where the lender (the one that invests the capital) has simultaneously the role of the debtor, different of the other that just works. Such construction is unusual, but other documents prove that possibility.

In this paper, we also analyse the "heritage of society." As with other documents of the Neo-Babylonian period, we have the ḫarrânu business ventures probably had its own heritage[19]. This heritage was rated the word ḫarrânu, demonstrating the distinct identity of such assets in relation to the personal assets of the partners.

In line 11 we have a clause bail, often present in ḫarrânu forms: “išten pu-ut šina-i na-šu-ú”, ie "they are guarantors of each other." This mutual guarantee clause is often used in the Neo-Babylonian period. However, it is interesting in this document the presence of several debtors. So we have a joint responsibility for sure: when several debtors guarantee to each other, we have a joint debt. Each joint debtor responds as liable only for its plot, but as guarantor he is liable for the portions of his co-debtors. In the above document, such a mechanism is even more interesting, since one of the debtors is also the lender.

In a ḫarrânu company with holdings in only one of the partners, we have the typical mutual structure: the partner who invests capital is the creditor and the other partner is the debtor who should return the value of that capital[20]. Here, however,

[15] Such translation is commonplace among scholars, so perfectly plausible to our document (H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., p. 4).

[16] Das Archiv des Bēl-eṭēri-Šamaš, in H.D. Baker/M. Jursa (coord.), Approaching the Babylonian Economy. Proceedings of the Symposium on the Economic History of Babylonia in the First Millennium Held in Vienna, Münster, 2005, pp. 197-268.

[17] It is not possible to determine precisely the date of this document, since this has not come full to us.

[18] Recalling also here can not know the exact amount of invested silver.

[19] H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., pp. 113 ss.

[20] H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., pp. 18 ss.

as both partners are jointly liable, both assume the investment risk. The guarantee clause is not present, although, in all ḫarrânu contracts.

4. Methodological aspects

The theme here clearly demonstrates the methodological difficulties of dogmatic character founded in scientific research in history of ancient law.

The nomenclature of the institutes are hard to clarify. The so-called ḫarrânu ventures, here treated as such, should be called that way? Societies? Companies?

Obviously, we know that this is not modern corporate law. Thus, there is a loss in terminological precision when we talk about a hypothetical "Neo-Babylonian corporate law." Similarly, there have had been problems in calling it "society," or any other name that refers to modern institutes (or not modern: it could not call these documents Neo-Babylonian law "societas", like the romans).

Moreover, there is no ideal solution to this problem. We could call these business "ḫarrânu ventures" or "ḫarrânu contracts" or "ḫarrânu documents." The problem, however, is clear: just Assyriologists and philologists would have access to that terminology, not reaching its main goal, which is to communicate with the receiver.

Similarly, it would be a plausible solution writing such terms in quotation marks, which is always suggested in such discussions. So we would have to write virtually any term of comparative law in quotes, which is not possible.

Therefore, we believe that the use of modern dogmatic terminology, intelligible to the modern jurist, is the best alternative to this methodological problem. After all, no need to remember that not stated in no time, of course, that the society of writing cuneiform rights, ie the ḫarrânu society would be equivalent to the modern law society. Thus we have the use of dogmatic - quite simply - as a communication element in scientific research in history of ancient law. Even with losses as the terminological precision, there are common elements dogmatic enough for such use modern terms, adapting also the economic purpose of these legal forms. Only than can communication between researcher and reader be effective, creating a methodological approach to the interpretation of historical sources.

Thus, we understand that the concepts and Roman Private Law institutions should be used as a communication element in scientific research in history of ancient law. Even with losses as the terminological precision, there dogmatists common elements sufficient for such use modern terms, suiting also the economic purpose of these legal forms. In this way, we have a Comparative Legal History Perspective as approach to study the cuneiform sources and to help unveil the still unclear fields of those legal sources.

Origins of General Concept of Contract in Western European Legal Science (12th through 16th Centuries)

Dmitry Poldnikov *

Abstract

The article presents the results of author's research of the origins of the general concept of contract in continental legal science in the Middle Ages and early Modern Times. This general concept marks one of the key features of the legal style in civil law countries, unknown to Roman jurisprudence, Muslim fiqh or Anglo-American common law. The formation of the general concept of contract proves to be the outcome of several generations of jurists archived through the combination of two models of contract in the medieval ius commune: agreement-based (in the commentaries on Roman law) and promise-based (in the church canons). It is argued that the synthesis of the two models in the 16th century is due to the efforts to reduce the Roman classical law to an art (as in the case of the French humanists) or to explain every rule of positive contract law through the ideal concepts of natural law and commutative justice (as in the case of Spanish legal thinkers). In arranging contract law the French jurists (such as François Connan and Ugo Donellus) followed the intended project of Cicero (ius in artem redigendi) by means of the methodology of Petrus Ramus. The representatives of the Spanish late scholastics (Domingo de Soto, Louis de Molina, Leonard Lessius) aimed at explaining all the provisions of the positive contract law in the sense of the higher moral and theological principles of natural law, as it was laid out in 'Summa Theologiae' by Thomas Aquinas. The author looks into the relevant works of the French and the Spanish jurists to analyse the definition of contract, its criteria, and to trace their origins in the legal commentaries of the medieval civilians and canonists, as well as in the medieval and antique treatises on moral theology and philosophy. The analysis allows for critical assessment of the inconsistencies and contradictions of the general concept of contract in the doctrines at the beginning of Modernity.

Key words*: concept of contract; promise; agreement; private law; history of jurisprudence; French humanists; Spanish late scholastics.*

Contract is one of the key concepts in the legislation, court practice and jurisprudence in civil law countries. Its application covers both private and public law, national and international. It is still more elaborated in the domain of private law as a symbol and key tool of private autonomy [1]. The concept of contract in private law is usually understood as an agreement between two and more persons on establishing, changing or extinguishing specific rights and obligations according to the principles of freedom of contract, parties autonomy, and binding force of contract. It is widely accepted in the academic and scholarly literature, in the civil codes of the 19th and 20th centuries and in the contemporary private codifications of private or contract law (e.g. Art. II–1:101 of the Draft Common Frame of Reference, Art. 1 of the (proposed) European civil code, or Art. 1:102, 2:101 of the Principles of European Contract Law).

This general concept of contract embraces all or most particular agreements recognised as contracts under law and it pulls together the necessary features of any such agreement. On the Continent such a concept became part of legal dogmatics since the time of German pandectists in the 19th century. These jurists presented contract as a meeting of the wills of the parties and expanded the domain of its application beyond the law of obligations (F.C. von Savigny) [2] to the whole sphere of private law (B. Windscheid) [3]. On the basis of this general concept both German scholars grouped the provisions applicable to all kinds of contracts together into the general part of contract law. Such transformation of contract doctrine was accepted in Germany and abroad (both by legal scholars and the legislators) [4]. This was the case of the modernized Russian civil law during the second half of the 19th century where both the civilians and the drafters of the Civil Code of the Russian Empire borrowed

* Dmitry Poldnikov, Ph.D., Associate Professor of Legal History, Higher School of Economics, Moscow, Russia.

1 This claim is the common sense for Russian civilians. Recently is was repeated in an article of Belov, V., 'The perspectives of the general concept of contract', in the collected essays 'Freedom of contract' ed. M.A. Rozhkova (Moscow, 2016, p. 107 ff.).

2 In 1840 Savigny announced contract as ‚the most important and all-embracing kind of the declaration of the will' in civil law. Thus, he broke away with the longstanding previous tradition to treat contracts as grounds for obligations only. See: *Savigny F.C.* System des heutigen römischen Rechts. Berlin: Veit und Comp, 1840, vol. 2, § 140.

3 *Windscheid B.* Lehrbuch des Pandektenrechts. 6 ed. Frankfurt am M., 1887, vol. 1, § 69, p. 190.

4 For the legislation, see section 3, chapter 3 ‚Contract', § 145 in the German Civil Code of 1900.

the general concept of contract and the general provisions on contracts as an indispensable part of the contract law[5]. Contemporary Russian scholars believe that the conclusions of the German pandectists are 'still valid for European and Russian jurisprudence today'[6].

The use of contract and other general concepts in jurisprudence and legislation is quite reasonably believed to be a major feature of the legal style on the Continent (K. Zweigert, H. Kötz), the true 'spirit of all modern codifications' (R. Cabrillac)'[7]. It was Rudolph Jhering who described it as 'the precious capacity of the legislator and legal scholars to extract general principles from the casuistic form and to concentrate the essential around some general idea which enables judges to decide specific cases more coherently[8]. Although the adequacy and efficiency of the general concepts are now disputed from time to time[9], the general concept of contract as legal agreement is still valid in contract law and legal doctrine in most civil law countries.

But why jurists on the Continent embraced such a general concept of contract? This question can be answered only on the basis of its history. The concept in focus should be regarded as the result of a complex and long process which is only partially investigated in the existing secondary literature. On its basis one can conclude that this notion could not emerge because of legal borrowing since general concepts were unknown or strange to Islamic, Anglo-American or Roman jurisprudence.

Since the Middle Ages the specialists in Sharia law (*faquihs*) regarded generalizations in contract law as redundant, impractical and 'too Western'[10]. English and American lawyers and judges were and are famous for their pragmatic thinking about specific contracts on a case-by-case basis, which delayed the introduction of general concepts until the second half of the 19th century[11].

Roman law deserves special mentioning as it is often perceived to be the foundation of the law of obligations in Continental Europe (R. Zimmermann). According to F.C. Savigny, Roman jurists should be remembered and praised primarily for their 'possession of the legal principles'[12]. Yet, despite all efforts, the study of the available Roman legal sources in the second half of the 20th century did not reveal the 'prototypes' of modern principles of contract law nor a general (abstract) concept of contract which might have been eclipsed for a thousand years by medieval and modern ignorance[13]. On the contrary, the evidence of a casuistic legal style in Rome grows. This style justified a skeptical attitude to the utility of definitions and generalisations for resolving legal disputes[14].

The Digest of Justinian (533 A.D.), a collection of quotations from the works of Roman jurists, preserved for us massive evidence of their casuistic approach to law generally and to contract law in particular. Hence, as Federico D'Ippolito rightly noted, to ascribe a general concept of contract to these texts is to do exactly what Roman jurists tried to avoid, that is reducing their law to abstract general rules[15].

The *Corpus iuris civilis* of Justinian, our principle source of knowledge about Roman law, contains provisions on contracts incompatible with the general (abstract) concept. The latest studies by R. Fiori and J. Parisio confirm that contracts (*contractus*) in the fragments of the *Corpus iuris* denoted only a limited number of typical transactions acknowledged as a source of an obligation under civil law[16]. Each contract was subject to its own regime and protected by specific lawsuits. Such contracts were differentiated from simple agreements which could

---

[5] For the academic writings see one of my previous articles, The Birth of the Russian science of civil law in the mid-19th century: towards the unity of the European legal tradition, in: Journal on European History of Law. 2014, vol. 5, n.1, p. 95–103. The general notion of contract was accepted in Section 1 ‚On contractual obligations in general' in Book 5 of the Draft Civil Code of the Russian Empire (published by the Drafting Committee in St. Petersburg in 1899).

[6] *Tuzov D*. On *traditio* as Proprietary Contract in Russian Civil Law, in: The Herald of the Supreme Court of Arbitration of the Russian Federation. 2007. N 8. P. 54-79. (in Russian)

[7] *Zweigert K., Kötz H*., Introduction to Comparative Law. 3d ed. Translated by T. Weir. Oxford Clarendon Press, 1998, p. 68 ff.; *Cabrillac R.*, Les codifications, Paris: PUF, 2002, p. 222 (cited according to Russian translation, Moscow: Statut, 2008).

[8] *Jhering R*., Legal Techunique: on the Essence of Legal Formalism. Translated from German by A. Shendorf. Ed. A.V. Polyakov. Moscow: Statut, 2014, p. 70 (in Russian).

[9] See, for example, the critical remarks on the definition of contract in art. 1101 of the French Civil Code, in: *Forray V*. Consensualism dans la théorie générale du contrat. Paris: L.G.D.J., 2007, p. 601; *Wéry P*. Droit des obligations, vol. 1 (Théorie générale du contrat). Bruxelles: Larcier, 2010, p. 60. On the normative status of the general theory of contract in French law see: *Savaux E*. La théorie générale du contrat : mythe ou réalité? Paris: L.G.D.J., 1997.

[10] *Rayner S.E*. The Theory of Contracts in Islamic Law. London: Graham & Trotman, 1991, p. 86, n. 3; with reference to *Schacht J*. An introduction to Islamic Law. Oxford: Clarendon Press, 1982.

[11] *Gordley J*. The Jurists: a Critical History. Oxford: Clarendon Press, 2013, p. 251 ff. (with references to the works of Patrick Atiyah, Grant Gilmore, Morton Horwitz).

[12] *Savigny F.C*. Of the vocation of our age for legislation and jurisprudence. Translated from the German by A. Hayward, London, 1831, p. 45.

[13] *Cannata C.A*. Lo splendido autunno delle due scuole, in: Pacte, convention, contrat. Mélanges en l'honneur du Professeur B. Schmidlin. Eds. A. Dufour, I. Rens. Frankfurt/Main, 1998, p. 458.

[14] Javolenus famously called any definitions in civil law is ‚dangerous, for there is hardly one which cannot be subverted' (D. 50. 17. 202). According to Peter Stein, the risk is that 'they give the impression that they have a general application and cover all the cases when in fact they do not'. *Stein P*. Regulae iuris; from juristic rules to legal maxims. Edinburgh: University Press,1966, p. 70.

[15] *D'Ippolito F*. On a well-timed translation of the Digest of Justinian from the cultural point of view, in: The Digest of Justinian. Russian translation. Ed. by L.L. Kofanov. Moscow: Statute, 2008, vol. 8, p. 46 (in Russian).

[16] *Fiori R*. Tipicità contrattuale e teoria generale del contratto. Alcuni problemi di storia e dogmatica, in: Roma e America. Diritto romano comune. Rivista di diritto dell'integrazione e unificazione del diritto in Europa e in America Latina. Roma, 2006, vol. 22, p. 105–113; *Paricio J*. Una historia del contrato en la jurisprudencia romana, in: Annali del seminaro giuridico della Università di Palermo. 2009, vol. 53, p. 71–114 (with references).

not give rise to an actionable obligation (see, inter alia, *Ulpian* in D.2. 14. 7.4; also the constitution of Septimius Severus of 206 A.D. in C. 5. 14. 1). Roman jurists used contracts to provide a legal form for specific transactions (*negotia*) and to link them with the limited number of lawsuits. They did not dedicate their efforts to define the elements of all or most contracts and there was not a widely recognized set of such elements. An agreement (*consensus*) might have been regarded a necessary element for all contracts (see Ulpian quoting Pedius in D. 2. 14. 1.3), but it did not become the analogue of a contract (*contractus*), nor the ground for their classification, nor the sufficient ground (*causa*) for an actionable obligation under civil law.

The rise of legal education in professional schools of the early Byzantium (5th and 6th centuries) facilitated the transition from casuistry to generalization in contract law. It was Theophilus, the professor of the leading law school in Constantinople, who offered the earliest definition of contract according to the rules of Aristotelian logic — through its genus one step higher (*genus proximus*) and the special difference which creates the species (*differentia specifica*). In his Greek 'Paraphrase' to Justinian's Institutes Theophilus wrote that «… Contract (*synallagma*) is an agreement and accord between two or more (persons) about the same with an aim to conclude an obligation and to bind one in favour of another» (Paraphr. 3. 13. 2).

Thus, the Byzantine professor clearly juxtaposed an exchange (*synallagma*) with an agreement and defined contract with the same words Ulpian once used to describe a simple agreement (*conventio*, D. 2. 14. 1.2)[17]. However this definition was not part of the *Corpus Juris* (the 'Paraphrase' itself was unknown to Western European jurists until the Renaissance) and the overall crisis in Byzantium during the second half of the 6th and 7th centuries led to the collapse of jurisprudence in Byzantium and interrupted the tendency to generalize contract law[18].

If a general concept of contract could not be borrowed from the *Corpus Juris*, then who should be credited for its invention in the West? The majority opinion tends to ascribe it to the jurists of the 18th and 19th centuries. Some writers point to German pandectists of the 19th century who could have arrived at a general concept of contract through the synthesis of the consensual contracts (*contractus consensu*) in Roman law with the doctrine of contractual ground (*causa*) in the sense of a legal goal to conclude an obligation[19]. Others give credit for a general concept of contract to the iusnaturalists and legal philosophers of the Enlightenment who allegedly established the first true legal theory and coined the term 'contract' to signify any agreement (meeting of the wills) giving rise to a legal obligation in private law[20].

However, recent studies of legal historians such as Italo Birocchi, James Gordley, Wim Decock, Thomas Duve show that a general concept of contract surfaced in the early modern legal science, that is as early as the 16th century[21]. One can find the first coherent use of 'contract' as an umbrella term for various groups of private contracts, its definition and elements, conditions of validity, as well as grouping of provisions common to all contracts and legal agreements in the 'Commentaries on Roman (civil) law' by the French legal humanists and the treatises 'On Justice and Law' by the Spanish late scholastics.

A comprehensive study of the intellectual background of the legal science in the 12th through 16th century show that the origins of the general concept of contract were rooted in three major collections of authoritative texts:

1) Roman laws of the *Corpus Iuris civilis* of Justinian (the 6th century);

2) canons of the Roman Catholic Church gathered in the *Decretum* of Gratian (ca. 1140) and the collections of papal decretal letters published in the 13th century;

3) the philosophical texts of Aristotle and Cicero.

Each collection taken separately could not provide sufficient ground for the emergence of a general concept of contract in legal science. The *Corpus Juris* offered the richest casuistry of contract law but contained few general concepts. The church canons and the philosophical and rhetorical writings of Aristotle and Cicero contained moral principles of fairness, justice and honesty in any human relations but lacked and denounced detailed provisions on common issues of contract formation, validity and performance. Only the synthesis of all three traditions enabled prominent jurists of the 16th century to conceptualise contracts in general for legal purposes.

Legal thinkers of the early modern period, however, stood on the shoulders of their medieval predecessors. Since the emergence of law schools at the universities in Northern Italy in the course of the 'renaissance of the 12th century' (Ch. Haskins) jurists were divided into those who interpreted Roman civil law (civilists) and Church canons (canonists). The differences between the laws and canons induced the jurists to develop two different models of contract.

The first model of the civilians can be labelled 'contract as agreement' for it built upon the relevant passages from the *Corpus Juris* highlighting the significance of an agreement in all contracts. As a starting point, they referred to the authorita-

[17] For more information on the Byzantine theory of contract see: *Cascione C.* Consensus: problemi di origine tutela processuale, prospettive sistematiche. Napoli: Editoriale scientifica, 2003, p. 457–463.

[18] On the study on the decay of legal education in Byzantium see: *Scheltema H.J.* L'enseignement de droit des antécesseurs. Leiden, 1970, p. 8 ff.; *Pieler P. E.* Byzantinische Rechtsliteratur, in: Die hochsprachliche profane Literatur der Byzantiner. Ed. H. Hunger. München: C.H. Beck, 1978, vol. 2, p. 429 ff.

[19] *Peters H.-J.* Vertrag und Einigung bei den Spätpandektisten. Dissertation. Köln, 1967.

[20] *Lipp M.* Die Bedeutung des Naturrechts für die Ausbildung der Allgemeinen Lehren des deutschen Privatrechts. Berlin, 1980; *Nanz K.-P.* Entstehung des allgemeinen Vertragsbegriffes im 16. bis. 18. Jh. München, 1985, p. 152–155, 164–168.

[21] *Birocchi I.* Causa e categoria generale del contratto. Un problema dogmatico nella cultura privatistica dell'etŕ moderna. Torino, 1997; *Gordley J.* The philosophical origins of modern contract doctrine. Oxford, 1991; *Decock W.* Theologians and contract law: the moral transformation of the ius commune (ca. 1500-1650). Leiden, Boston, 2012; *Duve T.* Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik, in: Der Einfluss der Kanonistik auf die Europäische Rechtskultur. Eds. O. Condorelli, F. Roumy, M. Schmoeckel, Köln-Weimar-Wien 2009, vol. 1, p. 389–408.

tive opinion of Pedius and Ulpian on *conventio* (see above D. 2. 14. 1.3). On the basis of literal interpretation of Ulpian's division of agreements (*conventiones*) medieval civilians (glossators and commentators) took *conventio* for the principle concept of their contractual doctrines, while contracts were qualified as species of *conventio* capable of producing legally protected obligation 'vested' in a number of ways fixed by law[22]. A unilateral promise without creditor's acceptance was labelled 'naked' and believed to be insufficient to give rise to a legal bond[23].

Under the influence of the philosophical concept of the essence or nature of things the civilians of the 14th century singled out the elements common to all contracts, namely, agreement (*consensus*), legal cause (*causa*) and legal protection (*actio*). In so doing they paved the way to a concept of contract embracing various contracts and pacts of the Roman law of obligations. Yet, until the 16th century the civilians did not surpass the notion of contract as a typical 'vested' transaction with its own legal nature, regime and conditions of validity, one and for all defined by the *Corpus Juris*[24]. In the 14th century the commentators slightly blurred the borders separating the typical contracts by limiting the number of unchangeable 'essential' terms of contract and expanding the range of changeable 'natural' conditions which parties to the contract could modify by their consent. But the dogma of contract as a typical transaction survived in the legal writings until the early modern period[25].

The second model treated contracts as promises. Medieval canonists in the 13th and 14th centuries forged it as a result of their legal qualification of moral opinions of the Church Fathers, the popes and the church councils on the necessity to honour any promise because of the Christian virtues of honesty, righteousness, which made any broken promise equal to 'mendacity (*mendacium*) of thy neighbour, that is a sin *(peccatum).*

These conclusions rested on several canons included into the *Decretum* of Gratian and the decretal collection of Gregory IX: 1) canon '*iuramenti*' qualifying broken oath as mendacity (a passage taken from the 5th chapter of Matthew; C. 22, q. 5. c. 12[26]); 2) canon 36 '*quicumque suffragio*' of the 4th church council in Toledo (633), which requested a bishop to honour his promise and pay for the work done in his church (C. 12 q. 5 c. 66); 3) a letter of Gregory the Great '*quia Iohannes*' (600) where the pontiff exhorted an archbishop to honour the promise of his predecessor Johannes to found a monastery (C. 12. q. 5, c. 3), 4) canon 12 '*Antigonus*' of the 1st council of Carthage (ca. 348) on the necessity to respect an agreement between two bishops on the borders of their dioceses (X. 1. 35. 1). These canons treated unilateral promises and bilateral pacts on equal footing.

The major achievement of the first canonists was to convert the moral discourse on promises into a legal one. Consequently, moral duties were transformed into legal rules for *all* transactions between Christian parties. Contracts were regarded as a voluntary promise of one legally responsible person (debtor) to another (creditor) in pursuit of a legitimate goal (*causa*) to give or to do something of value. This definition is my synthesis of the commentaries of several canonists. It covers accepted and unaccepted unilateral promises (*pollicitationes*) in virtue of the extended interpretation of the canon '*Antigonus*' (X. 1. 35. 1)[27].

In contrast to the original meaning of the canons, the legal implications of giving promises and entering into pacts under late medieval canon law can be proved by the principle of their binding force, known today as *pacta sunt servanda*. This principle was founded on the supposed true meaning of canon '*Antigonus*' (X. 1. 35. 1) and ultimately it implied legal protection of most promises and agreements in the church courts.

Yet, the concept of any contract as promise and its uniform protection under a universal lawsuit ('*condictio ex canone*') did not evolve to the general regime of contracts under Roman-Canon law ('ius commune'). The application of the rule '*pacta sunt servanda*' was limited by subsequent papal decretals and canonical doctrines to the transactions within the exclusive competence of the church courts. That involved cases with ecclesiastical elements — clerics as parties, church property or rights, an oath invoking God's name. The vast number of transactions among laymen fell outside the scope of the principle '*pacta sunt servanda*' and was decided on the basis of the civil (Roman) law and the doctrines of its medieval interpreters.

The experience of medieval *ius commune* proves that a coexistence of the two models of contract was not enough to produce its general concept for all legal transactions regardless of the parties. The emergence of such a concept required some substantial innovation in the theoretical foundations of jurisprudence. It took place in the 16th century because of the two academic schools building on the legacy of the Renaissance and

---

[22] This opinion and six ways of ‚vesting' conventions were authoritatively stated by Azo Portius (d. 1230) in his summary of the Code of Justinian. See Summa aurea (= Summa Codicis). Lugduni, 1596, p. 24, col. 2.

[23] *Azo*. Op. cit., p. 181 (no lawsuit from a unilateral promise).

[24] In the words of Baldus de Ubaldis each contract has its ‚nature' that defines its goal, terms and conditions. ‚Therefore, – he concludes, – the agreements which cannot reach their goal, are deemed to be imperfect' (*Baldus*. Commentaria ad C. 4. 38. 13, n. 5: '…unde conventioties, quae non possunt *attingere debitum finem* secundum naturam eis datam, reputant imperfectae').

[25] Helmut Coing and Paolo Grossi argued that it were the civilians of the second half of the 13th century who developed the doctrine of essential, natural and accidental conditions of private agreements of the basis of several fragments in the Digest of Justinian where ‚*natura contractus*' had been mentioned. See: *Coing H*. Europäisches Privatrecht. München, 1985, vol. 1, p. 410; *Grossi P*. Sulla 'natura' del contratto, in: Quaderni fiorentini. 15 (1986), p. 611.

[26] Hereinafter I use the standard abbreviation to cite canons in the *Decretum* (where 'C.' stands for '*Causa*' in the second part of this document, 'q.' – for '*quaestio*', and '*c.*' for canon or rule) and the collection of papal decretals *Liber Extra* of Gregory IX (where 'X.' stands for '(Liber) Extra' and the following numbers refer to a book, a title, and a chapter).

[27] This opinion was upheld by the authority of abbot Panormitanus in ‚Commentaria (super secunda parte libri primi Decretalium) ad X. 1. 35. 3 (Venetiis, 1610). He stated that ‚to promise' in the canon does not imply its acceptance and entering into a (bilateral) pact. ‚It was enough to give a simple promise of one party' (sufficit nuda promissio unius tantum).

Counterreformation. These were the French humanists and the Spanish late scholastics. Systematization and coherent exposition of law and its specific institutes became a prominent goal in both academias. Yet, they generalized the concept of contract pursuing diverging academies programmes and, thus, come to understand it somewhat differently.

The French humanists François Connan (1508–1551) and Hugo Donellus (Doneau, 1527-1591) discovered their general concept of contract in civil (Roman) law of the classical period (1st to 3rd centuries). They come to believe that Roman law of that period already contained the coherent hierarchical system of interconnected concepts and rules which was distorted by the compilers of the Digest of Justinian in the 6th century and the medieval glossators and commentators. The goal of the humanists of the 16th century was to restore the classical civil law in all its glory from the perspective of the ideal of Cicero ('to reduce the civil law to an art') through the means of the methodology of coherent exposition of the material as suggested by Petrus Ramus (1515–1572).

Cicero expressed his vision of the civil law reduced to an art in his late dialogues. Contemplating 'On the Orator' he noticed the difficulty for an ordinary Roman to understand the civil law because it was scattered in various sources and lacked order (De orat. I.41.185, 191). In the dialogue 'On the Laws' he criticised Roman jurists obsessively discussing trifles (*humiliora*) instead of focusing on a clear order and exposition of the civil laws (De leg. 1. 4. 14). Finally, he envisaged a new jurisprudence reduced to a perfect art of the civil law (*perfecta ars iuris civilis*), 'magnificent and copious but neither inaccessible nor mysterious' (De orat. 1. 41. 190-191), and thus easily comprehensible to all educated Romans. This idealized vision of the civil law echoed in the first book of François Connan's 'Commentaries on the civil law' (Comm. 1. 1. 7; published in 1553).

The Spanish late scholastics arrived at a general concept of contract in their efforts to arrange and to explain all positive law of their time — that is civil, canon, and Castilian — on the basis of higher religious and moral principles, known as natural law in the works of Thomas Aquinas (1225–1274). In his voluminous '*Summa Theologiae*' the leading representative of the medieval scholasticism only outlined a better approach to arrange the positive law to an art on the basis of Christian virtues, or natural law, and the methods of Aristotelian dialectic[28]. The late scholastics such as Domingo de Soto (1494–1560), Luis de Molina (1535–1600) and Leonard Lessius (1554–1623) accomplished this transformation of legal doctrine in their treatises 'On Justice and Law'[29].

Dissimilar approaches of the scholars of 16th century made them understand the concept of contract differently. French humanists built upon the civilian consensual model of contract as the basis for their general concept thereof and backed it up it with references to Aristotelian ethical theory of contract as an act of commutative justice and (implicitly) with certain ideas of medieval canonists. As a result, in the 12th book of 'Commentaries on the civil law' (1590) Hugo Donellus defined contract as 'an agreement (*consensus*) between two or more persons to transfer property and perform actions' (Comm. 12. 6. 3) which produces an obligation under civil law under certain conditions. It should be entered into by legally capable and responsible persons, relied on their serious intent, have a valid and lawful purpose (*causa*) and a specified object (Donellus, Comm. 12. 8. 4-5). François Connan in his 'Ten books of Commentaries on the civil law' (2 vols, Paris, 1553) defined contract as a voluntary and even exchange (*synallagma*) of property rights between the equal parties (Comm. 5. 1. 4). Both jurists considered contract to be the primary legal means to manage ones' property rights (*Connan*, Comm. 2. 1. 1; *Donellus*, Comm. books 12–16).

The French scholars rested their concept of contract on the opinions by Ulpian on the necessity for a mutual agreement in all contracts (D. 2. 14. 1.3) and by Paul on the legal meaning of obligations to 'bind another person to give, do, or perform something for us' (D. 44. 7. 3 pr.). But they framed both statements within Cicero's idea to reduce the civil law to an art and Aristotle's ethical theory of the voluntary exchange (synallagma) under the principle of commutative justice (Nicomachean Ethics, 5.5). Additionally, the ideas of a lawful purpose (*causa*) in each contract and its approbation (*approbatio*) by the positive law Donellus could have borrowed from the contractual doctrines of the canonists who used those requirements to limit the broad literal meaning of 'pacta sunt servanda' (cf. X. 1. 35. 1 and *Donellus*, Comm. 12. 8. 4).

In my view, the discovery of a general concept of contract in the sources of Roman law by several French humanists of the 16th century was due to the projection of their own notions of the ideal rationality, internal integrity and certainty of contract law on the Roman contract law of the classical period. Thus, we face an anachronistic attempt to represent the contract law as it was conceived not by Roman jurists themselves, but rather by the 16th century humanists, who relied on Cicero's ideal of civil law reduced to an art and the methodology of the early modern period. This approach caused some controversies and lacunas in the contractual doctrine.

First, the idea of contract as the primary legal means to manage one's subjective rights does not correspond to the evidence in the Digest where consensual contracts were rather a limited number of agreements protected by the lawsuit prescribed by the civil law (This is why Ulpian in D. 2. 14. 7.4 could claim that '… a mere agreement does not create an obligation under civil law…').

Secondly, the synallagmatic concept of contract excludes unilateral contracts of Roman law, most notably *stipulatio*. In *stipulationes* under Roman law the formal promise of one party (the debtor) does not presuppose any counter performance from the other (the creditor) (Gai. 3.92).

[28] For a detailed analysis of Aquinas' opinion on commutative justice see: *Gordley J*. The philosophical origins of modern contract doctrine. Oxford: Clarendon Press, 1991, p. 13–23.

[29] Their contribution to the ‚restoration' of freedom of contract in early modern private law has been thoroughly studied by Wim Decock in his voluminous book ‚Theologians and Contract Law' (see above n. 21).

Thirdly, the necessity of a mutual consent for the validity of a contract is doubtful because of the reference to Aristotle's objective understanding of exchange (*synallagma*) between the parties. In Nicomachean Ethics (5.5) the Greek philosopher analysed exchange (*synallagma*) only from the external and factual perspective ignoring the motives and intentions of those who performed an exchange.

So, to reduce the contract law to an art, to systemize it by using the general concepts of contract proved to be more difficult than the French humanists anticipated.

The general concept of contract in the treatises 'On Justice and Law' by the Spanish late scholastics appears to be more coherent. They unified the features of the contract in Roman and canon law (ius commune) with the principles of moral theology by Aquinas and by doing this produced a synthesis of general/ fundamental medieval approaches to contract. The most complete representation of the result of this transformation can be found in treatise by Luis de Molina, which was published in 1593–1597. He defines contract as an 'agreement (pact?) which produces reciprocal/ mutual obligation (= synallagma, or the act of commutative justice) which is the result of the 'will or agreement between parties concerning the transfer of the ownership or establishment or termination of the obligation' (De iustitia et iure. Tract. II, Disp. 252, N. 3, 11)[30].

In the cited definition by Molina legal, ethical and philosophical traditions are intertwined. Catholic moral theology and aristotelianism of Aquinas should have formed the view of contract as an act of reason and will aimed at achieving immediate and highest moral values or virtues (Summa Theologiae, I-II, q. 18, a. 5) through either commutative justice in equivalent exchange of goods and services or liberality towards 'thy neighbour' in gifts (Ibidem, II-II q. 61 a. 3)[31].

Under the influence of canon law doctrines the late scholastics emphasized the significance of debtor's promise (*promissio debitoris*) expressing his serious intention to undertake the performance of certain duties, and also recognized the need for a lawful purpose (*causa*) in every valid contract. So, despite the fact that Leonard Lessius defined contract as an 'agreement which produces an obligation on the side of the counterparty' (De iustitia et iure (1605). Lib. 2, Cap. 17, Dub. 1, N. 4), he grouped his meditations on the principles of contract law around the notion of promise (*promissio*)[32].

Finally, references to Roman civil law helped the late scholastics to explain the requirement of acceptance of the promise by the creditor in the formation of contractual obligation, contrary to the views of the medieval canonists and theologians, as well as to emphasize the proprietary nature of the rights and duties of parties to a contract under law.

When dealing with the elements of the general concept of contract, the late scholastics filtered the legacy of the medieval jurisprudence. They declared to be significant only those characteristics of the contract, which, in their opinion, should have originated from natural law based on the eternal (divine) law. This approach let them introduce into legal science the general concept of contract as that of natural law, analyse it using the provisions of the positive contract law, approve or criticize it, even offer to amend or abolish it.

However, efforts of the late scholastics to overcome the split between the two models of contract generated some inconsistences in the resulting doctrines. Most notably, the intention to rest the concept of contract on the religious and ethical idea of commutative justice excluded from this concept all gratuitous transfers of property (gift). The late scholastics explained the binding force of gifts referring to the Christian virtue of liberality. As a result, the Spanish scholars began to distinguish between contracts in the strict sense — acts of justice — and in a broader sense — acts of justice and liberality. Moreover, reverence for the doctrines of canon law, which stressed the binding force of any lawful promises, led many late scholastics questioning the requirement of acceptance of a promise for the formation of a valid contract under natural law. Domingo de Soto contested the need for acceptance altogether. Louis de Molina qualified acceptance as a rule of positive law. Leonard Lessius was the first among the authors of the treatise 'De iustitia et iure' who linked this rule to natural law because the will gave rise to an obligation only through an external sign by the promisor (offeror) to the promissee (offeree).

The general concept of contract emerged in the 16th century not only because of the combination of the aforementioned doctrinal sources with a higher level of abstract thinking of those legal scholars who interpreted Roman and canon law with greater freedom and criticism. It became necessary to address the scientific challenges of the legal science of the early modern period. This concept emphasized the importance of contract as the principal means to manage ones' property rights. It also helped to highlight and systematize the general provisions on specific contracts regarding their formation, conditions of validity, classification criteria. In so going the French and Spanish academics in the 16th century largely overcame the incoherent contractual doctrines of Bartolus' successors in the late middle Ages, who had decelerated generalization of the concept of contract by watering down of the meaning of the basic concepts and rules of doctrines regarding contracts through multiple exceptions and unclear wordy comments on comments.

So, the academics of the 16th century set the goal and took steps to generalize the concept of contract. But their understanding of contract differed from the consensual model in the first codifications of civil law in Europe. In fact, it was the legacy of the late scholasticism, which kept the leading theoreticians of contract law in the 17th century to focus on debtors' promise as the cornerstone of the general concept of contract. This is especially true concerning the position of Hugo Grotius and Samuel Pufendorf. Grotius (1583–1645) knew quite well the works of lawyers of the 16th century and, not by coincidence, saw the essence of contract in debtor' promise (*promissio*), by

[30] *Molina L.* De iustitia et iure. Coloniae Agrippinae, 1614.
[31] The full Latin text of Summa Theologiae (edition Romae, 1888) is available online at: http://www.corpusthomisticum.org/sth0000.html
[32] *Lessius L.* De iustitia et iure, ceterisque virtutibus cardinalibus libri quatuor. Brixiae, 1696.

which he conceded part of his freedom to his creditor (De iure belli 3. 1. 1). Pufendorf (1632–1694) declared an agreement to be the basis of contract but still understood it as debtor's concession to establish a legal duty to do something in favour of his creditor[33]. Both scholars regarded contract as a secular concept, rested not on Christian virtues or the opinions of the great Roman jurists, but on the universal reason, or natural law of the age of the scientific revolution.

By the 18th century the consensual concept of contract in private law prevailed over the promissory one in the writings of Jean Domat, Robert-Joseph Pothier and Christian Wolff. Yet, it took some more time for the majority opinion of the jurists to accept this general concept of contract. The generalizing style and abstract concepts slowly found their way into legal profession. Most practitioners met such innovations with skepticism and attributed them to the domain of legal philosophers[34]. Only in the age of great European codifications (the 'long 19th century') the general concept of contract finally became indisputable part legal dogma and a remarkable element of the legal style in civil law countries.

[33] *Pufendorf S*. De officio hominis et civilis secundum legem naturalem. Lipsae, 1726, lib. 2, cap. 15, § 15.

[34] Even in the mid 18th century legal practitioners of the *Ancien Régime* preferred the casuistic jurisprudence of the *Corpus Juris* to novel jusnaturalistic theories. According to an anecdote, a young adovocate Jean Portalis (who was to draft the *Code Civil* in his later years) was advised by the judges at the Parlement (court) in Aix-en-Provence to pay more attention to the commentaries of Bartolus and Baldus on civil law. See: *Arnaud A.-J*. Les Origines doctrinales du code civil français. Paris,1969, p. 29.

Tradition des römischen Rechts und Kodifikation des Privatrechts in Bulgarien
(The Tradition of Roman Law and the Codification of Private Law in Bulgaria)

Gábor Hamza *

Abstract

The states on Balkan peninsula received Roman law through the mediation of the Byzantine Empire. The reception of the Byzantine law-books was made easier in the Balkan states by the fact that substantive law was not separated from the law of procedure. Private law was dealt with in conjunction with financial, criminal, and canon law. During the first Bulgarian Empire the principal source of knowledge of Roman law was the Responsa Nicolai I papae ad consulta Bulgarorum albeit the influence of Byzantine law still prevailed. In 1867 a code entitled Medzellé was introduced in the territory of present-day Bulgaria. Its goal was to harmonize Islamic law with European law, especially with the French Code civil. After gaining independence a code of the law of obligations was promulgated in 1892 and another one pertaining to the law of things in 1904. Their primary model was the Italian Codice civile and to a lesser degree the Spanish Código civil. The traditions of Roman law they relied on are still there in the more recent and similar codes of 1950 and 1951. The influence of the German Pandectist School can also be seen in the legal science in Bulgaria.

Key words: *Act on Obligations and Contracts; Act on Ownership; Act on Private International Law; Act on Succession; Act on the Law of Persons and Family Law; Commercial Code of 1897; concept dualiste; Drafting of a Bulgarian Civil Code; Hexabiblos; ius Graeco-Romanum; ius Byzantinum; Medjelle; Pandectist Legal Science; Responsa Nicolai I papae ad consulta Bulgarorum; Zakon sudnij liugiem.*

Schrifttum im Hinblick auf das Byzantinische (Oströmische) Reich und die Länder auf der Balkanhalbinsel

R. de Hubé: *Droit Romain et Gréco-Byzantin chez les peuples slaves. Avec un extrait des lois Romano-Byzantines.* Paris – Toulouse 1880.; N. Iljinskij: *Sintagma Matfeja Vlastarja.* Moskva 1892.; J. Nicole: *Le livre du Préfet ou l'Edit de l'empereur Léon le Sage sur les corporations de Constantinople.* Genčve 1893.; H. Oroschakoff: *Ein Denkmal des bulgarischen Rechts.* Stuttgart 1915.; L. Niederle: *Manuel de l'antiquité slave.* Paris 1923.; E. Stein: *Untersuchungen zur späthyzantinischen Verfassungs- und Wirtschaftsgeschichte.* Hannover 1925.; L. Thallóczy: *Illyrisch-albanische Forschungen. I–II.* München – Leipzig 1916.; A. Albertoni: Diritto bizantino, diritti balcanici, diritto italiano. In *Studi Rumeni. IV.* Bucuresti 1930.; K. Kadlec: *Introduction ŕ l'étude comparative de l'histoire du droit public des peuples slaves.* Paris 1933.; N. Jorga: *Byzance aprčs Byzance.* Bucurest 1938.; A. V. Soloviev: L'śuvre juridique de Mathieu Blastares. In *Studi Bizantini e Neoellenici,* 5 (1939) S. 698–707.; J. Vasica: Origine Cyrillo-Methodienne du plus ancien code slave dit „Zakon sudnyi ljudem". In *Byzantinoslavica,* No. 12, Prague, 1951.; H. F. Schmid: La legislazione bizantina e la pratica giudiziaria occidentale nel piů antico codice slavo. In *Atti del Congresso internazionale di diritto romano e di storia del diritto. Verona 1948. I.* Milano 1953. S. 405–426; P. Lemerle: Invasions et migrations dans les Balkans depuis la fin de l'époque romaine jusqu'au VIII[e] siccle. *Revue historique,* 3 (1954); Pan. J. Zepos: L'influence du droit Byzantin sur la législation roumaine de la période des princes phanariotes. In *Studi in memoria di P. Koschaker. I.* Mailand 1954. S. 427–437.; A. Solovjev: L'influence du droit byzantin dans les pays orthodoxes. In *Atti del X Congresso internazionale di Scienze Storiche, 6.* Firenze 1955. S. 587 ff.; C. E. Zachariae von Lingenthal: *Geschichte des griechisch-römischen Rechts.* (Neudruck) Aalen 1955.; B. Sinogovitz: *Studien zum Strafrecht der Ekloge.* Athen 1956.; H.-G. Beck: *Kirche und theologische Literatur im byzantinischen Reich.* München 1959.; A. V. Soloviev: Der Einfluß des Byzantinischen Rechts auf die Völker Osteuropas. *ZSS RA* 76 (1959) S. 432–479.; M. Andréev: Le droit romain et l'Eclogue Slave. In *Bartolo da Sassoferrato. Studi e documenti per il VI centenario V.I.* Milano 1961. S. 109-129.; M. N. Tihomirov – L. V. Milov: *Zakon Sudnij Ljugiem.* Moskva 1961.; V. Al. Georgesco: Unité et diversité des formes de la réception du droit romain en Occident et du droit byzantin en Orient. *Revue des Études –sud-est européennes,* 2 (1964) S. 153 ff.; D. Obolensky: *The Empire and its Northern Neighbours.* Cambridge 1966.; N. J. Pantzapoulos: *Church and Law in the Balkan Peninsula during the Ottoman Rule.* Thessaloniki 1967.; V. Al. Georgesco: La réception du droit romain de Justinien en Occident et celle du droit romano-byzantin en Orient. In *Studi Accursiani. III.* Milano 1968. S. 1207 ff.; A. Startos: *Byzantium in the Seventh Century.* Amsterdam 1968.; L. Brehier – S. Gouillard: *Vie et mort de Byzance (Le monde byzantin).* Paris 1969.; F. Dvornik: *Les Slaves. Histoire et civilisation.* Paris 1970.; D. Angelov: Formation and Development of the Bulgarian Nationality (Ninth to Twelth Centuries). In: *Bulgarian Historical Review* No. 1, 1973.; M. Andréev: La compilation „Loi de Constantin-Justinien" et le problčme de la fusion et de la confusion du droit coutumier des slaves du sud avec leur ancien droit écrit d'origine byzantine. In *Actes du XIVe Congrčs International des Études Byzantines, 3,* 1976 S. 39-41.; Ch. K. Papastathis: Zur Verbreitung der Hexabiblos des Harmenopoulos im slawischen Raum. *Balkan Studies,* 17 (1976) S. 67–78.; G. Stadtmüller: *Geschichte Südosteuropas.* München 1976.; L. Waldmüller: *Die ersten Begegnungen der Slawen mit dem Christentum und den christlichen Völkern.* Amsterdam 1976.; Ch. K. Papastathis: *L'oeuvre législative de la mission Cyrillo-Méthodienne en Grande Moravie.* Théssalonique 1978.; D. Angelov: *Obstestvo i obstestvenata misal v srednovekovna Balgariaja (IX – XIV v.).* Sofia 1979.; F. McGraw Donner: *The Early Islamic Conquests.* Princeton 1981.; V. Besevliev: *Die protobulgarische Periode der bulgarischen Geschichte.* Amsterdam 1981.; I. Bosilov: *Tzar Simeon Veliki /893-927/.* Sofia 1983.; J. Irmscher: „Nuova Roma" o „Seconda Roma" – renovatio o translatio? In: *Da Roma alla Terza Roma. Documenti e studi.* Roma – Costantinapoli – Mosca. Napoli 1983. S. 233-240.; F. Milkova: La „loi pour juger les gens" premičre loi écrite bulgare et slave. *Revue historique de droit français et étranger* 64 (1986); Jelavich B.: *A Balkán története. I–II.* (Die Geschichte des

* Prof. Dr. Gábor Hamza; Juristische Fakultät, Loránd-Eötvös-Universität Budapest, Ungarn; ordentliches Mitglied der Ungarischen Akademie der Wissenschaften.

Balkans. I–II.) Budapest 1996.; P. Garde: *Les Balkans.* Paris 1999[3].; A. Avenarius: *Die byzantinische Kultur und die Slawen. Zum Problem der Rezeption und Transformation (6. bis 12. Jahrhundert). Veröffentlichung des Instituts für Österreichische Geschichtsforschung. Bd. 35.* Wien – München 2000.; C. G. Pitsakis: Un demisiècle d'études sur Constantin Harménopoulos: un bilan. In *Byzantine Law. Proceedings of the International Symposium of Jurists. Thessaloniki 10–13 December 1998.* (Ed. by Ch. Papastathis) Thessaloniki 2001. S. 131–164.; P. Garde: *Le discours balkanique. Des mots et des hommes.* Paris 2004.; G. Hamza: *Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé moderne.* Budapest 2005. S. 80 f.; ders.: *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition.* Budapest 2009. S. 160-164.; ders.: *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano.* Santiago de Compostela 2013. S. 159-163. und D. Ceccarelli Morolli: *Il diritto dell'Impero Romano d'Oriente. Introduzione alle fonti e ai protagonisti.* Pontificio Istituto Orientale (PIO) KANONIKA 21 / 2016. Roma, 2016.

I. Einführung

1. Auf der Balkanhalbinsel und in den Donaufürstentümern (Moldau bzw. Moldawien und Walachei) wirkte das römische Recht durch den politischen Einfluß des Byzantinischen Reiches *(Pars Orientis Imperii Romani)* in Form des byzantinisch-römischen Rechts *(ius Graeco-Romanum* oder *ius Byzantinum)* fort. Auch auf den Gebieten des heutigen Griechenlands, Bulgariens, Serbiens, Albaniens, Mazedoniens und in den rumänischen Fürstentümern (Donau-Fürstentümern) Moldau bzw. Moldawien und Walachei entfalteten die *Eklogé tón nomón* und der *Nomos geórgikos* breite und maßgebliche Wirkung.

Später, ab dem 14. Jahrhundert, nahmen drei weitere wichtige Quellen maßgeblichen Einfluß auf das Recht der dort entstehenden Staaten: erstens der *Nomokanon* (eine Sammlung kirchlicher und weltlicher Rechtsnormen) des Pseudo-Phótios[1] vom Ende des 9. Jahrhunderts; zweitens das im Jahre 1335 entstandene *Syntagma tón theión kai hierón nomón*, genannt auch *Syntagma kata stoicheion* („Alphabetisch geordnete Rechtssammlung") des Mönches Matthaios Blastarés aus Thessaloniki, welches neben dem *Nomokanon* des Pseudo-Phótios die wichtigsten Regeln des *Procheiron* und der *Basiliken* beinhaltet;[2] und drittens das sechsbändige *Procheiron nomón* (genannt *Hexabiblos*) des hochangesehenen Stadtrichters Konstantinos Harmenopoulos aus Thessaloniki vom Jahre 1345, das das Zivil- und Strafrecht des *Procheiron* des Basilios I. (der Mazedonier) (867–886), Teile der Basiliken und die damalige Rechtspraxis enthält.

2. Die Rezeption und das Fortleben (Fortwirken) der byzantinischen Gesetzbücher bzw. der sonstigen Rechtsquellen *(fontes iuris)* in den Ländern der Balkanhalbinsel und in den Donaufürstentümern wurden dadurch erleichtert, dass diese Werke sämtliche Bereiche des Rechtslebens erfaßten. Das materielle Recht wurde nämlich in den byzantinischen Rechtsquellen zusammen mit dem Verfahrensrecht und dem Recht über die Struktur und die Funktion der weltlichen und kirchlichen Gerichte geregelt. Ebenso wenig wurde das Privatrecht vom Finanz-, Straf- und Kirchenrecht getrennt dargestellt.

II. Bulgarien im Mittelalter

Schrifttum

J. K. Jireček: *Geschichte der Bulgaren.* Prag 1876.; H. Oroschakoff: Ein Denkmal des bulgarischen Rechts. *ZVglRWiss* 33 (1915) S. 210–251.; G. Fehér: *Bulgarisch-ungarische Beziehungen in den V-XI. Jahrhunderten.* Budapest 1921.; St. Bobčev: Droit romain et byzantin dans l'ancienne Bulgarie. *Annuaire de l'Université de Sofia. Faculté de droit* 21 (1926) S. 3–122.; St. Runciman: *History of the First Bulgarian Empire.* London 1930.; V. Ganeff: Le droit byzantin et l'ancien droit d'obligation bulgare. In *Studi A. Albertoni. III.* Padova 1938.; I. Dujcev: Die Responsa Nicolai I papae ad consulta Bulgarorum als Quelle für die bulgarische Geschichte. In *Festschrift zur Feier des zweihundertjährigen Bestandes des Haus- Hof- und Staatsarchivs 1.* Wien 1949. S. 349-362.; F. Dölger: Bulgarisches Zarentums und byzantinisches Kaisertum. In *Byzanz und die europäische Staatenwelt.* (Hrsg. von F. Dölger) Ettal 1952. S. 140–158.; P. Pritsak: *Die bulgarische Fürstenliste und die Sprache der Protobulgaren.* Wiesbaden 1955.; D. Angelov – M. Andreev: *Istoria na blgarskata drsava i pravo.* Sofija 1959.; G. Sergheraert: *Simeon le Grand (892–927).* Paris 1960.; *Zakon Sudnyj Ljudem. Kratkoj redakcii.* (Ed. M. Tichomirov – L. Milov) Moskva 1961.; Br. Paradisi: Il diritto romano nell'alto medioevo, le epistole di Nicola I e un'ipotesi del Conrat. In *Studia Gratiana 11 (1967)* S. 209-252. (erneut: In Br. Paradisi: Studi sul medioevo giuridico, I. Roma 1987. S. 225-262.; V. Prochazka: Le Zakon sudn'ij ljudem et la Grande Moravie. *Byzantinoslavica,* 28 (1967) S. 359–375.; I. Dujčev: *Medievo Bizantino-Slavo. I–III.* Roma 1965–1971.; M. Andreev – D. Angelov: *Istoria na blgarskata drsava i pravo feodalisma.* Sofija 1972.; G. Cankova-Petkova: Contribution au sujet de la conversion des Bulgares au Christianisme. *Byzantion-Bulgarica,* 4 (1973) S. 37 ff.; V. Gjuzelev: Allgemeine Charakteristik und Etappen der Errichtung der militärischen und administrativen Verwaltung des Ersten Bulgarischen Staates (VII bis XI Jahrhundert). In *Études Balcaniques tom. 3. 1978* S. 71-77.; D. Lang: *The Bulgarians from Pagan Times to the Ottoman Conquest.* Southampton 1976.; L. Heiser: Die Responsa ad consulta Bulgarorum des Papstes Nikolaus I. (858-867). Ein Zeugnis päpstlicher Hirtensorge und ein Dokument unterschiedlicher Entwicklungen in den Kirchen von Rom und Konstantinopel. In *Trierer theologische Studien, 36, Trier 1979.*; V. Gyuzelev: *The Protobulgarians.* Sofia 1979.; D. Angelov: *Die Entstehung des bulgarischen Volkes.* Berlin 1980.; R. Čolov: Le droit romain en Bulgarie médiévale: diffusion, penetration, confusion ou interaction? In *Roma Costantinopoli Mosca. I.* Napoli 1983. S. 399–404.; A. Popov: Srednovekovnata stolitsa Tirnovo v titulatura na patriarsi i tsare. In *Preslav 3 sbornik (red. T. Totev)* Varna 1983 S. 283-289.; V. Tapkova-Zaimova: Les idées de Rome et de la Seconde Rome chez les Bulgares. In *Roma Costantinopoli Mosca. I.* Napoli 1983.; Ch. Papasthatis: On the Application of Western Canon Law Provisions in Medieval Bulgaria. A note on the LXXV chapter of the „Responsa Nicolai Papae. In *MNEME G. A. Petropoulo (1897–1964). vol. B.* Athena 1964. S. 197–200.; R. J. Crampton: *A Concise History of Bulgaria.* Cambridge 1997.; G. Hamza: *Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé moderne.* Budapest 2005. S. 81 f.; ders.: *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition.* Budapest 2009. S. 164 f. und ders.: *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano.* Santiago de Compostela 2013. S. 163.

3. In Bulgarien machte sich der Einfluß des byzantinisch-römischen Rechts *(ius Graeco-Romanum* bzw. *ius Byzantinum)* während des Ersten Bulgarischen Reiches (681–1018) bemerkbar. Besondere Bedeutung hat die Tatsache, dass Papst Nikolaus I. (858–867) dem zum christlichen Glauben konvertierten bulgarischen Volk – unter der Herrschaft von Boris I. (852–888) – an Rom orientierte Gesetze zusandte. Bezeugt wird dieses geschichtliche Ereignis durch die *Responsa Nicolai I papae ad consulta Bulgarorum* vom Jahre 864.

---

[1] Photios war Patriarch von Konstantinopel und ein Zeitgenosse der beiden Kaiser Michael III. (842–867) und Basileios I. (867–886). Photios verfaßte die *Epanagoge*, in der er die Doktrin der *symphonia* („Einklang") zwischen *basileia* (auf Lateinisch: *imperium*) und *hierosyne* (auf Lateinisch: *sacerdotium*) dargelegt hat. Lange Zeit ging man davon aus, dass auch der *Nomokanon*, die erste umfassende Sammlung des Kirchenrechts, von ihm verfaßt wurde. Deshalb wird der *Nomokanon* als „Nomokanon des Pseudo-Photios" bezeichnet.

[2] Die Erstellung des *Syntagma* des Matthaios Blastarés war deswegen erforderlich, weil der byzantinische Kaiser Andronikos Paläologos III. (1328–1341) im Jahre 1329 durch eine umfassende Gerichtsreform die weltlichen Gerichte mit den kirchlichen Gerichten vereinigte. Die Zuständigkeit der an diesen Gerichten tätigen Richter *(katholikoi kritai)* erstreckte sich sowohl auf kirchliche wie auch auf weltliche Angelegenheiten.

Grundlegende Bedeutung für die bulgarische Rechtsentwicklung hatte die *Eklogé tón nomón.* Ihre altbulgarische Übersetzung diente als Quelle für das älteste slawische Gesetz, das aus dem 9. Jahrhundert stammende *Zakon sudnij liugiem* („Verhaltensgesetz für die Menschen"). Ebenso wichtig war der Nomokanon des Ióhannés Scholastikos, die *Synagógé* („Sammlung"). Im zweiten Bulgarischen Reich (1185–1396) verwendete man neben dem lokalen (örtlichen) Gewohnheitsrecht *(consuetudines, ius consuetudinarium)* die bulgarische Version des *Syntagma kata stoicheion* von Matthaios Blastarés.

4. Was das Fortleben bzw. Fortbestehen des römischen Rechts auf dem Gebiet des öffentlichen Rechts *(ius publicum)* betrifft, soll folgendes erwähnt werden: Zum Anlaß seiner Krönung nahm Simeon I., genannt „der Große" (893-927) im Jahre 913 den Zarentitel (d.h. den Kaisertitel) – in welchem sich die römische Reichsidee widerspiegelte – erst noch (nur) als Mitherrscher des Byzantinischen Reiches an. Die künftigen bulgarischen Zaren, die bis zum Zusammenbruch des ersten Bulgarischen Reiches im Jahre 1018 und nach dem Wiedererstehen des Bulgarischen Reiches herrschten, hielten sich geradeweg für die rechtmäßigen Erben des (Oströmischen) Byzantinischen Reiches *(Pars Orientis Imperii Romani)*.

Da sie auf diese Weise die Legitimation für ihr Zarenreich vom Römischen Reich *(Imperium Romanum)* ableiteten, nannten sie die Hauptstadt ihres Reiches *Veliko Trnovo (Tirnovo)* demgemäß das „Neue Rom" *(„Nea Roma")*.

5. Am Ende des 14. Jahrhunderts wurde das zweite Bulgarische Reich von den Osmanen zerschlagen[3] und verlor seine Unabhängigkeit bzw. Souveränität. Dies führte dazu, dass Bulgarien (im Gegensatz z.B. zu den rumänischen Fürstentümern d.h. Donaufürstentümern, Moldau bzw. Moldawien und Walachei) seine Eigenständigkeit sogar im Bereich des Rechts weitgehend verlor.

III. Bulgarien im modernen Zeitalter

Schrifttum

L. Léger: *La Bulgarie.* Paris 1885.; C. L. Lemouche: *La Bulgarie dans le passé et le présent.* Paris 1892.; L. de Launay: *La Bulgarie d'hier et de demain.* Paris 1912.; V. Ganev: Istoric'esko razvit'ije na trgovskoto pravo. *Gog'isnyik na SU Jur. Fak.,* 12 (1915–1916); G. Ancel: *L'Unité de la politique bulgare (1870–1919).* Paris 1919.; Gy. Balanyi: *A Balkán-probléma fejlődése a párizsi congressustól a világháború kitöréséig (1856–1914).* (Die Entwicklung der Balkan-Frage vom Kongreß von Paris bis zum Ausbruch des Weltkrieges [1856–1914]) Budapest 1920.; A. Kayser: *La nouvelle Bulgarie.* Paris 1922.; F. Schöndorf: *Einführung in das geltende slawische Recht 1. Bulgarien.* Leipzig – Berlin 1922.; G. Destons: *La Bulgarie aprčs le traité de Neuilly.* Paris 1930.; A. Kojucharoff: Die Scheriatsgerichte in Bulgarien. *ZOR N.F.* 5 (1938/1939) S. 671–680.; S. Evans: *A Short History of Bulgaria.* London 1960.; D. Angelov – A. Andrejev: *Istoria bolgarskogo gosudarstva i prava.* (Perevod). Moskva 1962.; R. Sacco: Il sustrato romanistico del diritto civile nei Paesi socialisti. *RDC* 15 (1969) S. 115–131.; J. F. Brown: *Bulgaria under Communist Rule.* New York 1970.; M. Andrejev: *Istoria na blgárskáta bursoásná drsáva i pravo.* Sofia 1975.; E. Kirstchera – P. Bohata: Ausgewählte Probleme des neuen bulgarischen Arbeitsgesetzbuches von 1986. *Jahrbuch für Ostrecht,* 38 (1987) S. 381–402.; G. Ajani: *La proprietŕ delle organizzazioni sociali nel diritto dei paesi socialisti.* Milano 1988.; R. Sacco: The Romanist Substratum in the Civil Law of the Socialist Countries. *Review of Socialist Law,* 14 (1988) S. 65–86.; M. Manolova: Kodifikácija bolgarskogo bursoasnogo prava. In *Velké Kodifikace. II.* Praha 1989. S. 13–22.; G. Ajani: Continuity and Discontinuity of Law in Times of Social Revolution: the Case of Central and Eastern Europe. In *Italian National Reports to the XIVth International Congress of Comparative Law.* Athens 1994. Milano 1994. S. 1–14.; ders.: La circulation des modčles juridiques dans le droit post-socialiste. *RIDC* 46 (1994) S. 1087–1105.; ders.: By Chance and Prestige: Legal Transplants in Russia and Eastern Europe. *AJCL* 43 (1995) S. 93–117.; K. sredkova: Das bulgarische Arbeitsgesetzbuch auf dem Wege der Reformen. Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht 9 (1995) S. 253-262.; T. Kamenova: Civil Law in Bulgaria: The Relationship between International and Domestic Law and the Impact on Civil Law (with Special Emphasis on the Law of Obligations and Developments in Intellectual Property). In *The Revival of Private Law in Central and Eastern Europe. Essays in Honor of F. J. M. Feldbrugge.* (Ed. by G. Ginsburgs et alii) The Hague – London – Boston 1996. S. 541–556.; P. Popov: Das Handelsgesetzbuch vom Jahre 1897. In *100 Jahre Handelsgesetzbuch.* (Hrsg. von M. Paschkov und P. Popov) Hamburg 1998. S. 15 ff.; I. L. Aladschov: Die Novellierung des bulgarischen Konkursrechts. *OsteuropaR,* 48 (2002) S. 28 ff.; G. Hamza: Characteristic Features of the Codification of Civil (Private) Law in Central and Eastern Europe. In *Studi in memoria di V. E. Cantelmo.* I. Napoli 2003. S. 891–905.; V. Panova: Bulgaria di fronte all'integrazione europea e la globalizzazione. Roma e America. *Diritto Romano Comune*, 15 (2003) S. 233–238.; G. Hamza: *Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé moderne.* Budapest 2005. S. 81 f.; ders.: New Trends of Codification of Civil (Private) Law in Central and Eastern Europe. In *International Symposium. International Cooperation in the Field of Legal Studies and an Agenda for Comparative Law Studies – Experiences of Legal Assistance to Countries in Transition – May 29, 2004. Tokyo, Japan.* Center for Asian Legal Exchange. Graduate School of Law. Nagoya University. Nagoya 2005. S. 89–111.; ders.: Continuity and Discontinuity of Private /Civil/ Law in Eastern Europe after World War II. *FUNDAMINA,* 12 (2006) S. 48–80.; ders.: Le nuove codificazioni privatistiche nei Paesi dell'Est europeo: Continuitŕ e discontinuitŕ. *Vita notarile,* n. 3 (2006) S. 1209–1237.; J. Zidarova – V. Stanceva-Minceva: Gesetzbuch über das Internationale Privatrecht der Republik Bulgarien. *RabelsZ* 71 (2007) S. 398–455.; G. Hamza: *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition.* Budapest 2009. S. 465-469. und ders.: *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano.* Santiago de Compostela 2013. S. 417-420.

6. Während der fast fünf Jahrhunderte andauernden osmanischen Herrschaft verwendete die orthodoxe Kirche, welche auf weiten Gebieten nicht zu unterschätzende Autonomie bzw. Eigenständigket besaß, das *Syntagma kata stoicheion* von Matthaios Blastarés und die *Hexabiblos* des Konstantinos Harmenopoulos.

In dem auch auf dem Gebiet des heutigen Bulgarien in Kraft gesetzten Kodex privatrechtlichen Inhalts *(Medjelle)* wurde versucht, das aufgrund der osmanischen Besetzung vorherrschende islamische Recht *(Schari'a)* mit den Prinzipien der europäischen Rechtsordnungen bzw. Rechtssystemen (vor allem mit der des französischen *Code civil* und des *Code de commerce*) in Einklang zu bringen. Die *Medjelle* baut daher nicht unmittelbar auf dem römischen Recht auf.

7. Mit dem Erlangen der Unabhängigkeit Bulgariens[4] wurden wichtige Teile bzw. Bereiche des bulgarischen Privatrechts

[3] Die Osmanen hatten im Jahre 1393 Trnovo, die Hauptstadt und einige Jahre später ganz Bulgarien militärisch erobert.

[4] Der Prozeß des Erlangens der Souveränität Bulgariens dauerte von 1878 bis 1908. Ostrumelien geriet erst im Jahre 1885 unter die Herrschaft des Fürstentums Bulgarien. Der Herrscher (Fürst) von Bulgarien, Ferdinand I. (1887–1918), nahm den Zarentitel im Jahre 1908 an. In diesem Jahre erlangte Bulgarien seine uneingeschränkte Souveränität vom Osmanischen Reich. Bulgarien erklärte einseitig seine vollständige Unabhängigkeit vom Osmanischen Reich am 22. September 1908.

gesetzlich geregelt. Das Gesetz über Schuldverhältnisse und Verträge wurde im Jahre 1892 und das Gesetz über Vermögen, Eigentum und Dienstbarkeiten im Jahre 1904 angenommen. Als Modell für diese beiden Gesetze diente hauptsächlich der italienische *Codice civile* vom Jahre 1865 und in geringerem Maße der spanische *Código civil* vom Jahre 1889. Weitere Gesetze aus dieser Zeit sind das Gesetz über das Erbrecht vom Jahre 1890, das Gesetz über die Personen vom Jahre 1907 und das Gesetz über Privilegien und Hypotheken vom Jahre 1908.

8. Im März 1915, d.h. einige Monate vor Königreich Bulgariens Eintritt in den Ersten Weltkrieg[5], begann man mit der Kodifikation des bürgerlichen Rechts bzw. Privatrechts. Im Justizministerium in Sofia wurde eine Kodifikationskommission aufgestellt. Wegen der Kriegsereignisse konnte aber die Kodifikationskommission ihre Arbeit nicht zu Ende bringen. Die Redaktoren der Kodifikationskommission konnten nicht einmal den Entwurf eines bulgarischen Bürgerliches Gesetzbuches fertigstellen.

9. In der Zwischenkriegszeit wurde die umfassende Reform der bulgarischen Rechtsordnung *(ordo iuris)* fortgeführt. Im Jahre 1935 wurde der Landeskodifikationsrat aufgestellt, in dessen Rahmen die Kommission Nr. 1 damit beauftragt wurde, die Kodifikation des bürgerlichen Rechts vorzubereiten. Die Mitglieder dieser Kommission hatten vor, bei der Redaktion eines bulgarischen Bürgerlichen Gesetzbuches die deutsche Pandektistik bzw. Pandektenwissenschaft d.h. das Pandektenrecht zu berücksichtigen. Dieser Plan wurde jedoch aus unterschiedlichen Gründen nicht verwirklicht.

10. Bulgarien hatte einige Jahre nach dem Zweiten Weltkrieg, im Jahre 1951 alle vor dem 9. September 1944 verabschiedeten Gesetze bzw. Verordnungen des Landes in ihrer Gesamtheit aufgehoben. Diese Maßnahme führte im Bereich der Rechtsanwendung, insbesondere in der Gerichtspraxis zu großen Schwierigkeiten.

Auch nach dem Zweiten Weltkrieg wurde in Bulgarien kein Zivilgesetzbuch fertiggestellt. Stattdessen kam es lediglich zur Verabschiedung von Teilkodifikationen. Erwähnenswert sind in dieser Hinsicht das im Jahre 1949 promulgierte Gesetz über das Erbrecht *(Zakon za nasledsvoto),* das im gleichen Jahre angenommene Gesetz über die Personen und die Familie, das Gesetz über Schuldverhältnisse und Verträge vom Jahre 1950 *(Zakon za zadălženijata i dogovorite)* und das im Jahre 1951 verabschiedete Gesetz über das Eigentum (*Zakon za sobstvenosta*).

11. Dieses Gesetz regelt entgegen seinem Namen das gesamte Sachenrecht *(ius reale)*.[6] In ihm findet man etliche Konstruktionen, die unter Vermittlung der Pandektistik auf das römische Recht zurückgehen. Dies bezieht sich vor allem auf das Erbbaurecht *(superficies),* auf den Nießbrauch *(ususfructus)* und auf die Erbpacht *(emphyteusis)*. Nach dem Systemwechsel wurde das Eigentumsgesetz von den ideologisch gefärbten Elementen bereinigt. Das Eigentumsgesetz wurde durch Spezialgesetze über Agrarboden im Jahre 1991 und über staatliches bzw. kommunales Eigentum im Jahre 1996 ergänzt.

12. Im Jahre 1963 wurde ein Gesetz über die Verträge zwischen den sozialistischen wirtschaftlichen Organisationen verabschiedet. Das Gesetz über das – weitgehend beschränkte – Eigentum der (Staats)Bürger stammt aus dem Jahre 1973.

Das im Jahre 1949 angenommene Gesetz über die Personen und die Familie wurde im Jahre 1968 weitgehend von einem Familienkodex ersetzt. Dieser Familienkodex wiederum galt bis zum Inkrafttreten des neuen Familiengesetzbuches vom Jahre 1985.

Das Arbeitsgesetzbuch wurde im Jahre 1986 verabschiedet.

13. Schon vor der Wende begann die Redaktionsarbeit zu einem bulgarischen Zivilgesetzbuch. Der Entwurf vom Jahre 1985 wurde jedoch nicht promulgiert. Bei den Kodifikationsbestrebungen nach der Wende in den Jahren 1989/1990 berücksichtigen die Redaktoren (Kodifikatoren) in erster Linie die deutsche zivilrechtliche Tradition. Daneben findet das neue niederländische Bürgerliche Gesetzbuch *(Nieuw Burgerlijk Wetboek)* besondere Beachtung.

14. Am 4. Mai 2005 wurde das Gesetz über das internationale Privatrecht (IPR) verabschiedet, dessen Redaktoren den jüngsten Tendenzen der internationalen IPR-Doktrin weitgehend Rechnung tragen.

15. Das Handelsrecht dagegen wurde im Jahre 1897 kodifiziert. Bei der Redaktion des bulgarischen Handelsgesetzbuches wurde weitgehend dem ungarischen Handelsgesetzbuch (auf Ungarisch: *Kereskedelmi Törvénykönyv*) vom Jahre 1875 (Gesetzesartikel XXXVII) Rechnung getragen. Der italienische *Codice di commercio* vom Jahre 1882 wurde hingegen bei der Regelung des Konkursrechts und des Seehandelsrechts *(diritto marittimo)* – das im Jahre 1908 in einem eigenständigen Gesetz geregelt wurde – berücksichtigt. Das ungarische Handelsgesetzbuch besaß nämlich keinen Teil über das Seehandelsrecht.

16. Am 9. November 1951 wurden durch Gesetz *(Zakon za otmenjavane na vsički zakoni)* alle Gesetze aus der Zeit vor dem 9. September 1944 in ihrer Gesamtheit aufgehoben. Demgemäß verlor auch der Handelskodex vom Jahre 1897 seine Geltung. Als Ersatz dienten die Bestimmungen des Gesetzes über Schuldverhältnisse und Verträge vom Jahre 1950.

17. Nach der Wende wurden die Handelsgesellschaften gesetzlich neu geregelt, wobei – wie auch im Bereich des Zivilrechts – die deutsche handelsrechtliche Tradition weitgehend weitergeführt wurde. Das Handelsgesetzbuch ist stufenweise verabschiedet worden: die ersten beiden Teile im Jahre 1991, der Dritte Teil im Jahre 1996 und der Vierte Teil schon vorher, im Jahre 1994. Das Handelsgesetzbuch beinhaltet neben den Vorschriften in Bezug auf Kaufleute und Handelsgesellschaften auch das Insolvenz- und Konkursrecht.

---

[5] Bulgarien hat am 14. Oktober 1915 Serbien den Krieg erklärt.

[6] U. Drobnig: Das bulgarische Gesetz über das Eigentumsrecht vom 8. 11. 1951. *RabelsZ* 18 (1953) S. 692-698. und Fr. Schöndorf: *Einführung in das geltende slavische Recht (Privat- und Prozessrecht) in rechtsvergleichender Darstellung, Bd I: Bulgarien.* Leipzig – Berlin 1992.

Das bulgarische Handelsgesetzbuch hat aber im Gegensatz zum tschechoslowakischen Handelsgesetzbuch vom Jahre 1991 – keine Regelungen in Bezug auf das Vertragsrecht. Das Vertragsrecht wird einheitlich, d.h. ohne Unterscheidung zwischen zivilrechtlichen und handelsrechtlichen Verträgen, geregelt.[7]

18. Das Handelsgesetzbuch (HGB) wurde im September 2000 weitgehend modifiziert. Die Modifizierungen betrafen vor allem die Regelung der verschieden Formen der Handelsgesellschaften.

19. In der bulgarischen Zivilrechtswissenschaft bzw. Doktrin des Zivilrechts ist der Einfluß der deutschen Pandektistik ununterbrochen vorzufinden. Der wohl bedeutendste Anhänger der bulgarischen Privatrechtswissenschaft pandektistischer Prägung war J. Fadenhecht (1873–1953), der seine juristischen Studien in Leipzig und Göttingen absolvierte und in den Jahren zwischen 1897 und 1939 in Sofia Professor für bürgerliches Recht war. Fadenhecht war ein auch international hochgeschätzter, renommierter Zivilist.

20. Vom Einfluß der deutschen Pandektistik (Pandektenwissenschaft) zeugt auch das reiche wissenschaftliche Śuvre von P. Dančov (1857–1913) und S. Angelov (1881–1925), den ausgezeichneten und auch international hochgeschätzten Kennern des römischen Rechts und des bürgerlichen Rechts, die ihre Studien ebenfalls an deutschen Universitäten absolvierten. An der juristischen Fakultät in Sofia wurde die Rechtsgeschäftslehre (Doktrin des *negotium iuridicum*) als Hauptkolleg gelesen, was beredtes Zeugnis vom starken Einfluß der deutschen Pandektistik (Pandektenwissenschaft) ablegt.

[7] Demzufolge verfolgt der bulgarische Gesetzgeber das dualistische Konzept (*concept dualiste*) mit Einschränkungen.

Some Remarks on the Issue of Suicide in Roman Criminal Law

Tamás Nótári *

Abstract

This paper analyses the issue of suicide in the sources of Roman law, primarily criminal law. In the course of that it will focus on the following key points: after a few introductory remarks outlining the Roman custom of committing suicide, first it will discuss the judgement of suicide in criminal law in general; then it will examine the appearance of the culprit's suicide as grounds for exclusion of culpability (and limits thereof) in sources in imperial law; finally, it will briefly analyse the legal position of suicide in military criminal law.

Key words: *suicide; Roman criminal law; Roman criminal procedure.*

Introductory remarks

When examining the terminology, the following terms for suicide can be found in Roman sources: *mortem sibi consciscere*,[1] *manus sibi inferre*[2] (cf. Gr. *autokheiria*), *mors voluntaria*.[3] There are more general phrases than the above: *vitam finire*, *se occidere* and *se interficere*, including terms that refer to the form of committing the act, i.e., jumping into the depth in the first one and self-hanging in the second one, *se praecipitare*[4] and *vitam suspendio finire*.[5]

In this respect it is worth briefly considering the forms of committing suicide. Regarding slaves we can read mostly about throwing themselves into the depth.[6] Use of a rope as means of suicide made death especially dishonourable. Servius attaches the comment to the relevant locus in *Aeneis*, Vergilius's epic – also serving to legitimise Augustus[7] – that in this case the *pontifices*[8] refused burial of the dead person: *"cautum fuerat in pontificalibus libris, ut qui laqueo vitam finisset, insepultus abiciatur"*.[9]

It is not by chance that Ulpianus's *responsum* – by referring to Neratius – prohibits mourning for enemies and persons sentenced to death owing to high treason and those who have committed suicide by a rope, while this prohibition applies only to those out of persons who choose other means that voluntarily put an end to their life not because of being weary of life but owing to pangs of conscience felt over the crime committed by them: *"Nec solent autem lugeri, ut Neratius ait, hostes vel perduellionis damnati nec suspendiosi nec qui manus sibi intulerunt non taedio*

* Dr. habil. Tamás Nótári, Ph.D., Senior Research Fellow, Institute for Legal Studies, Centre for Social Sciences, Hungarian Academy of Sciences, Budapest, Hungary.

1 Ulp. D. 21, 1, 1, 1. *Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto: ex his enim causis iudicium dabimus.*

2 Marci. D. 48, 21, 3 pr. *Qui rei postulati vel qui in scelere deprehensi metu criminis imminentis mortem sibi consciverunt, heredem non habent.*

3 Diocl. C. 6, 22, 2, 1. *Quod si futurae poenae metu voluntaria morte supplicium antevenit, ratam voluntatem eius conservari leges vetant.*

4 Diocl. C. 6, 22, 2. *Si is, qui tecum uxorem tuam heredem scripsit, quando testamentum ordinavit, sanae mentis fuerit nec postea alicuius sceleris conscientia obstrictus, sed aut impatiens doloris aut aliqua furoris rabie constrictus se praecipitem dedit, euisque innocentia liquidis probationibus commendari potest a te, adscitae mortis obtentu postremum eius iudicium convelli non debet.*

5 Vandenbossche, A.: *Rechereches sur le suicide en droit romain.* Annuire de l'Institut de Philologie et d'Histoire Orientales et Slaves 12. Bruxelles 1952. 472[3]; Battaglini, M.: *Libertá e determinazione nel suicidio in Roma antica.* In: *Scritti G. Ambrosini, I.* Milano 1970. 94. ; Wacke, A.: *Der Selbstmord im römischen Recht und in der Rechtsentwicklung. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 1980. 41.

6 Wacke 1980: 45.

7 On these tendencies see Heinze, R. : *Virgils epische Technik.* Leipzig 1915; Bailey, C.: *Religion in Virgil.* Oxford 1935; Büchner, K.: *Der Schicksalsgedanke bei Vergil.* Freiburg im Breisgau 1945; Boyancé, P. : *La religion de Vergil.* Paris 1963; Wallace-Hadrill, A.: *The Golden Age and Sin in Augustan Ideology. Past & Present* 1982. 19–36; Kühn, W.: *Götterszenen bei Virgil.* Heidelberg 1971; Pötscher, W.: *Vergil und die göttlichen Machte. Aspekte seiner Weltanschauung.* Hildesheim–New York 1977; Monti, R. C.: *The Dido Episode and the Aeneid. Roman Social and Political Values in the Epic.* Leiden 1981; Williams, G.: *Technique and Ideas in the Aeneid.* New Haven–London 1983; Hardie, Ph. R. : *Virgil's Aeneid: Cosmos and Imperium.* Oxford 1986; Wifstrand Schiebe, M.: *Vergil und die Tradition von den römischen Urkönigen.* Wiesbaden 1997; Adler, E.: *Vergil's empire : political thought in the Aeneid.* Maryland 2003; Reed, J. D.: *Virgil's gaze: nation and poetry in the Aeneid.* Princeton 2007.

8 On the *pontifices see* Nótári T.: *Római köz- és magánjog.* Kolozsvár 2011. 468.

9 Verg. *Aen.* 12, 593–603. *Accidit haec fessis etiam fortuna Latinis / quae totam luctu concussit funditus urbem. / Regina ut tectis venientem prospicit hostem / incessi muros, ignis ad tecta volare, / nusquam acies contra Rutulas, nulla agmina Turni, / infelix pugnae iuvenem in certamine credit / extinctum et subito mentem turbata dolore / se causam clamat crimenque caputque malorum, / multaque per maestum demens effata furorem / purpureos moritura manu discindit amictus / et nodum informis leti trabe nectit ab alta.*

vitae, sed mala conscientia."[10] This manner of death seemed unnatural to the Greek and the Romans because they believed that by squeezing air passages the soul cannot leave the body in a proper manner and so cannot go over to the other world.

Natural restrictions were placed on committing the act by poison by the fact that the Antiquity knew only a very limited number of poisons that produced its impact quickly and painlessly; however, they included *cicuta* (water hemlock), which served as means in numerous cases of murder and suicide, although selling poisons was strictly punished by *lex Cornelia de sicariis et veneficis*, i.e., it was judged by it identically as murder.[11] The dagger and the sword were regarded as the noblest form of voluntarily chosen death; however, it must be added that in ancient times suicide was a much more complicated and painful act by all means requiring greater moral strength than nowadays.[12]

As a tradition that cannot be supported by specific legal sources, it is worth briefly looking at the archaic age of Rome in terms of judging suicide. The fifth king of Rome, Tarquinius Priscus, to keep citizens who intended to escape from his despotism at the expense of their life from committing suicide, enacted a regulation much stricter than the prohibition of suicide usual in the archaic Roman law, corresponding with Greek customary law, which we can learn of also from Servius's *Aeneis* commentary[13]. As in view of the king's certain measures – during the construction of the *cloaca* – numerous Roman citizens took their own life, the ruler ordered that the corpse of suicides had to be strung up to the cross to let birds and wild animals clear away the dead bodies.[14] Cassius Hemina – as we learn of it also from Servius – in his *Annales* allegedly noted that this was the first occasion in Roman history when suicide was deemed as a contemptible and punishable act since thereby the perpetrator deprived the state from one citizen.[15]

On the basis of the narratives of historians it is possible to declare that from the earliest period of the Republic suicide of persons in non-military *status* was not liable to criminal prosecution; for example, Livius let us know that Appius Claudius and Spurius Coppius, the two *decemviri* who were charged with an act to be punished by death penalty before the popular assembly, to avoid total forfeiture of property affecting also their families, put an end to their life before the sentence was adopted – it should be noted that they were nevertheless not able to avoid forfeiture of property thereby.[16] (Legal regulation of the connection between capital punishment, suicide and forfeiture of property – as we shall see – would be carried out only in the time of Hadrianus.[17]) It is worth mentioning that at the time of the Republic suicide committed in a "shameful" manner, i.e., by self-hanging did not constitute the subject of the facts of a case in criminal law either.[18]

Judging suicide in criminal law

It is highly questionable whether Roman regulation in the classical age affected the legal problems arising in connection with suicide at all or not. Although Quintilianus refers to an alleged law which prescribed that those who wanted to take their own life voluntarily had to show the cause of their decision and the planned manner of committing the act to the *senatus* – and if they had failed to do so, they could not be buried: *"Qui causas voluntariae mortis in senatu non reddiderit, insepultus abiciatur."*[19] Quintilianus's narrative is hardly worth of credit since the account he gives of this alleged law is nothing else than a historical parable for the act carried out by Euphrates the philosopher, who disclosed his intention to commit suicide to emperor Hadrianus and took poison only when the emperor had given authorisation to do so.[20] The information on the one-time law can be considered even less reliable since in the age of Quintilianus suicide committed by free citizens with civil (i.e. military) legal standing were not deemed as punishable, and so Euphrates's case enriched the list of exceptions only. Similarly, we cannot forget that Quintilianus's work entitled *Declamationes* discusses fictitious cases and its purpose is not to provide an authentic historical narrative but merely to enumerate cases, paradigms that can be used in training of orators and are suitable for those who intend to acquire skills of rhetoric.[21]

The statutes of a funeral association from 133/136 AD *(lex collegii funeraticii Lanuvini)* do not allow to provide suicides with proper funeral: *"Item placuit: quisquis ex quacumque causa mortem sibi adsciverit, eius ratio funeris non habebitur."*[22] This regulation can be supposedly attributed to the belief that the soul of suicides will not find peace even in the other world and therefore burying anybody near them should be avoided.[23]

Lex Cornelia de sicariis et veneficis did not contain any provisions to prohibit suicide. Its only locus referring to this subject discusses a case reminding us of *aberratio ictus*: *"In lege Cornelia*

[10] Ulp. D. 3, 2, 11, 3.
[11] Marci. D. 48, 8, 3 pr. *Eiusdem legis Corneliae de sicariis et veneficis capite quinto, qui venenum necandi hominis causa fecerit vel vendiderit vel habuerit, plectitur.*
[12] Hirzel, R. : *Der Selbstmord. Archiv für Religionswissenschaft* 1908. 243.
[13] Serv. *in Verg. Aen.* 12, 607.
[14] Plin. *Nat. hist.* 36, 24.
[15] Serv. *in Verg. Aen.* 12, 607.
[16] Liv. 3, 58.
[17] Cf. C. 9, 50, 1.
[18] Val. Max. *Dicta* 5, 8, 3.
[19] Quint. *Decl.* 4, 337.
[20] Quint. *Decl.* 337.
[21] On Quintilian see Gwynn, A.: S. J.: *Roman Education from Cicero to Quintilian.* New York 1926; Kennedy, G.: *Quintilian.* New York 1969; Laing, G. J.: *Quintilian, the Schoolmaster. The Classical Journal* 1920. 515–534; Leitch, V. B. (ed.): *The Norton Anthology of Theory and Criticism.* New York 2001; Logie, J.: *Quintilian and Roman Authorship. Rhetoric Review* 2003. 353–373.
[22] Riccobono, S.–Arangio Ruiz, V.: *Fontes iuris Romani anteiustiniani*. Florentiae 1940–1943. III. 99.
[23] Wacke 1980: 48.

dolus pro facto accipitur, neque in hac lege culpa lata pro dolo accipitur. Quare si quis alto se praecipitaverit et super alium venerit eumque occiderit… ad huius legis coercitionem non pertinet."[24] Accordingly, no punishment was prescribed for a person who wanted to commit suicide by throwing himself into the depth but in the course of that he fell on somebody else and striking him dead he stayed alive since his act can be classified not as *dolus* but only as *culpa lata*. Paulus emphasises that in cases belonging to the scope of *lex Cornelia de sicariis et veneficis*, *dolus* – contrary to the general rule[25] – is not judged identically as *culpa lata*.

The case when somebody would have been obliged to prevent a third party's suicide but failed to do so constituted the subject of criminal law regulation. By the application of *analogia legis* a slave was obliged to do so on the basis of *senatus consultum Silanianum*. The *senatus consultum Silanianum* originating from 10 A.D. ordered to punish a slave by death who did not try to prevent a violent criminal attempt against his master's life and if he knew about and took part in such an attempt.[26] The law withdraws murder committed by poison, in secret and treacherously from this scope since the slave was not able to know about it and therefore was not able to do anything against it: *"Qui occisus dicitur, si constet eum sibi quoquo modo manus intulisse, de familia eius quaestio non est habenda, nisi forte prohibere potuit non prohibuit."*[27] On the basis of *analogia*, in the same way it was obligatory to punish slaves who albeit saw that their master turned against himself in furious rage and although they could have prevented his act they did not do anything against it: *"Qui occisus dicitur, si constet eum sibi quoquo modo manus intulisse, de familia eius quaestio non est habenda, nisi forte prohibere potuit non prohibuit."*[28] *"Si sibi manus quis intulit, senatus consulto quidem Silaniano locus non est, sed mors eius vindicatur, scilicet ut, si in conspectu servorum hoc fecit potueruntque eum in se saevientem prohibere, poena adficiantur: si vero non potuerunt, liberentur."*[29] Similar obligation bound prison guards in Rome[30] in case of persons in preliminary custody: *"Sed si se custodia interfecerit vel praecipitaverit, militi culpae adscribitur, id est castigabitur."*[31] This obligation binds prison guards the same way since they must prevent the confined person from escaping,[32] and must make sure that nobody should smuggle weapon or poison into the prison.[33] (If they kill the confined person themselves, then their act will naturally be considered *homicidium*, homicide.[34])

The culprit's suicide as grounds for exclusion of culpability (and limits thereof)

Valuable conclusion may be drawn from the description provided by Valerius Maximus, informing us of the death of Caius Licinuis Macer *praetor*. Macer was charged with *crimen repetundarum*, and the office of the president of the quaestio was fulfilled by Cicero. Macer, to save his honour and his family from forfeiture of property, committed suicide. After that Cicero as the president of the *quaestio* did not conduct the proceedings, that is, did not have forfeiture of property announced as second punishment[35] – at the same time, it remains questionable whether Cicero's act was motivated by customary law or only by his own fairness.

According to Tacitus's accounts, in the first centuries of the period of the Roman empire numerous citizens took their own life voluntarily to avoid being sentenced and the shame involved by it as well as forfeiture of property, and accordingly sometimes emperors gave authorisation to those threatened by capital punishment for executing the sentence not pronounced yet on themselves voluntarily.[36] It occurred several times that the culprits of capital offence left significant bequests to the emperor in their testament to induce the *princeps* thereby to grant the option of executing other testamentary provisions.[37] However, in certain cases emperors – especially if they wanted to make up for the deficits of the state treasury – did not dispense with total forfeiture of property even after the voluntary death of the culprit. This custom is well exemplified by the case of Drusus Libo, who was charged with high treason by Trio (the ill-famed *calumniator*), and who wanted to forestall the lawsuit by suicide – after the death of the culprit the charge was invariably maintained, and during conducting the lawsuit emperor Tiberius put the prosecutor in possession of the property of the

[24] Paul. D. 48, 8, 7 pr.
[25] Cels. D. 16, 3, 36. *Dolus culpa aequiparatur.*
[26] Mommsen, Th.: *Römisches Strafrecht.* Leipzig 1899. 630.
[27] Ulp. D. 29, 5, 1, 18.
[28] Paul. *Sent.* 3, 5, 4.
[29] Ulp. D. 29, 5, 1, 22.
[30] See also Eisenhut, W.: *Die römische Gefängnisstrafe.* In: Temporini, H. (Hrsg.): *Aufstieg und Niedergang der römischen Welt*. Hildesheim – New York 1972. I/2. 268.
[31] Mod. D. 48, 3, 14, 3. *Sed si se custodia interfecerit vel praecipitaverit, militi culpae adscribitur, id est castigabitur.*
[32] Mod. D. 48, 3, 14, 2. *Qui si negligentia amiserint, pro modo culpae vel castigantur vel militiam mutant: quod si levis persona custodiae fuit, castigati restituuntur. Nam si miseratione custodiam quis dimiserit, militiam mutat: fraudulenter autem si fuerit versatus in dimittenda custodia, vel capite punitur, vel in extremum gradum militiae datur.*
[33] Marci. D. 48, 3, 4. *Cum agere custodiam vel ferrum venenumve in carcerem inferri passus est, officio iudicis puniendus est: si nescit, ob negligentiam removendus est officio.*
[34] Mod. D. 48, 3, 14, 4. *Quod si ipse custos custodiam interfecerit, homicidii reus est.*
[35] Val. Max. *Dicta* 9, 12, 7–8. *Consimili impetu mortis C. Licinius Macer vir praetorius, Calvi pater, repetundarum reus, dum sententiae diriberentur, Maenianum conscendit. si quidem, cum M. Ciceronem, qui id iudicium cogebat, praetextam ponentem vidisset, misit ad eum qui diceret se non damnatum, sed reum perisse, nec sua bona hastae posse subici, ac protinus sudario, quod forte in manu habebat, ore et faucibus suis coartatis incluso spiritu poenam morte praecucurrit. qua cognita re Cicero de eo nihil pronuntiavit. Igitur inlustris ingenii orator et ab inopia rei familiaris et a crimine domesticae damnationis inusitato paterni fati genere vindicatus est.*
[36] Tac. *Ann.* 11, 3;16, 11;16, 33.
[37] Tac. *Ann.* 16, 11; *Agricola* 43.

deceased.[38] Similar fate fell to Classicus's lot, who was charged with negligent administration of his province, and who wanted to prevent the lawsuit also by suicide – the accusers insisted on conducting the lawsuit; however, enforcement of this possibility was carried out only as an exception – as we learn of from the letter of Plinius maior.[39]

With regard to judging suicide, interesting problems are raised by the criminal procedure conducted in case of crimes sanctioned in accordance with Roman law by death as principal punishment – by exile for life in case of *honestiores* –[40] and by forfeiture of property as second punishment. The testament of a citizen punished by death and forfeiture of property is invalid; instead of both his testamentary and intestate heirs exclusively the *fiscus* will inherit, the children of the condemned person could get a fraction of the property only through "special fairness" of the state to escape from total impoverishment thereby.[41] At the same time, forfeiture of property applied only to the assets owned by the condemned person at the time of passing the judgment,[42] so until he was condemned the accused was able to freely dispose over his goods.[43]

Furthermore, it should be noted that by the death of the accused the criminal procedure also terminated, no death sentence could be passed *post mortem rei*, and, in the absence of principal punishment, pronouncing any second punishment, i.e., originally forfeiture of property did not lie. So, in accordance with this regulation, if the accused forestalling the judgment to come committed suicide successfully during the criminal procedure, then his testament remained in force, and in accordance with that his property devolved not on the *fiscus* but on his testamentary inheritors.[44] We cannot know exactly when this *in fraudem legis* state was ended; however, it is certain that in the period of Hadrianus we can find a perfectly worked out regulation contrary to the above,[45] and his successors, e.g., Antoninus Pius, refined these provisions.[46]

As we can learn from the *Digest* and the *Code of Justinian*, in case of crimes that the law ordered to be punished by death sentence, mine work, animal fight and *deportatio* as principal punishment,[47] and if the perpetrator was caught in the act or the charge was already brought, the accused could not prevent forfeiture of property threatening his inheritors by his suicide. Contrary to earlier practice, execution of forfeiture of property did not require adopting a sentence in compliance with rules of procedure, in other words, evidencing the guilt of the accused; guilt was presumed from purely the fact of suicide as implicit acknowledgement, thereby substantiating lawfulness of the sentence.[48]

At the same time, the legal successors of the accused had the option to request continuation of the lawsuit and thereby to evidence the innocence of the accused, on the one hand, and other motivation of the suicide, which could not be construed as confession, on the other – the following were considered such a cause: weariness of life, painful disease, death of a beloved person, insolvency, boasting, instantaneous mental disturbance and madness.[49] If the inheritors did not waive the option to continue the lawsuit they were lawfully entitled to, and they managed to evidence either the innocence of the accused (or lack of his guilt) or the fact that he committed suicide driven by any of the above-mentioned causes, then the state treasury could not carry out forfeiture of property, i.e., could not take the inheritors' place.[50] This procedure is well exemplified by emperor Hadrianus's *rescriptum* which states that a father was charged with murdering his son and the father put an end to his life during the term of the investigation already. When the case was brought before Hadrianus, the emperor decided that – in

[38] Tac. *Ann.* 2, 27–32; Dio Cass. 57, 15

[39] Plin. *Epist.* 3, 9.

[40] Mommsen 1005.

[41] See Seidel, H.: *Die Konfiskation des römischen Rechts.* Diss. Göttingen 1955. 66. ff

[42] Gaius D. 28, 1, 8, 1. *Bona quae tunc habuit cum damnaretur, publicabuntur.*

[43] Wacke 1980: 53.

[44] Concerning the so called *adoptio fraudis causa facta* see Paul. D. 48, 20, 7, 2. *Ex bonis damnatorum portiones adoptivis liberis, si non fraudis causa facta est adoptio, non minus quam naturalibus concedi aequum est. Fraudis autem causa adoptio facta videtur, etiamsi non in reatu, seddesperatione rerum per conscientiam, metu imminentis accusationis quis adoptet in hoc, ut ex bonis, quae se amissurum cogitat, portio detrahatur.*

[45] D. 48, 21, 3, 5. Also also mentioned: Ulp. D. 28, 3, 6, 7; Papin. D. 29, 1, 34 pr. *Eius militis, qui doloris impatientia vel taedio vitae mori maluit, testamentum valere vel intestati bona ab his qui lege vocantur vindicari divus Hadrianus rescripsit.*; Arr. Menander D. 49, 16, 6, 7. *Qui se vulneravit vel alias mortrem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non aminadvertatur in eum, sed ignomia mittatur, si nihil tale praetendat, capite puniatur. Per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda.*

[46] Marci. D. 48, 21, 3, 8. *De illo videamus, si quis conscita morte nulla iusta causa praecedente in reatu decesserit, an, si parati fuerint heredes causam suscipere et innocentem defunctum ostendere, audiendi sint nec prius bona in fiscum cogenda sint, quam si de criminbe fuerit probatum: an vero omnimodo publicanda sunt.*

[47] Ulp. D. 28, 3, 6, 6. *Sed et si quis fuerit capite damnatus vel ad bestias vel ad gladium vel alia poena quae vitam adimit, testamentum eius irritum fiet, et non tunc cum consumptus est, sed cum sententiam passus est: nam poenae servus efficitur: nisi forte miles fuit ex militari delicto damnatus, nam huic permitti solet testari, ut divus hadrianus rescripsit, et credo iure militari testabitur. qua ratione igitur damnato ei testari permittitur, numquid et, si quod ante habuit factum testamentum, si ei permissum sit testari, valeat? an vero poena irritum factum reficiendum est? et si militari iure ei testandum sit, dubitari non oportet, quin, si voluit id valere, fecisse id credatur.*

[48] Marci. D. 48, 21, 3, 1. *Ut autem divus Pius rescripsit, ita demum bona eius, qui in reatu mortem sibi conscivit, fisco vindicanda sunt, si eius criminis reus fuit, ut, si damnaretur, morte aut deportatione adficiendus esset.*; Marci. D. 48, 21, 3, 3. *Ergo ita demum dicendum est bona eius, qui manus sibi intulit, fisco vindicari, si eo crimine nexus fuit, ut, si convinceretur, bonis careat.*; Diocl. et Maxim. C. 6, 22, 2. *Si is, qui tecum uxorem tuam heredem scripsit, quando testamentum ordinavit, sanae mentis fuerit nec postea alicuius sceleris conscientia obstrictus, sed aut impatiens doloris aut aliqua furoris rabie constrictus se praecipitem dedit, eiusque innocentia liquidis probationibus commendari potest a te, adscitae mortis obtentu postremum eius iudicium convelli non debet.*

[49] D. 28, 3,6, 7; 48, 21, 3, 4. 5; 49, 14, 45, 2.

[50] D. 24, 21, 3, 8.

view of the fact that the father committed suicide in his pain felt over the death of his son – his property could not constitute the subject of confiscation: *"Videri autem et patrem, qui sibi manus intulisset, quod diceretur filium suum occidisse, magis dolore filii amissi mortem sibi irrogasse et ideo bona eius non esse publicanda divus Hadrianus rescripsit."*[51]

In accordance with this modification, although in case of the culprit's suicide death sentence can be no longer imposed as principal punishment, but the expected second punishment, forfeiture of property would be pronounced and executed even in the absence thereof, specifically on the basis of the well-known principle of *confessus pro iudicato est*[52]; so, the suicide committed is evaluated as a kind of confession.[53] In this case, as a matter of fact, also the motifs of committing suicide must be profoundly examined – the following four conditions had to exist at the same time for pronouncing forfeiture of property.[54] On the one hand, the sanction (at least one of the sanctions) of the crime shall be forfeiture of property also in other – so-called normal – cases. On the other hand, either the perpetrator had to be *manifestus* or a charge had to be brought against him in a proper procedure. Thirdly, the accused had to commit suicide not owing to any other cause, e.g., out of weariness of life *(taedium vitae)* or mourning over the death of his relative *(luctus*[55]*)*, madness *(furor)*, disease *(morbus)* or unbearable pain *(impatientia doloris)* but owing to his bad conscience felt over the crime committed *(conscientia admissi criminis)*.[56] Forthly, the culprit's guilt had to be proved on the merits – at the same time, if no other motif of suicide[57] could be found, then the act was evaluated simply as confession.[58] Forfeiture of property could be pronounced only in case of joint existence of the above-listed conditions; both legal scientists' papers and imperial decrees took firm action against attempts at interpreting the above provisions in practice in an extensive manner.[59]

Nevertheless, certain loci of Justinian's laws seem to imply that the property of the accused must be confiscated under any circumstances if he might commit suicide driven by fear of the punishment threatening him or bad conscience.[60] In accordance with that, in the sources we can find reference to the point that if suicide had been committed during a procedure of indictment pursued owing to a crime that did not threaten the accused with capital sentence (e.g., in case of theft), then the property of the suicide could not constitute the subject of forfeiture of property: *"Idem rescripsit eum, qui modici furti reus fuisset, licet vitam suspendio finierit, non videri in eadem causa esse, ut bona heredibus adimenda essent, sicuti neque ipsi adimerentur, si compertum in eo furtum fuisset."*[61] Whereas in the event that owing to the above-mentioned causes forfeiture of property was carried out, not only the opportunity for intestate succession did not present itself but also every testamentary disposition was repealed, and only legal transactions between living persons could continue to be in effect.[62]

Suicide in Roman military criminal law

For soldiers, all forms of desertion, i.e., running away from military obligation was evaluated as serious insubordination, and was sanctioned – in addition to other options of punishment – by dungeon for life.[63] As to whether suicide committed in the army was ranked among these facts, the sources before Hadrianus do not provide any information.

It does not seem to be unworthy of briefly looking at how suicide was judged in Roman military criminal law. Attempt at suicide committed by a soldier – if any of the causes that allowed more lenient judgement did not exist – was sanctioned by death, and in other cases by discharge *(missio ignominosa)*; if the soldier was prompted by an intoxicated state or foolish bragging to make an attempt at suicide, then he was punished

---

51 D. 48, 21, 3, 5.

52 Paul. D. 42, 2, 1. *Confessus pro iudicato est, qui quodammodo sua sententia damnatur.* Cf. Kunkel, W.: *Prinzipien des römischen Strafverfahrens.* In: *Symbolae iuridicae et historicae Martino David dedicatae.* Leiden 1968. I. 111. ff

53 Mommsen 1899:438., Vandenbossche 1952: 487. ff., Wacke 1980: 55.

54 Wacke 1980: 55. Vö. Marcianus D. 48, 21, 3, pr., 1–5.

55 See also Nótári T.: *De iure vitae necisque.* Jogtudományi Közlöny 1998. 11. 421. ff.

56 Cf. Ulp. D. 28, 3, 6, 7; Ulp. D. 48, 9, 8; Marci. D. 48, 21, 3, 7.

57 Ulp. D. 28, 3, 6, 7. *Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis testamenta irrita constitutiones faciunt, licet in civitate decedant. Quod si quis taedio vitae vel valetudinis adversae impatientia vel iactatione, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant.* (Az utóbbi esetek prototipusát írja le Lukianos a *De morte Peregrini* című művében.)

58 See also Ulp. D. 48, 19, 8, 1.

59 Paul. D. 49, 14, 45, 2; C. 9, 50, 1; C. 9, 50, 2; C. 9, 6, 5; Ulp. D. 29, 5, 1, 23. C. 3, 26, 2; Ulp. D. 24, 1, 32, 7; Flor. D. 38, 2, 28. pr.

60 Ulp. D. 28, 3, 6, 7. *Eius qui deportatur non statim irritum fiet testamentum, sed cum princeps factum comprobaverit: tunc enim et capite minuitur. sed et si de decurione puniendo vel filio nepoteve praeses scribendum principi interlocutus est, non puto statim servum poenae factum, licet in carcere soleant diligentioris custodiae causa recipi. nec huius igitur testamentum irritum fiet, priusquam princeps de eo supplicium sumendum rescripserit: proinde si ante decesserit, utique testamentum eius valebit, nisi mortem sibi conscivit. nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant: quod si quis taedio vitae vel valetudinis adversae impatientia vel iactationis, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant. quam distinctionem in militis quoque testamento divus hadrianus dedit epistula ad pomponium falconem, ut, si quidem ob conscientiam delicti militaris mori maluit, irritum sit eius testamentum: quod si taedio vel dolore, valere testamentum aut, si intestato decessit, cognatis aut, si non sint, legioni ista sint vindicanda.*; Marci. D. 48, 21, 3. pr. *Qui rei postulati vel qui in scelere deprehensi metu criminis imminentis mortem sibi consciverunt, heredem non habent. papinianus tamen libro sexto decimo digestorum responsorum ita scripsit, ut qui rei criminis non postulati manus sibi intulerint, bona eorum fisco non vindicentur: non enim facti sceleritatem esse obnoxiam, sed conscientiae metum in reo velut confesso teneri placuit. ergo aut postulati esse debent aut in scelere deprehensi, ut, si se interfecerint, bona eorum confiscentur.*; C. 9, 50, 1. pr. *Eorum demum bona fisco vindicantur, qui conscientia delati admissique criminis metuque futurae sententiae manus sibi intulerint.*

61 Marci. D. 48, 21, 3, 2.

62 Ulp. D. 24, 1, 32, 7. *Si maritus uxori donaverit et mortem sibi ob sceleris conscientiam consciverit vel etiam post mortem memoria eius damnata sit, revocabitur donatio: quamvis ea quae aliis donaverit valeant, si non mortis causa donavit.*;

63 Val. Max. *Dicta* 6, 3, 3; Suet. *Aug.* 24.

by demotion. (*Milesqui sibi manus intulit nec factum peregit, nisi impatientia doloris aut morbi luctusve alicuius vel alia causa fecerit, capite puniendus est: alias cum ignomia mittendus est*.[64] *Qui se vulneravit vel alias mortem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum, sed ignomia mittatur, si nihil tale praetendat, capite puniatur, per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda*.[65]) Romans regarded suicide committed or attempted by a soldier as cowardice just as running away from fight, *desertio*.[66]

If the soldier attempting suicide was able to prove any of the above-mentioned grounds for exculpation (for example, serious illness, unbearable pain, deep mourning), he was discharged from the army: *"Qui se vulneravit vel alias mortem sibi conscivit, imperator Hadrianus rescripsit, ut modus eius rei statutus sit, ut, si impatientia doloris aut taedio vitae aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum, sed ignominia mittatur, si nihil tale praetendat, capite puniatur. per vinum aut lasciviam lapsis capitalis poena remittenda est et militiae mutatio irroganda."*[67] If a soldier put an end to his life owing to pangs of conscience felt due to committing some military crime, his testament became invalid, and his property devolved on the *fiscus*; whereas if any of the above-mentioned grounds for exculpation justified his suicide and he had no testament, then his property was given to his intestate heirs, or, if there were none, to the legion: *"… Nec huius igitur testamentum irritum fiet, priusquam princeps de eo supplicium sumendum rescripserit: proinde si ante decesserit, utique testamentum eius valebit, nisi mortem sibi conscivit. Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant: quod si quis taedio vitae vel valetudinis adversae impatientia vel iactationis, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant. quam distinctionem in militis quoque testamento divus Hadrianus dedit epistula ad Pomponium Falconem, ut, si quidem ob conscientiam delicti militaris mori maluit, irritum sit eius testamentum: quod si taedio vel dolore, valere testamentum aut, si intestato decessit, cognatis aut, si non sint, legioni ista sint vindicanda."*[68]

Although this paper focuses on the criminal law aspects of suicide, it is worth adding that Roman law contains regulations concerning suicide of slaves that takes account of several criteria. When calculating the *peculium*, the owner cannot deduct the loss suffered owing to the slave's self-mutilation or suicide from it, since a slave also has the right to cause damage to his own body;[69] in accordance with the *aedilis curulis edictum* the seller had to specify accurately if the slave had tried to escape or attempted at suicide already.[70] If he had, then the slave was worth less, except when he committed suicide attempt upon the effect of unbearable pain,[71] and Ulpianus intends to support this case – extended to suicide attempt in addition to escape – by the reason not convincing even purely in terms of psychological deliberations that what a slave has attempted to commit against himself he will not shrink back from in case of others either; in other words, he is dangerous both to himself and the public.[72]

Summary

By analysing the Roman law aspects, more specifically primarily criminal law aspects of suicide, we can establish the following as main points. Roman law – just as ancient Greek law – as a general rule did not regard suicide as a punishable act. Although committing, more accurately the form of committing the act – e.g., self-hanging – might have been contemptible but did not entail legal sanction on the merits (except for possible prohibition of mourning). Regarding suicide, imperial jurists developed a peculiar – and at the same time reversible (!) – presumption. They presumed that a person charged with an act sanctioned by capital punishment and forfeiture of property committed suicide in captivity because his bad conscience tortured him and thereby as it were he admitted his act – this was necessary because death terminated the procedure; if it was not possible to impose the principal punishment (death penalty), then it was not possible to impose the second punishment (forfeiture of property) either, and by this presumption they prevented culprits of lawsuits (quite often of show trials), who were sure of being sentenced, from saving their property for their heirs. Military criminal law – which was significantly different from "civil" criminal law also in Rome – sanctioned suicide attempt committed by a soldier (as *desertio*) by death, suicide attempt committed for excusable reasons by *missio ignominosa*, i.e., dishonourable discharge.

64 Paul. D. 48, 19, 38, 12.
65 Arr. Menander D. 49, 16, 6, 7.
66 See also Brand, C. E.: *Roman Military Law.* London 1968. 9. ff.
67 Menen. D. 49, 16, 6, 7.
68 D. 28, 3, 6, 7.
69 Ulp. D. 15, 1, 9, 7. *Si ipse servus sese vulneravit, non debet (dominus) hoc damnum deducere, non magis quam si se occiderit vel praecipitaverit: licet enim etiam servis naturaliter in suum corpus saevire, sed si a se vulneratum servum dominus curaverit, sumptuum nomine debitorem eum domino puto effectum, quamquam, si aegrum eum curasset, rem suam potius egisset.*
70 Ulp. D. 21, 1, 1, 1; Ulp. 21, 1, 17, 4.
71 Paul. D. 21, 1, 43, 4.
72 Ulp. D. 21, 1, 23, 3; Marci. D. 48, 21, 3, 6.

Slavery in the Ottoman Empire

Katalin Siska *

Abstract

In 1842 the British Consul of Morocco stated that as part of his government he is around to abolish the slavery permanently, and do everything in order to introduce the suppression of the slave trade measures. To this statement that was addressed to I. Abdul-Mejid (1823-1861) Sultan he replied the next: "The slave trade is a case in which from the time of Adam and sons to our days all religions, sects and nations have agreed…" Then he added "I do not know any single religion, sect that specifically forbade slavery, so there is no need to raise related issues. Such and similar questions lead both to too low and too lofty answers, although the phenomenon is such natural, as the sun rises."

Unfortunately, the Sultan's today obsolete perception of abolition the slave trade contained legally founded statements. The institution of slavery actually existed since time immemorial in the ancient civilizations: in Asia Africa Europe and in America before Columbus. Accepted and even supported the Judaism, Christianity, Islam and other world religions.

The institution officially survived in the Ottoman Empire until 1890 significantly longer than the transatlantic slave trade. In my essay I study the reason of this phenomenon, especially the slavery traditions of the Ottoman Empire, the religious and secular legal background comparing the most important features to the transatlantic slave trade and slavery.

Key words: *Ottoman Empire, slavery, elite slaves, slave trade, sharia.*

I. Introduction

In 1842 the British Consul of Morocco stated that as part of his government he is around to abolish the slavery permanently, and do everything in order to introduce the suppression of the slave trade measures. To this statement that was addressed to I. Abdul-Mejid (1823-1861) Sultan he replied the next: "*The slave trade is a case in which from the time of Adam and sons to our days all religions, sects and nations have agreed…*" Then he added "*I do not know any single religion, sect that specifically forbade slavery, so there is no need to raise related issues. Such and similar questions lead both to too low and too lofty answers, although the phenomenon is such natural, as the sun rises.*" [1]

Unfortunately, the Sultan's today obsolete perception of abolition the slave trade contained legally founded statements. The institution of slavery actually existed since time immemorial in the ancient civilizations: in Asia Africa Europe and in America before Columbus. Accepted and even supported the Judaism, Christianity, Islam and other world religions.

The legitimacy of slavery with the moderated example of Prophet Muhammad who himself bought, sold, captured slaves may explain why the institution has survived into the 19th century, in some states in the 20th century (for example, in Saudi Arabia. 1960). The momentum of abolition the slavery actually came from the colonial powers, as well as some Muslim thinkers were strongly supportive of abolition, but it was not resulted by legal regulation. In my opinion, the specialities and differences of the eastern slavery contrary to transatlantic perception helped to create a culture where slaves were differentiated, they were not considered only means of production, they could assimilated into the community rather than their Western counterparts and this could have caused the very long life of this institution.

According to figures [2] the slave trade in the East, launched from the areas of Islam was one of the greatest organized trading, at least as big as the transatlantic version. In addition, when the transatlantic slave trade has stopped the eastern slave trade flourished taking place in, and even more the „captures" in Africa did not disappear, only the shipment's destination changed.

The *Sharia* is eternal. Its views on slave-keeping is still without change form the basis of the legal system of the Islamic countries, and today does not give any reason to the abolition of slavery or even restriction of the slave trade.[3] Of course in the modern Islamic countries unimaginable that these condi-

* Dr. Katalin Siska, associate professor, Department of Legal History, Faculty of Law, University of Debrecen, Hungary.

1 Bernard Lewis: *Race and Slavery in the Middle East*, Oxford University, 1994, 12.

2 Peter Hammond: *Slavery, Terrorism and Islam*, Xulon, 2010, 27.

3 Bernard Lewis: *The Shaping of the Modern Middle East*, 1994, 37.

tions ever occurred. According to the prevailing secular law the institution of slavery is illegal, the slave trade is a crime and most of the Muslims abhors it.[4]

However the extremist, radical groups keen to go back to those ideas, which we found deeply unethical and serious crime today. However in the early stage (and in the next millennium) of the Sharia was no concept of universal human rights nor Islamic nor any other religion-dominated areas. Slavery in the world at this time was based on economic and legal institutions, so such extreme thoughts are not imputed to the detriment of sharia.[5]

In my study I examine the slavery traditions, religious and secular legal background of the Islamic areas, especially in the Ottoman Empire - briefly touching its contemporary legal assessment - compared the most important features to the transatlantic slave trade and slavery's main characteristics.

It is important to point out that I found misleading and in my study I avoid the use of terms such as "*Islamic Slavery*" and "*Islamic slave trade*" as on one hand the institution existed in the Islamic culture in different areas and times on the other hand the transatlantic trade is not called a „*Christian slave trade*" no matter how Christians were the organizers.

II. Slavery in the Quran

The institution of slavery was adopted before the spread of Islam and the tradition continued after the spread of Islam (622 A.D.). The Quran have been announced in the cities of Mecca and Medina, and the legal framework which had to face its rules should be looking for in the ancient customs of Arabia. The slavery practiced by the Arabs was similar to that which existed in other parts of the ancient world. The slave does not constitute a man was regarded as an object, may have been buy and sell, their rights were non-existent.[6]

Although the Islam was initially moderated and reduced the cruelty of the age-old institution of slavery, yet never preached the teachings of the abolition of slavery.[7] Conditions refers to the slaves as well as to women improved by introducing Islam but not abolished the institution.[8] Their status remained a complex legal status, which resulted such a legal quality, where the slaves as kind of inferior human being was both person and could be object of poverty.[9]

The Quran[10] does not bases, but assumes slavery. It contains rules concerning the institutional practices and implicitly accepts it. In addition two major changes were made regarding the institution of slavery: one of which was to establish the presumption of freedom, which ultimately resulted the liberation of the slaves, the other were narrow and strict rules which regulated the conditions of being slave for freemen.

In the Quran the word *abd* (slave) is rarely used, often replaced by a paraphrase than *ma malakat aymanukum*, which means something like "*who belongs to your right hand*."

The Quran recognizes the fundamental inequality between the master / slave and recognizes the rights of the former over the latter (XVI: 71; XXX: 28). It also recognizes the institution of concubinate (IV: 3; XXIII: 6; XXXIII: 50-52; LXX: 30). Encourages kindness to the slaves but not order it (IV: 36. IX: 60; XXIV 58). It recommends the slave liberation as penitence (IV: 92 V: 92; LVIII: 3) or simply as humanity (II: 177; XXIV 33. XC: 13). Encourages the masters to leave the servant earn money and leave them liberate themselves and buy their freedom.[11]

An important change compared to the days before Islam - which was also missing from the other religions' slave perception – is that in strictly religious sense the Islamic faithful slave became (faith)brother of the free Muslim men and before God he was superior to free non-Muslims or idolater subjects (II: 221).[12]

II.1. Presumption of freedom

The ideas of slavery formed by the orientation toward Islam greatly eased compared to the past. The Arab slave in the Islamic religion was not only an object, but also became a human being, also had rights.

One of the most important principles of the Islamic jurisprudence was a presumption that the natural status of the men is the state of freedom. Under the presumption - which was built on the principle of the analogy that if something is not explicitly permitted it is allowed to - if it is not known whether a person is a slave, or unknown the origin of the person, he is a free man (*al-'asl huwa 'l-hurriya*).[13] While recognizing that freedom is the natural state of a man you may limit your options, you can enslave people and freeing them up as well and control the lives of slaves. The rebels against Islamic religion and heretics were repeatedly declared wicked, or worse apostates, which meant that they could be enslaved, especially in the areas of Islam in Africa.[14]

II.2. The circumstances of becoming a slave

Since all human beings are free by nature, the Islam greatly limits the number of persons who can be made a slave, and can be kept under slavery conditions.

The early Caliphs who ruled the Islamic community after the Prophet's death introduced, further humanitarian reforms

[4] ‚Abdullahi Ahmed: An-Na'im, Shari'a and Basic Human Rights Concerns, in: Charles Kurzman (ed.) *Liberal Islam*, Oxford University, 1998, 27.
[5] Ibid.
[6] Bernard Lewis: From Race and Slavery in the Middle East: An Historical Enquiry, in *Kevin Reilly-Stephen Kaufman-Angela Bodino: Racism: A Global Reader,* M.E. Sharpe, 2003, 52–58.
[7] Forough Jahanbaksh: *Islam, Democracy and Religious Modernism in Iran, 1953-2000*, Brill, 2011, 34-37.
[8] Malise Ruthven: *Islam in the World*, Oxford University, 2006, 26-28.
[9] Reuben Levy: *The Social Structure of Islam*, Cambridge, 1957, 247-256.
[10] mek.oszk.hu/06900/06931/06931.pdf
[11] Peri Bearman–Rudolph Peters – Frank Vogel (ed.): *The Islamic School of Law: Evolution, Devolution, and Progress*, Harvard University, 2005, 45-50.
[12] Ali Unal: *The Qur'an with Annotated Interpretation in Modern English,* Tughra, 2008, 1027.
[13] Peri Bearman (ed.): *Encyclopedia of Islam*, Brill, 2015.
[14] Mohammad Hashim Kamali: *Principles of Islamic Jurisprudence*, Islamic Texts, 2005, 44.

among the terms of slavery. Slavery could only be created under two circumstances: (1) birth from slave parents (2) if captured in war. The latter is of course was only limited to interception of unbelievers in *jihad*.[15]

These reforms have significantly limited the supply of new slaves. Abandoned children could not be captured into slavery, as was common practice in ancient times, and free people do not too. According to Islamic law, the only way to become enslaved is birth, or holy war that could happen only outside the borders of the Islamic world.[16] Muslim people cannot be enslaved. Specially constituted unlawful if a free Muslim herself or her child was sold, even if the person has committed a crime (even though it was a common practice in the 16th century Christian Europe).[17]

The first result of rapid expansion and conquest of the Holy War brought abundant supply in the field of new slaves. However, with the stabilization the borders of the Ottoman Empire the supply narrowed. Most of the war was conducted by organized armies, prisoners of war who are no longer sold, but rather replaced or demanded for ransom. Islam spread quickly among the residents of the newly acquired areas who no matter kept their old religion (*dhimmis*), or not, became protected, cannot be enslaved except in exceptional cases.

Exceptions were if the laws of Islam were violated, or the enemy was helped in their fight against the Islamic State or withheld *jizyat*, the tax paid by non-Muslims for exemption from compulsory military service.[18]

III. Muhammad and slavery

„He will not enter Paradise who behaveth ill to his slaves." „Then be kind to them as to your own children, and give them to eat what you eat yourselves. The slaves that say their prayers are your brothers, and Allah has put them under your command. So the one under whose hand Allah has put his brother, should feed him of what he eats, and give him dresses of what he wears, and should not ask him to do a thing beyond his capacity. And if at all he asks him to do a hard task, he should help him therein." „'There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats this money." [19]

Citing the Prophet's words the disciple Abu Musa Al-Ash'ari says: *„The Prophet said give food to the hungry, pay the cure of the patient and liberate the man in captivity."* [20]

The Quran's perception of slavery is reinforced by the numerous legends and traditions (*hadiths*) associated with the name of the Prophet where the quoting of the Prophet encouraged the believers the attentive, equal treatment with the slaves condemning the cruelty, rudeness, or even all forms of incivility, suggesting the final release, reminding the believers that the teachings of the Prophet speak both freemen and slaves.[21]

Muhammad - according to the legend (*hadith*) himself held slaves [22] - according to the teachings the slaves were regarded as human beings who have their own rights and dignity and the liberation of the slaves is a virtuous thing.[23]

Several legends have survived to justify the relationship of the Prophet and slaves. One of them is about to Bilal the most cherished African slave of Prophet Muhammad who converted to Islam. Finally the Prophet freed Bilal, who was elected for the first muezzin for his beautiful voice. According to another legend, another slave of the Prophet called Zaid was a young boy. Allegedly, he was one of the four men, who converted to Islam. Indeed, when Zaid's father offered to buy the freedom of his son Mohamed said to Zaid that he was free to go and no money needed from his father, but his father's jaw-existence Zaid decided to remain at Muhammad. The Prophet's wife was a Coptic Christian slave girl. The Prophet liberated 63, his wife 43 slaves freed during his lifetime.[24]

According to legend, the life of the Prophet made the following rules in connection with slavery: stated that the freeing of the slaves is an act which is listed among the greatest virtues for Allah. The *Zakat* (charity - the third pillar of Islam) principle is often used as a reason for the liberation of slaves.[25]

He stated that slave liberation can be used as an act of penitence for criminals or immoral perpetrators according to Islam. He ordered that it should be possible for slaves to buy their freedom, and if necessary, should be given the opportunity to make money or borrow from the state in order to liberation. It must be enabled for slaves to plea for escaping from some difficult circumstances. It also noted that contracts for the slaves in cases of doubt should be interpreted in favor of the slaves. He stated that goodness showed towards the slaves must also be exercised in direction of the family or even neighbours of the slaves. Or when a child was born from a slave women and her master the child must inherit after his father like his other children.[26]

Muhammad's teachings of Islam was interpreted in two ways by the law schools today. The representatives of the liberal trend, Hanafi law school believe that the teachings of Muhammad were intended to gradually eliminate slavery, reduce the number of new slaves and to enable their release.[27] This idea, however, does not appear in his early writings.

---

15 Martin Klein: *Historical Dictionary of Slavery and Abolition,* Scarecrow, 2002, 89.
16 Carolina Finkel: *Osman's Dream: The History of the Ottoman Empire*, Basic Books, 2005, 48-50.
17 Muhammed Kutub: *Islam, the Misunderstood Religion*, 31. http://www.islamicbulletin.org/free_downloads/new_muslim/islam_the_misunderstood_religion.pdf
18 Kecia Ali: *Marriage and Slavery in Early Islam*, Harvard University, 2010, 5.
19 Muhammad Husayn Haykal: *The Life of Muhammad*, Islamic Book Trust, 2008, 461; 476.
20 Arthur Jeffery: *Materials for the History of the Text of the Quran,* Leiden, 1937, 209-211. http://www.islamicmanuscripts.info/reference/books/Jeffery-1937-Materials/Jeffery-1937-Materials-000-061.pdf
21 Ehud Toledano: *Slavery and Abolition in the Ottoman Middle East*, Universtiy of Washington, 1997, 3-20.
22 Kecia Ali: *The Lives of Muhammad*, Harvard University, 2016, 34.
23 Richard Noake – Nicholas Buxton: *Religion, Society and God, Public Theology in Action*, SCM, 2013, 32-49.
24 Syed Maududi: *Human Rights in Islam*, New Era, 1981, 76.
25 Bernard Lewis (ed.): *The Cambridge History of Islam, vol. 1 A,* Cambridge University, 1977, 36.
26 Shaykh-ul Islam Dr Muhammad Tahir-ul-Qadri: *Human Rights in Islam*, Minhaj, 2005, 225-240.
27 Christie Warren: *The Hanafi School*, Oxford University, 2013, 44.

Representatives of the conservative Salafi law school argue that by controlling slavery the Prophet contributed to maintaining the slavery and with his behaviour that he hold slaves actually approved this institution.[28]

According to the Salafi scholars often quoted by the Islamic extremist[29] the reform of secular law of the 20th century in Islamic countries that have banned slavery was incompatible with the morality of the Quran.[30] According to a *fatwa* issued by Sheikh Saleh Al-Fawzi a Saudi jurist and representative of the school in 2003 the idea of the slavery stated by secular law is a failed idea *„sinister and confused development"* as *„slavery is part of Islam."* *„Slavery is part of the jihad, and as long as stays on Islam there is jihad."* The jurist among others attacked the legal rules on abolition the slavery because in making attended scholars who were infidels and unexperienced in *saria*.

According to Abdul-Latif Mushtahari the General Director of Al-Azhar University Homiletics Institute: *„Islam does not forbid slavery, but it will keep for two reasons: the first reason is jihad (either a civil war or a holy war fought with foreigners) in which the prisoners of war can be made slaves provided that the war is not between Muslims. Only non-Muslim prisoners can be enslaved. The second reason is the reproduction since the slaves from their relationship with slaves produce new slaves for their masters."*[31]

Slavery was a headstone in the Arab society in the 7th century, and it would not have been easy to eliminate with breaking of Islam.[32] The paradox of this situation, however, was that Islam laid great emphasis on the value of human dignity and freedom, as the ideal society-building principles.[33] Its recommendation that the slaves can be released, the poor should be clothed, the hungry must be fed removed the institutional cruelty and actually made it acceptable for a long time.[34]

IV. The rights of the slaves in Islam

The *saria*[35] provides the following rights to slaves: slaves were forbidden to hurt or employ cruel treatment for them. The slaves must be kept properly. The slaves able to take legal action against their masters who make a serious breach of the present rules and they can be freed in return for compensation.[36]

The slaves could have own property. The slaves may possess slaves. A slave can marry if the slave holder agrees. The slaves must be undertaken on behalf of the owner. The slaves who committed a crime can get half penalties than other free criminals. The female slave cannot be separated from her child, while he reached the age of seven. Female slaves cannot be forced into prostitution. The slave cannot hold a high religious position. A slave cannot be a witness at court. The murder of a slave cannot get death penalty according to Islamic law.

The *saria* differentiates the slaves into various classes: the *mukatab* is a slave who has a contractual right to buy their freedom, *mudabbar* is a slave who is released when his master died (except the master's estate is too small) and *umm walid*, that is a female slave who gave birth a child to his master.[37]

V. Comparing the transatlantic slave trade to the eastern

Concerning its dimensions the Eastern slave trade was similar to the transatlantic slave trade and the conditions were also similar, but in the Islamic countries it took much longer than the Western version.

In my opinion this was because the *sharia* defended the slaves and contained provisions which gave the slaves human rights to a certain extent. It provided the prohibition of cruel treatment, the slave can enter into marriage, can have his own family and had a good chance to being freed. Law granted the opportunity to flee from the slave status.[38]

It was a completely different relationship between the Muslim and American slaves and masters.[39]

I lists some typical differences between the Eastern and transatlantic slavery:

The transatlantic trade lasted until the 15-19th century, while the Eastern trading from the 7th to the 20th century. On the Islamic areas the slaves were regarded mainly as men and secondly as property while in the western trade as property and often only as means of production. The Islamic law gave protection to slaves contrary to the transatlantic trade where it was virtually absent. Islamic law protection given to the slaves, facing the Atlantic trade, in which is virtually absent.[40]

The *sharia* can only authorized the slavery if the interception was done in a lawful warfare (otherwise it was illegal) contrary to the transatlantic slave trade where anyone can become a slave who had commercial value.

In the Islam the slave-traders were not allowed to take a child from its mother's side and enslaved which was also common in the Atlantic trade.

---

28 Charles Le Gai Eaton: *The Book of Hadith: Sayings of the Prophet Muhammad from the Mishkat al Masabih*, The Book Foundation, 2008, 23-32.
29 Khaled Abou El Fadl, William Clarence-Smith
30 William Gervase Clarence-Smith: *Islam and the Abolition of Slavery*, Oxford University, 2006, 19-22.
31 Farhang Rajaee: *Islamism and Modernism. The Changing Discourse in Iran*, Texas University, 2007, 67-73.
32 Jacob Neusner - Tamara Sonn: *Comparing Religions through Law: Judaism and Islam*, Routledge, 1999, 67.
33 Ibid.
34 ,Abdullahi Ahmed op.cit.76.
35 Mashood Baderin: *International Human Rights and Islamic Law, Oxford University, 2008, Vol.3.* https://books.google.hu/books?hl=hu & lr=&id=RHRCAgAAQBAJ & oi=fnd & pg=PP17 & dq=islamic+law+slavery & ots=yJpO9hFmsM & sig=xQO_o7U6nfpFyXxg6LzkwZ2WbhY & redir_esc=y#v=onepage & q=islamic%20law%20slavery & f=false
36 Madeline Zilfi: *Women and Slavery in the Late Ottoman Empire: The Design of Difference* (Cambridge Studies in Islamic Civilization), Cambridge University, 2012, 96.
37 Orlando Patterson: *Slavery and Social Death, A Comparative Study*, Harvard College, 1982, 34-37.
38 Gwyn Campbell; Frank Cass, The Structure of Slavery in Indian Ocean Africa and Asia, Frank Cass, 2004, 12-18.
39 Ronald Segal: *Islam's Black Slaves*: *The Other Black Diaspora*, Farrar, Straus and Giroux, 2002, 57-62.
40 Anthony Tibbles: *Transatlantic Slavery:Against Human Dignity*, Liverpool University Press 2005, 3-12.

According to *sharia* freeing slaves was a „good" religious act and says that those slaves who convert to Islam can be released. Other methods also existed to liberate the slaves for example as punishment for committing crimes, as penitence or during religious rituals.

According to Islamic law a slave can take the slave holder to court in connection with a grievance against him. The judge has the right against the wishes of the masters to liberate the slave for compensation. This type of practice does not meet the Atlantic trade.

The Islam allowed the slaves to have high positions at offices unlike the transatlantic trade where slaves were the lowest stratum of the society. While the transatlantic trade for two men had a female slave, in the Eastern slave trade two female slaves came to one man. While the transatlantic trade was intended to ensure the means of farming in the Eastern slave trade was much more varied and gave different roles for the slaves. In the transatlantic slave trade black Africans were involved in the Eastern slave trade different ethnic groups.[41]

The institution of slavery had a strong racial characteristics of the transatlantic trade in the eastern slavery was much less common. Each of the slave owners and slaves in a variety of colours and backgrounds possessed. The result was that while the Muslim slaves to slave owners allowed access to the Islamic world, while the transatlantic slave trade to his successors long suffered discrimination and were those belonging to the lower classes (underclass) in Hungary until recently.

The institution of slavery had a strong racial characteristics in the transatlantic trade while in the Eastern slavery it was much less common. Each of the masters and slaves were from different ethnic groups. The result was that while the Muslim slaves were allowed to the Islamic world while the transatlantic slaves and their successors suffered discrimination and were belonged to the lower classes (underclass) until recently.

The transatlantic trade racism against nature and, therefore, the survivors was mainly due to the segregation of slaves. This kind of separation was not typical of Islam. The whites do not push blacks down from the sidewalk. They were not banned from dining places and catered them. The institution of slavery was therefore gentler in Islamic areas than in the West.[42]

In addition, the transatlantic slavery was motivated by the economy, the enslaved people were cheap and disposable labour in plantations. The Muslims are historically not used the slaves as means of production, although undoubtedly had profit from the slave trade. The institution of forced collective labour in Islamic areas were not used.[43]

VI. The elite slavery

There was a special layer among the Eastern slaves, whom was possible to achieve significant power and wealth in addition maintain their slave status. This elite group of slaves represented tremendous value for the slave-holders because it created a military-diplomatic-government group who were trained as outsiders who were not members of the Sultan's dynasty and did not jeopardized the political power of their masters.

These highly skilled slaves only depended on their masters, they did not have their own families and therefore they could serve the interests of the Sultan more reliably and more efficiently than the hereditary nobility whose interests may have crossed the ruler's.[44]

The paradox of elite slavery were tried to explain in different ways.

One answer[45] is that the authority and high position of the slave depends on the person who provides it all to him, and he can remove the slave from this status in case he decided. The elite slaves must show total loyalty and obedience to their masters in order to maintain these rights and advantages.

According to another view[46] the slave who reached the elite status and position is not really a slave, can use his position and strength to get rid of limitations resulting from slavery. The latter in my opinion, is a less convincing argument, as in case of liberation they can be in danger to lose their privileged status.

VI.1. The Mamelukes

The Mamelukes (Arabic meaning: white slave) were slave-soldiers of the Abbasside Empire (9th century) who eventually ruled Egypt from 1250 to 16th century until the Turks broke their rule. The mamelukes were originally from Central Asia, teamed 12-14 year-old boys who have been specially trained for military service. Although the Mamelukes were not free people (for example they were unable to transfer their children anything) elite slaves were professional soldiers who remained loyal to the Islamic rules.[47]

After the fall of the Mamelukes in Egypt they founded their own royal dynasty (after having rebelled against the masters were no longer slaves). They ruled from 1250 to 1517. The idea of military slavery - the Mamelukes' total loyalty to his owner who bought, formed, maintained and released them - was the pillar of the society in Mameluke Caliphate and later established on the ruins of Mameluke caliphate the Ottoman Sultanate.

When the slave has decided that a Mameluke reached his maturity and was ready for the official work released and al-

[41] James Rawley: *The Transatlantic Slave Trade*, University of Nebraska, 2009, 34.
[42] Ronald Segal opt.cit. 67-71.
[43] Malise Ruthven: *Islam in the World*, Oxford University, 2000, 57-61.
[44] Leslie Peirce: *The Imperial Harem: Women and Sovereignty in the Ottoman Empire*, 1993, 12.
[45] Bernard Lewis
[46] Leslie Pierce
[47] Michael Winter: *Egyptian Society under Ottoman Rule*, 1517-1798, Routledge, 1992, 1-7.

lowed him to grow his beard which meant now he was a free man, not depend on its owner. The master is often appointed the former slaves to a military post even a bey or a commander. Very often the master decided who can marry the Mameluke and with this decision could also improve its financial situation.[48]

VI.2. The devshirme system

The *devshirme* system was introduced in the 14th century and its essence was the non-Muslim residents of the Ottoman Empire were forced to hand over their children to work as slaves in Islam. According to some authors half a million to a million people were enslaved in this way over the centuries. The conquered Christian communities, especially in the Balkans, had to pass twenty percent of their sons for the benefit of the state. Some of them were trained to fill high governmental positions, for example Grand Vizier.

Some of them served in elite military groups in the Ottoman Empire, they were called janissaries and almost without exception they were forced to turn from Christian faith to Islam. The *devshirme* played a key role in II. Mehmet Sultan conquered Constantinople, and from then the played consistently high positions in the imperial administration as well. Although members of the *devshirme* class were virtually slaves, they played a great importance as guaranteed the power of the Sultan with absolute loyalty.

The *devshirme system* survived until the end of the seventeenth century.

VI.3. The Eunuchs

The eunuchs were also slaves of the empire, who in many cases were subjected to humiliation due to their specific anatomy, even though many of them managed to gain quite a huge fortune. Paradoxically anatomical peculiarities made it possible for them to move freely both in the world of men and women occasionally cross between the two groups.

The castrated were those who preserved the harem, or the *„House of Happiness"* and the room which lead to the Sultan's treasury and preserved the prince's harem, the men's part of the harem. It was recorded that the number of eunuchs in the Ottoman family-owned house in 1903 was 194, of which 35 filled high positions at the end of their service.[49]

The castrated in the first category appeared in 1582, when III. Murad appointed Mehmed agate the black Abyssinian eunuch as senior eunuch.[50] Then the senior (black) eunuch was *„the most powerful internal service agency"* who in authority often reached the Grand Vizier.[51] According to Toledano the African eunuchs gained so strong influence in the 16-18th century in the Ottoman Empire that we can called it to the Sultanate of the African Eunuchs.[52]

Not surprisingly the inhabitants of the harem often formed a political alliance. Their intermediary role has allowed them to control the flow of money and carry information between the harem and the world outside, as the inhabitants of the harem had rather limited mobility and so often relied on the help of their help in communication, or through the various transactions.

In addition, on daily basis the continuous screening of the women living in the harem was done by the eunuchs who besides administered the potential violators. This role was reflected in their placement in the Topkapi Palace, on half way between the harem and the outer courtyard.[53]

The other factor, which also increased the power of the eunuchs in the palace was that under the reign of Suleiman I the education of the princes was concentrated in the palace which was managed by the head of the eunuch's.[54]

When the prince reached its maturity was moved from the female division to the *„cage"* a strictly segregated area of the men where they gave an eunuch mentor.[55]

The eunuchs were not allowed to marry they did not develop family ties and thus did not dangered their masters' power. The mutilation was carried out between 8-12 years of age without any anaesthetics and modern medical knowledge. It was a huge pain often led to fatal complications not to mention both physical and psychological problems.

VI.4. Concubines

The Encyclopaedia of Islam defines the institution of concubine as more or less permanent cohabitation (not marriage) between a man and a woman, or women whose position can describe several ways: second wife, bought woman, a woman received as a gift, woman captured in war or domestic slavery.

In Islamic world was more female slave than man. The women were employed for various jobs, one of the most common feature was the maid. The part of the lives of concubines were sexuality but they could not be forced. They were sexually available for their masters, but they were not equivalent to prostitutes. The concubines' had some „advantages". If a slave woman gave birth to a child from her master, his status has improved - she could no longer be sold and when the owner died she was freed. Her child was free and after his father he/she herited as the other children.

---

[48] Michael Winter i.m. 7-14.

[49] Hathaway James: Habesi Mehmed Agha: The First Chief Harem Eunuch (Darussade Agasi) of the Ottoman Empire, In Asad Q. Ahmed - Behnam Sadeghi - Michael Bonner (ed.): *The Islamic Scholarly Tradition: Studies in History, Law, and Thought in Honor of Professor Michael Allan Cook*, 2011, 181.

[50] Akgunduz, Ahmed - Said Ozturk: *Ottoman History: Misperceptions and Truths*. Istanbul: Islamitische Universiteit Rotterdam, 2011, 403.

[51] Freely John: *Inside the Seraglio, Private Lives of the Sultans in Istambul*, University of Michigan, 1999, 67-72.

[52] Toledano Eric: The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam, *Middle Eastern Studies* 1984/20/ 3, 382.

[53] Lad Jateen: Panoptic Bodies: Black Eunuchs as Guardians of The Top Kapi Harem", in Marilyn Booth (szerk.): *Harem Histories: Envisioning Places and Living Spaces*. Duke University Press, Durham & London, 2010, 135-176.

[54] Peirce Leslie (2008): 91. "Beyond Harem Walls: Ottoman Royal Women and the Exercise of Power", in *Servants of the dynasty: palace women in world history*, Anne Walthall ed, University of California Press, 2008, p. 91

[55] Hathaway James opt.cit. 182.

The concubines lived in the building of the harem, a separate part of the household, separately from the men. Ehud Toledano thus described the nature of harem:

„The system of the harem grew out of the need in Ottoman society to achieve gender segregation and limit women's accessibility to men who did not belong to their family. Households were divided into two separate sections: the selamlik, housing the male members, and the haremlik, where the women and children dwelt. At the head of the women's part reigned the master's mother or his first wife (out of a maximum of four wives allowed by Islam). The concubines were also part of the harem, where all the attendants were women. Male guests of the master were not entertained in the harem. An active and well-developed social network linked harems of similar status across Ottoman towns and villages; mutual visits and outdoor excursions were common. For the women who actually spent their lives in the harems, reality was, of course, far more mixed and complicated. The women who came into the harem as slaves (câriyes) were taught and trained to be "ladies," learning all the domestic and social roles attached to that position. As they grew up, they would be paired with the men of the family either as concubines or as legal wives. However, harem slaves' freedom of choice was rather limited, as was that of women in general in an essentially male-dominated environment. Harem slaves frequently had to endure sexual harassment from male members of the family." [56]

Haseki and *Sultana* the terms used in female family members of the dynasty meant a certain rank.[57]

The *haseki* (meaning exclusively for the Sultan) title was used when a slave or concubine gave birth to a son for the Sultan or Prince. The birth of male children was very important to the survival of the dynasty, so women have always hoped to bring a progeny into the world. If a concubine gave birth to a son immediately stepped forward *haseke* and besides got the title of Sultana as well.[58]

The word *sultana* had two meanings. Those women were *sultana* who have had a child from the sultan. Even she gave birth to a girl received this rank and was moved to a separate suite with her own servants. The title of "*first woman*" was originally the name of Sultan's favorite concubine, but after I Suleiman married Roxelana the slave (disregarding with a 1000 year old tradition), the address was given to the wife of the padisah. In addition sultanas were those women who were born in the royal family, whose ancestors were members of the dynasty. The most powerful sultana was the *Valide*, the mother of the Sultan. He directed the life in the harem life, moreover, was the second most important person of the Ottoman Empire. The main living mothers and spouses of the ruling sultan wore the title after their name: for example, Ayşe Hafsa Sultana, Suleiman's mother and the first Valide Sultana and Hürrem Sultana, the first wife and the first *Haseki* Sultana of Suleiman the Magnificent.

As the leading position of the first consort in the 17th century eroded, the first consort of the Sultan lost his title, having been replaced by the "*Kadin*" (related to the former address *Khatun*) address. From this time the mother of the crown prince and ruler Sultan was the only woman in the realm who could wear the sultan / sultana address.[59]

The *haseki* had a very important place in the palace after the sultana validates was the most influential woman in the harem of the Sultan's palace and. The *haseki* was not related by blood to the ruling sultan, but was still in higher position than the Sultan's own siblings, aunts, princess of the dynasty. Elevated status stemmed from the assumption that she is the mother of a future sultan. Roxelana was the first *Haseki* Sultan of the dynasty also functioned as advisor of Suleiman in affairs of state, and had influence on international political life.[60]

The concubines played an important political role and significant direct political influence on the political life. There were no dynasty except the Ottoman Dynasty, where concubines determined the principles of the succession to the throne. All descendants of the sultans from I. Osman virtually came from concubine mothers.[61]

The benefit for the state, or at least the ruling dynasty from the fact that the heirs to the throne were not born from wives, but from concubines was that in the exercise of power only one family attended. The woman's family became completely irrelevant in this case. In case of wife the family of the woman could expect to have influence in the life of the child and these potentially conflicting interests could affect the inheritance and weaken the ruling family.[62]

However, the role and power of the *valide sultana* the first concubine besides symbolic aspects also extended to direct exercise of power both domestic and foreign policy of the realm. She was the sultan's chief adviser, confidant, and the „ears" in the palace. Hürrem was an excellent example of this, since every time she sent a letter to the Sultan, on the one hand she expressed her love as insatiable desire, on the other hand she informed him on the situation in the capital, and any events that require immediate attention.[63]

Similarly reports Paolo Contarini ambassador in Venice who reported that Murad I followed his mother's instructions, because he believes that nobodies council should be as loving and loyal as hers.[64]

---

[56] Ehud Toledano: *Slavery and Abolition in the Ottoman Middle East*, University of Washington, 1998, 36.

[57] Peirce Leslie: Beyond Harem Walls: Ottoman Royal Women and the Exercise of Power, in Anne Walthall (ed.): *Servants of the Dynasty: Palace Women in World History*, University of California Press, 2008, 81.

[58] Duben Alan: *Istanbul Households: Marriage, Family, and Fertility, 1880-1940. A detailed study of family life in the last years of the Ottoman Empire*. Cambridge University, 1991, 148.

[59] Fanny Davis: *The Ottoman Lady: A Social History from 1718 to 1918.* Greenwood Publishing Group, Portsmouth, 1986, 124.

[60] Douglas Scott Brookes (szerk.): *The Concubine, the Princess, and the Teacher. Voices from the Ottoman Harem*, Universtiy of Texas Press, Austin, 2008, 200-212.

[61] Leslie Peirce: opt.cit. 38.

[62] Mary Ann Fay: From Concubines to Capitalists: Women, Property, and Power in Eighteenth-century Cairo, *Journal of Women's History*, 1998/10/3.

[63] Yermolenko Galina opt.cit. 228.

[64] Freely John opt.cit. 82.

In addition, the influential female figures of the dynasty also had ambassadorial functions. In this context, sent gifts and letters to the leaders of European powers. Nurbanu, sultana was in correspondence with Catherine Medici, mother of Henry III. for promoting good French and Turkish relations [65] while Safiye corresponded with Queen Elizabeth.[66]

According to Murat Iyigun historian the valide sultana was such active politician in the empire that correlation seen between the origin of the concubines and military campaigns carried out by the Ottoman Empire. Indeed, according to the historian is due to concubines from the west the Ottoman Empire did not attack certain areas. Although in my opinion, this result can not only attribute to ladies in the Sultan's palace or their ethnicity, it cannot be excluded that the mothers or concubines had a positive impact on foreign policy with the Christian territories.[67]

The power behind sultanas was able to control even the whole the sultanate. Kösem Sultana, who was the grandmother of Mehmet IV. led the empire like a sultan and made decisions on issues such the appointment or even cancellation of the grand vizier.[68] After the assassination of Kösem her successor Turhan sultana took over the "Glorious Mother" (*Walide'I Muazzama*) title and acted until 1656 when she gave the power to Ahmed Köprülü Grand Vizier.[69]

In the Ottoman Empire the habit of enslaving women was in effect until 1908.

VII. Abolition of slavery

Initially, the provisions banning slavery concerned to the white people, and later extended it to members of all races and religions. In 1830 Sultan Mahmud II. freed the white slaves. The regulation issued by British pressure covered the Circassian amongst it was customary to sell their own children into slavery, and included liberation of the enslaved Greeks who rebelled against the empire in 1821.

On July 2, 1890 the Ottoman Empire at the conference in Brussels signed with 16 other countries the agreement regarding prohibition of the slave trade, which thanks to the *sharia* rules in practice continued until the beginning of the 20th century.

The second part of the title of my paper was a question: *ended or is still going on?*

The answer to this is in the Janus-face of the Ottoman legal system, that regarding principles followed the concept of Islam, while strictly stick to the Sultan's, and later a secular legal concepts' and trends.

The sultan in theory exercised its power in accordance with the rules of *sharia*, but in practice there was no institutionalized mechanism to the Sultan transactions comply with the rules of *sharia* point e.g. decades after abolition of slavery and banning the slave trade we cannot find any reference in the legal texts for sanctions to violators of the rule. We had to wait until 1871 (20 July), when who continued practising the slave trade were punished with imprisonment up to one year.

Slavery remained as built-in tissues, part of Islam for more than 1,200 years. During the 20th century, with the change in attitudes the Cairo Declaration in 1990 recorded in relation to the institution of slavery:

"Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High." [70]

The Declaration and other secular regulatoin clause is, despite held the institution of slavery incompatible with the requirements of the 21st century contains the following clause:

„All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah."

The explanation this is followed from the classical theory of the Islamic legal system which based on divine order, which cannot be preceded by the state and cannot be controlled by the Muslim community. The Islam precedes the state and the Islam controls the Muslim community.[71]

Bibliography

Abdullahi Ahmed: An-Na'im, Shari'a and Basic Human Rights Concerns, in: Charles Kurzman (ed.) Liberal Islam, Oxford University, 1998.

Akgunduz Ahmed - Said Ozturk: Ottoman History: Misperceptions and Truths. Istanbul: Islamitische Universiteit Rotterdam, 2011.

Ali Unal: The Qur'an with Annotated Interpretation in Modern English, Tughra, 2008.

Anne Walthall (ed.): Servants of the Dynasty: Palace Women in World History, University of California Press, 2008.

Anthony Tibbles: Transatlantic Slavery: Against Human Dignity, Liverpool University Press 2005.

Arthur Jeffery: Materials for the History of the Text of the Quran, Leiden, 1937.

Asad Q. Ahmed - Behnam Sadeghi - Michael Bonner (ed.): The Islamic Scholarly Tradition: Studies in History, Law, and Thought in Honor of Professor Michael Allan Cook, 2011.

Bernard Lewis: The Shaping of the Modern Middle East, Oxford University, 1994.

Bernard Lewis: Race and Slavery in the Middle East, Oxford University, 1994.

[65] Godfrey Goodwin: *The Private World of Ottoman Women*, Sagi Essentials, London, 2007, 76-77.

[66] Godfrey Goodwin opt.cit. 85.

[67] Iyigun Murat: *Lessons from the Ottoman Harem (On Ethnicity, Religion and War),* Institute for the Study of Labor, Discussion Paper 3556/2008.

[68] Akgunduz Ahmed - Said Ozturk: *Ottoman History: Misperceptions and Truths*. Istanbul: Islamitische Universiteit Rotterdam, 2011, 244.

[69] Akgunduz Ahmed - Said Ozturk opt.cit. 245.

[70] Cairo Declaration on Human Rights in Islam, 11. Article 1990. http://www.oic-oci.org/english/article/human.htm

[71] Coulson, Noel: *A History of Islamic Law*, Edinburgh University Press, 1964. 1-2.

Bernard Lewis (ed.): The Cambridge History of Islam, vol. 1 A, Cambridge University, 1977.
Cairo Declaration on Human Rights in Islam, 11. Article 1990.
Carolina Finkel: Osman's Dream: The History of the Ottoman Empire, Basic Books, 2005.
Charles Le Gai Eaton: The Book of Hadith: Sayings of the Prophet Muhammad from the Christie Warren: The Hanafi School, Oxford University, 2013.
Coulson, Noel: A History of Islamic Law, Edinburgh University Press, 1964.
Douglas Scott Brookes (szerk.): The Concubine, the Princess, and the Teacher. Voices from the Ottoman Harem, Universtiy of Texas Press, Austin, 2008.
Duben Alan: Istanbul Households: Marriage, Family, and Fertility, 1880-1940. A detailed study of family life in the last years of the Ottoman Empire. Cambridge University, 1991.
Ehud Toledano: Slavery and Abolition in the Ottoman Middle East, Universtiy of Washington, 1997.
Fanny Davis: The Ottoman Lady: A Social History from 1718 to 1918. Greenwood Publishing Group, Portsmouth, 1986.
Farhang Rajaee: Islamism and Modernism. The Changing Discourse in Iran, Texas University, 2007.
Freely John: Inside the Seraglio, Private Lives of the Sultans in Istambul, University of Michigan, 1999.
Godfrey Goodwin: The Private World of Ottoman Women, Sagi Essentials, London, 2007.
Iyigun Murat: Lessons from the Ottoman Harem (On Ethnicity, Religion and War), Institute for the Study of Labor, Discussion Paper 3556/2008.
Gwyn Campbell; Frank Cass, The Structure of Slavery in Indian Ocean Africa and Asia, Frank Cass, 2004.
Jacob Neusner - Tamara Sonn: Comparing Religions through Law: Judaism and Islam, Routledge, 1999, 67.
James Rawley: The Transatlantic Slave Trade, University of Nebraska, 2009.
Khaled Abou El Fadl, William Clarence-Smith, William Gervase Clarence-Smith: Islam and the Abolition of Slavery, Oxford University, 2006.
Lad Jateen: Panoptic Bodies: Black Eunuchs as Guardians of The Top Kapi Harem", in Marilyn Booth (szerk.): Harem Histories: Envisioning Places and Living Spaces. Duke University Press, Durham & London, 2010.
Mary Ann Fay: From Concubines to Capitalists: Women, Property, and Power in Eighteenth-century Cairo, Journal of Women's History, 1998/10/3.
Mishkat al Masabih, The Book Foundation, 2008Forough Jahanbaksh: Islam, Democracy and Religious Modernism in Iran, 1953-2000, Brill, 2011.
Kecia Ali: The Lives of Muhammad, Harvard University, 2016.
Kecia Ali: Marriage and Slavery in Early Islam, Harvard University, 2010.
Leslie Peirce: The Imperial Harem: Women and Sovereignty in the Ottoman Empire, 1993.
Madeline Zilfi: Women and Slavery in the Late Ottoman Empire: The Design of Difference (Cambridge Studies in Islamic Civilization), Cambridge University, 2012.
Malise Ruthven: Islam in the World, Oxford University, 2000.
Martin Klein: Historical Dictionary of Slavery and Abolition, Scarecrow, 2002.
Mashood Baderin: International Human Rights and Islamic Law, Oxford University, 2008.
Michael Winter: Egyptian Society under Ottoman Rule, 1517-1798, Routledge, 1992.
Mohammad Hashim Kamali: Principles of Islamic Jurisprudence, Islamic Texts, 2005.
Muhammad Husayn Haykal: The Life of Muhammad, Islamic Book Trust, 2008.
Peri Bearman–Rudolph Peters – Frank Vogel (ed.): The Islamic School of Law: Evolution, Devolution, and Progress, Harvard University, 2005.
Peri Bearman (ed.): Encyclopedia of Islam, Brill, 2015.
Peter Hammond: Slavery, Terrorism and Islam, Xulon, 2010.
Peirce Leslie (2008): 91. "Beyond Harem Walls: Ottoman Royal Women and the Exercise of Power", in Servants of the dynasty: palace women in world history, Anne Walthall ed, University of California Press, 2008.
Peirce Leslie: Beyond Harem Walls: Ottoman Royal Women and the Exercise of Power, in Toledano Eric: The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam, Middle Eastern Studies 1984/20/ 3.
Reuben Levy: The Social Structure of Islam, Cambridge, 1957.
Richard Noake – Nicholas Buxton: Religion, Society and God, Public Theology in Action, SCM, 2013.
Shaykh-ul Islam Dr Muhammad Tahir-ul-Qadri: Human Rights in Islam, Minhaj, 2005.
Orlando Patterson: Slavery and Social Death, A Comparative Study, Harvard College, 1982.
Ronald Segal: Islam's Black Slaves: The Other Black Diaspora, Farrar, Straus and Giroux, 2002.
Syed Maududi: Human Rights in Islam, New Era, 1981.

On the Emergence and Development of the Trust Legal Institution

István Sándor *

Abstract

In the history of law, the English institution of the trust is one of the most original institutions of the private law. A jurist who studies and deals with legal systems based on the traditions of Roman law applies the principle of the numerus clausus of property rights. Therefore, in the theory of civil law, the Anglo-Saxon institution of the trust with split ownership structure appears to be an alien concept. To understand the unique feature of the equity and the trust institution it is unavoidable to discover the historical background of these. This work aims to provide a comprehensive description of the emergence and development of the trust from the Middle Ages until the 19th century.

Key words: *trust; use; feoffor; feoffee; cestui que use; settlor; trustee; beneficiary; equity; common law.*

Introduction

The development of English law slightly diverged from the traditions of Continental Europe.[1] This is mainly attributable to the uniqueness of common law, which essentially signifies the law developed by the royal courts of England. It is a generally held view in jurisprudence that English law is fundamentally different from Continental European law. The principal cause for this is the fact that English law was not embedded in the Continental European legal systems built on the foundations of *ius commune*, which evolved from the traditions of Roman law. English law is unique with the absence of a sharp distinction between sources of law; the oldest case law is just as part of the legal system, enjoying perhaps even greater distinction, as the newest statutes.

Similarity between Roman law and common law is expressed by the law of writs and by the cardinal relevance of casuistry. Gábor Hamza argues in favour of similarities between the praetor's edicts and English equity.[2] Similarly to Roman law, English law is also defined by an approach based on the law of writs. English law is *ars judicandi,* while Continental European law is *scientia iuris,* i.e. in Anglo-Saxon law, justice based on judicial independence is superior to codification.[3] These similarities, however, are of a formal nature; they do not result in similarities in substantive law.

1. The place and role of equity in the English legal system

English law consists of three different laws. Common law incorporates the case law of the English royal courts. Common law has developed continuously since the earliest times as the customary law of the country (universal custom of the realm). Common law does not mean written law in the true sense of the term, but is legislation continuously evolving on the principles laid down by judges in their earlier judgements.

Case law, precedents give rise to general immemorial custom, which is laid down in the decisions of the courts (records, reports, abridgements) and in authoritative judicial codes.

Beyond common law, the other important constituent of English law is statute law, which is most similar to the Continental European legal systems. Initially, the enactment of such law was the exclusive privilege of the king; a strengthening parliament gradually took over such powers during the Middle Ages. The supremacy of the law prevails in English law, which, according to the dominant interpretation, means the supremacy of laws over customary law.

In addition to common law and statute law, there is the institution of equity, which is a law developed by the Court of Chancery.[4]

* Dr. habil. István Sándor, PhD, associate professor, Department of Roman Law and Comparative Legal History, Faculty of Law, Eötvös Loránd University, Budapest, Hungary.

1 "The trust, like the majority of English legal concepts and institutions, can only be explained by history." DAVID, René – BRIERLEY, John E. C., *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*, London, 1985[3], p. 310.

2 HAMZA, Gábor, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján (Development of modern private law systems based on traditions of Roman law)*, Budapest, 2002, 82.

3 VARGA, Csaba, *Jogrendszerek, jogi gondolkodásmódok az európai egyesülés perspektívájában. Magyar körkép – európai uniós összefüggésben (Legal Systems, Legal Concepts From the Perspective of European Unification. Hungary From the Perpective of the European Union)*, Budapest, 2009, p. 53.

4 BATTIFOL, H., *The Trust Problem as Seen by a French Lawyer*, Journal of Comparative Legislation and International Law 33 (1951) p. 25. See also BOGDAN, Michael: *Comparative Law*, Kluwer, Norstedts Juridik, Tano, 1994, p. 109.

Equity incorporates principles based on the concept of good faith and equity, which is broader than the context of law.[5] The term derived from the French word *équité* means fairness and impartiality, but its true sense signifies the sum of real rules of law applied exclusively by the Courts of Chancery.[6] In a sense, the chancellor also plays the role of "*deus est procurator fatuorum"* (God is the guardian of fools), not unlike the ecclesiastical courts, as they defend those who are unable to care for themselves or defend themselves.[7] The judicial procedure began with the writ *(breve)*, which is a court order. Initially it was a letter of appointment written on parchment received from the king, which calls on the county sheriff to order the offender to appear before the court. The writ was issued by the Lord Chancellor upon request, which was subject to a fee *(purchase a writ)* (See praetorian law in Roman law). This practice was later met with resistance and was abolished.

1.1 The origin and development of the Court of Chancery

The judiciary of the Court of Chancery drew up the legislation of equity, which also covered use, and eventually regulated the trust. The development of this legal institution can be examined upon review of the role of the Court of Chancery.[8]

Following the Norman conquest, each English king had a chancellor, who was almost exclusively a member of the clergy, commonly a bishop; he kept the king's seal and was head of the officers of the king. In the 13th century, from the time of the rule of Henry III, the king did not have a chief justiciar; the chancellor became the prime minister of the king[9], as member of the Curia Regis, who was required to be familiar with not only common law, but also with canon law and Roman law.[10] The judicial powers of the chancellor extended to two areas: firstly, he judged the received pleas, and secondly, he had the right to issue writs.[11]

The common law applied by the royal courts often resulted in strict judgements. Appeals against such judgements were submitted to the king on equitable grounds, who authorised the chancellor to judge these. By exercising such powers, the chancellor established his own court from the middle of the 14th century.[12] In the 13-14th centuries, beyond the common law applied by the Court of Exchequer, the Common Pleas and the King's Bench, the judicial activities of the chancellor and the equity courts gained in relevance. As a consequence, law-finders turned directly to the chancellor, if, for example, they were in dispute with the king or with other persons with greater influence than themselves.[13] It should be noted that owing to the mobility of judges, often the judges of common law courts judged cases at the Courts of Chancery.[14] The applicants sought extraordinary remedy (a blessing, king's favours) in their case for the love of God and charity.[15] From the early 15th century, it became common for the chancellor to exercise powers in affairs of private law according to the rules of equity, or rather, the rules of conscience and ethics, without bringing these cases before the king or the royal council.[16] Equity fundamentally rested on moral and not legal foundations.[17] The Court of Chancery was very popular because it operated throughout the entire year, the judges of the Chancery not only relied on legislation, but also took into account the facts of the case, and their procedure broadened room for evidence. In addition, the Court of Chancery applied sanctions that were not applicable by the courts of common law; it acted not only after the occurrence of infringements, but was authorised to take measures prior to their occurrence.[18]

In the second half of the 15th century, from the reign of Henry VII, the Court of Chancery became an integral part of the English justice system alongside the courts of common law, and the rules of equity became prominent constituents of English pri-

---

[5] NEWMAN, Ralph A., *Equity and Law: a Comparative Study*, New York, 1961, p. 11.

[6] The accurate definition of the concept of equity, and the description of its scope and specific domain is particularly difficult. HANBURY, H. G., *The Field of Modern Equity*, Law Quarterly Review 45 (1929) p. 196.

[7] For example, they do not issue covenants, which could be given effect before a court of common law, but only rely on verbal agreements. MAKOWSKI, Elizabeth, *„Deus est procurator fatuorum" Cloistered Nuns and Equitable Decision-Making in the Court of Chacery*, In PENNINGTON, Kenneth – EICHBAUER, Melodie Harris (ed.), Law as Profession and Practice in the Medieval Europe. Essays in Honour of James A, Farnham, Burlington, 2011, p. 205.

[8] "In English law equity might be compared to the Rhone entering the Lake of Geneva, apparently mingling with its waters, but showing, when it leaves it again, that it has preserved its independence." NEWMAN, *op. cit.* p. 14.

[9] He was "… the King's natural prime minister". His office was of a higher order, variable and undefinable. MEAGHER, R. P. – GUMMOW, W. M. C. – LEHANE, J. R. F., *Equity. Doctrines and Remedies*, Sydney, Melbourne, Brisbane, Adalaide, Perth, Canberra, Hobart, 1992[3], p. 3.

[10] MAITLAND, Frederick William, *The Consitutional History of England*, Cambridge, 1908, p. 221. BOGDAN, *op. cit.* p. 109. KECSKÉS, László, *Polgári jogi fejlődés az angol és a skót jogban*, Budapest, 2012, p. 96.

[11] As the large seal – held by the chancellor - was required for the issue of all writs, the chancellor exercised control over the entire system of writs. It follows that the chancellor made practice out of drafting legislation through the issue of writs. Such powers of the chancellor were initially curtailed by the English parliament in 1258 through the Provisions of Oxford, then through the approval of the Statute of Westminster in 1285, resulting in the chancellor's incapacity to issue new writs. MEAGHER – GUMMOW – LEHANE, *op. cit.* p. 4.

[12] NEWMAN, *op. cit.* p. 22.

[13] NEWMAN, *op. cit.* p. 24.

[14] MEAGHER – GUMMOW – LEHANE, *op. cit.* p. 6.

[15] NEWMAN, *op. cit.* p. 37.

[16] MAITLAND, *op. cit.* p. 223 ff.

[17] "… equity is so much more ethical than law". AMES, James Barr, *The Origin of Uses and Trusts*, Harvard Law Review 21 (1908) p. 261. "… equity was equity and not strict law". SCOTT, Austin Wakeman – FRATCHER, William Franklin, *Scott on Trust. The Law of Trusts*, Vol. I, Boston, Toronto, 1987[4], p. 9.

[18] BUTLER, Andrew (ed.), *Equity and Trusts in New Zealand*, Wellington, 2003, p. 5.

vate law.[19] Over time, similarly to the rules of common law, the norms evolving from the principles of equity became binding.[20] The basic function of equity is to supplement and even correct the inadequate or flawed rules of common law. It does so within a framework, where equity follows the law; it was never used as an instrument to directly devalue or conflict with the rules of common law. Moreover, if there was a collision of the rules of common law and equity, the rules of equity enjoyed precedence. This is mainly attributable to the fact that the courts of common law were bound by strict formal rules, while the courts of equity enjoyed a much larger degree of freedom with respect to both their rules of procedure and the substance of their decisions.[21] Due to the varying sanctions applied under common law and equity, however, this did not amount to real conflict; it only meant that one law granted legal protection to the applicant, while the other law did not.[22] With the development of equity evolving over time, the rules of equity solidified and basically took on rigidity similar to that of common law.[23] The separation of equity from common law strengthened under the Tudors, and, hence, it proliferated and gained in secular character.[24]

Competition between the two areas of law peaked during the rule of James I (1567-1603). Lord Chief Justice Coke and Lord Chancellor Ellesmere engaged in a dispute over law. Lord Coke found fault with the Court of Chancery's right to issue injunctions on behalf of plaintiffs, whose such application had been denied by the court of common law. Coke argued that this was in conflict with the rules of the Statute of Praemunire. James I, however, ruled that the Court of Chancery enjoys precedence in all cases.[25]

Before Thomas More (1478–1535), the chancellor was almost always a dignitary of the clergy. Between 1330 and 1515, at least fifteen chancellors studied canon law or Roman law. This is why the chancellor followed canon law, and applied *denuntiatio evangelica* and *imploratio officii iudices* in his practice.[26] *Denuntatio evangelica* is the best proof of the effect of equity *in personam.*[27] Thus, equity relied significantly more on canon law than on civil law.[28] Equity, however, was much more open to the influence of Roman law than the courts of common law.[29] Thomas More was a qualified jurist. Although he served as chancellor for only three years, he contributed to substantial changes. Thereafter the position was traditionally filled by jurists, with very rare exceptions.[30]

John Selden describes variation within the operation of the courts of equity as thus: "Equity is a roguish thing, for law we have a measure, know that to trust to. Equity is according to the conscience of him that is Chancellor, and as it is larger or narrower so is equity. It is all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot; what an uncertain measure would this be; one Chancellor has a long foot, another a short foot, a third a different foot; it is the same thing in the Chancellor's conscience." Lord Eldon argued in a similar spirit: "The doctrine of this Court ought to be as well settled and made as uniform, almost as those of the Common Law laying down fixed principles but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed by every succeeding judge. Nothing would inflict on me greater pain in quitting this place that the recollection that I had done

---

19 MAITLAND, *op. cit.* p. 225.

20 „In course of time […] the rules of equity became just as strict as the rules of common law – the chancellors held themselves bound to respect the principles to be found in the decisions of their predecessors – a decision was an authority for future decisions." MAITLAND, *op. cit.* p. 225.

21 DAVID – BRIERLEY, *op. cit.* p. 341.

22 BOGDAN *op. cit.* p. 110. Hanbury regards such statements of Maitland, adopted by Bogdan, to be inconclusive. HANBURY, *op. cit.* p. 201. It is obvious, however, that equity is the sum of two areas: the rules of procedural law and substantive law. O'CONNOR, J. F., *Good Faith in English Law*, Aldershot, 1990, p. 70.

23 BOGDAN, *op. cit.* p. 109.

24 MEAGHER – GUMMOW – LEHANE, *op. cit.* p. 6.

25 Statute of Praemunire (16 Ric. 2, c. 5. [1351]). This Statute was enacted by the English parliament during the reign of Richard II, declaring that the judgements of either ecclesiastical or other courts are not acceptable. See OOSTERHOFF, A. H. – CHAMBERS, Robert – MCINNES, Mitchell – SMITH, Lionel: *Oosterhoff on Trusts. Text, Commentary and Materials*, Toronto, Ontario, 2004[6], p. 5.

26 NEWMAN, *op. cit.* p. 27. *Denuntiatio evangelica* was enforced by *ratio peccati*, i.e. if someone fails to fulfil his promise, he commits a sin. See BÓNIS, Péter, *A képviselet és a harmadik személy javára kötött szerződés a középkorban (Representation and the Third Party Beneficiary Contract in the Middle Ages)*, Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica XXX/1 (2012), p. 52.

27 "It is clear that the Chancellor's decision to limit his jurisdiction to the prevention of extreme hardship and to confine his remedies to personal commands to the defendant to act or to refrain from action was based on the fact that jurisdiction and remedies in canon law took those forms and on practical and political reasons." NEWMAN, *op. cit.* p. 30.

28 The chancellors were members of the clergy, who relied less on Roman law, and more on *ius commune*. Thus, equity originates not from civil law, but from *denuntiatio evangelica*, the canonical procedure emerging in the 12th century, where human conscience plays an important role. GLENN, H. Patrick, *The Historical Origins of the Trust*, In RABELLO, Alfredo Mordechai (ed.), Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions, Jerusalem, 1997. p. 774.

29 GLENN, *op. cit.* p. 116.

30 Bishops were elected chancellors at the end of the reign of Edward VI (1547–1553) and during the rule of Mary I (1553–1558). Sir Christopher Hatton, who was neither a member of the clergy or a jurist, filled the position of chancellor for five years during the reign of Elisabeth I (1558–1603). During the reign of James I (1603–1625), after Bacon, the bishop held the seal for four years. During the reign of Charles II, Anthony Ashley Cooper (1st Earl of Shaftesbury) assumed the office of chancellor as a politician. With the exception of the above cases, the position of chancellor was filled by jurists from 1529. They included distinguished jurists, such as Sir Nicholas Bacon (1558–1579), Thomas Egerton (1st Viscount Brackley, Ellesmere) (1596–1617), Sir Francis Bacon (1617–1621), Sir Orlando Bridgeman (1667–1672) and Heneage Finch (1st Earl of Nottingham), the "father of modern equity". Their work contributed to raising equity to the level of increasingly organised law and an independent legal system. SCOTT – FRATCHER, *op. cit.* p. 10.

anything to justify the reproach that the equity of this court varies like the Chancellor's foot."[31]

The law of procedure applied by the Court of Chancery varied significantly from the law applied by the courts of common law. The procedure was launched with the writ of subpoena, and not with the form of action. If the defendant did not want to litigate, the Court of Chancery had the right to levy a fine on him. The chancellor had the right to oblige the defendant to take some action, or to prohibit him from taking an action. The judgement was explicitly of a personal effect and applied to specific actions, and not simply subject to monetary compensation ruled by the courts of common law.[32] The rules of procedure were under the strong influence of canon law; the inquisitorial procedures were initially conducted in writing, without a jury, initially in Latin, then relatively soon in English.[33] The probative procedure played less of a central role, as decisions were passed chiefly on a moral basis.[34] From the 17th century, the right was established to appeal the decisions of the Court of Chancery to the House of Lords.[35] The Courts of Chancery continuously gained ground, with a sharp rise in the number of cases heard by them.[36]

Legislation drawn up by the Courts of Chancery served to remedy the deficiencies of common law, that is, the lawfinder had to first examine the specific case under common law, and then had to take into account the rules of equity.[37] In 1818, Lord Elden noted that "[i]t is not the duty of a judge in equity to vary rules, or to say that rules are not be considered as fully settled here as in a court of a law."[38] The legislation of equity did not constitute a contained unit or a clearly defined, uniform system.[39] The systematised classification of equity legislation begins under the chancellorship of Lord Nottingham. Equity does not essentially affect the branch of criminal law, nor is it prominent in relation to tort, with the exception of certain rules of procedure. Its effect is similarly negligible in company law, with the exception of the question of directors' liability. Equity, however, plays an important role in contract law, and to a lesser extent, in commercial law (e.g. in relation to the regulation of partnerships).[40]

There have been numerous conflicts between the courts of common law and equity. The Court of Chancery, as an independent court, was abolished in 1875 pursuant to the Judicature Acts 1873-1875.[41] As a result of judicial reform, the Queen's Bench Division, within the organisation of the High Court of Justice, conducts the procedure in accordance with common law, within the framework of a verbal and contradictory procedure. In contrast, the Chancery Division conducts a written procedure of an inquisitorial nature. The co-existence of the two divisions within a single judicial organisation did not lead to the resolution of differences between common law and the law of equity; these differences have practically survived to this day. The distinction between the common lawyer and equity lawyer has also persisted; the same barrister may not act before both divisions.[42] It should be noted that in the present, equity does not necessarily imply the duality of the judicial system; obligations under equity and claims under property law may be recognised nonetheless.[43] Today, equity's role lies in its function to supplement and support common law, therefore the two legislative corpora are jointly relied on by the courts through the unification of the two judicial organisations.

1.2 The chief characteristics of the equity

Equity can only be described, but not defined in the form of substantive law.[44] Equity does not correspond to the meaning of equity derived from ancient Greek law and expressed with the term *aequitas* in Roman law. The essence of Aristotelian equity may be summed up by saying that a judge may derogate from the application of a rule of law if, in his view, it would

[31] Gee v. Pritchard (1818), 2 Swanst, 402 at p. 414. POLLOCK, Sir Frederick (ed.), *John Selden – Richard Milward: Table Talk of John Selden*, Oxford, 1927, p. 43.

[32] HESS, Amy Morris – BOGERT, George Gleason – BOGERT, George Taylor, *The Law of Trusts and Trustees. A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and Administration with Forms*, Eagan, 2007[3], Vol. 1. p. 26.

[33] MAITLAND, Frederick William – MONTAGUE, Francis C., *A Sketch of English Legal History*, New York, London, 1915, p. 125. The courts of common law used legal French for a long time. BOGDAN, *op. cit.* p. 111.

[34] DAVID – BRIERLEY, *op. cit.* p. 344.

[35] BOGDAN, *op. cit.* p. 110. The court of common law, however, did not hold the power to revise the decisions of the Court of Chancery, even if such decisions were false or unfair. IVES, E. W. – MANCHESTER, A. H., *Law Litigants and the Legal Profession*, London, New Jersey, 1983. p. 85.

[36] During the reign of the House of York (1461–1485), for example, the number of cases heard before the Courts of Chancery quadrupled, principally resulting from the rising number of commercial cases. For details see IVES – MANCHESTER, *op. cit.* p. 82.

[37] "Law and equity still flow side by side, one system aiding and supplementing the other, thus presenting a phenomenon peculiar to English jurisprudence." HANBURY, *op. cit.* p. 201. BOGDAN, *op. cit.* p. 110. In the words of Szászy: "Present English customary law is Common Law modified by the principles of Equity." SZÁSZY, István, *A magyar magánjog alapintézményei (Basic Institutions of Hungarian Private Law)*, Budapest, 1949, p. 17.

[38] Davis v Duke of Marlborough (1818) 2 Swanst 108 at 163; 36 ER555 at 569. See BUTLER, *op. cit.* p. 7.

[39] "… equity is still a miscellany, made up of various doctrines which sometimes seem mutually almost unrelated, and that its field encroaches more than ever on the field of law of property." HANBURY, *op. cit.* p. 196.

[40] HANBURY, *op. cit.* p. 199.

[41] It should be noted that in Cromwell's time, in 1653, the English parliament had already approved a law on the abolition of the Court of Chancery, but the enacting decision was not passed. And in 1690, a bill was submitted to parliament on the annulment of equity by the rules of common law, but it was not passed, either. See BUTLER, *op. cit.* p. 7.

[42] DAVID – BRIERLEY, *op. cit.* p. 345. BOGDAN, *op. cit.* p. 112. HANBURY, *op. cit.* p. 201.

[43] This is the legal situation, for example, in countries once belonging to the English colonial empire, as in India, Pakistan, Bangladesh, Sri Lanka, Malaysia, Singapore, and in some African countries. HONORÉ, Tony, *Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland*, In RABELLO, Alfredo Mordechai (ed.), Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions, Jerusalem, 1997, p. 795.

[44] "Equity can be described but not defined." MEAGHER – GUMMOW – LEHANE, *op. cit.* p. 3.

result in injustice.[45] The principle of *summum ius summa iniuria* in Roman law corresponds to the ancient Greek rule of *kalon kai dikaion.* In classic Roman law, the concept of *aequitas* was in many respects identical in meaning to the concept of *bona fides*; it was often used as a synonym.[46] Without dismissing the ancient Greek concept of *kalon kai dikaion*, the English equity, in contrast, centers around the notion of conscience.[47] The Earl of Oxford's Case ([1615] 1 Ch Rep. 1.) remains a key case in terms of the principle that an unconscionable decision may not be passed against a conscientious defendant.

In contrast to common law, the courts of equity developed rules of injunction and specific performance in relation to contract law. The injunction was enforced to prohibit someone from some unlawful action. There is correlation between the institution of the injunction and the principle of *pacta sunt servanda*, where good faith demands performance under the agreement.[48] The introduction of the injunction was also relevant in relation to tort. In the case of specific performance, someone is required to take specific action. The emergence of satisfaction, performance, ademption and hotchpot were new concepts in the law of succession. The institutions of relief against penalties, forfeiture, fraud, undue influence, accident and mistake evolved to dampen the rigidity of law, while the institutions of the set-off, interrogatory and discovery were introduced in the law of procedure. Courts of equity also handled cases concerning the guardianship of minors and the administration of the property of the mentally disabled.[49] The development of the institutions of part performance, proprietary estoppel and the trust is also attributable to courts of equity.[50] It should be noted that the courts of common law were aware of the institution of the trust, but took no steps to enforce it.[51]

In the case of a breach of contract, common law stipulates the single remedy of the judgement of damages, determined in money.[52] Equity is applied on the premise that the honest person is obliged to keep his promise, hence, the judge issues an order for specific performance.[53] Specific performance is ordered on a discretionary basis, but legal practice has defined particular rules.[54] In many instances, the sanctions of equity were not rivalling with the sanctions imposed by common law, but, rather, supplemented those.[55]

It is worth noting that it was possible to take action in the same case before both the court of common law and the Court of Chancery, as the sanctions applied by the two courts varied.[56]

The parallel application of substantive law and equity is not without precedent in the history of law. Almost all legal systems in the world contain normative systems established by legal forums, which aim to diminish the rigidity and injustices created by substantive law. Similar trends can be observed during the development of Roman law, when rigid civil law was dampened in response to praetorian legal practice, and the standardisation of canon law and medieval Spanish law provide further evidence of this.[57]

2. The appearance and application of the Medieval use

2.1 Outline of the English Medieval property law

The structure and precedents of Anglo-Saxon law, built on unique traditions, show fundamental differences to the Continental legal systems. Accordingly, English property rights, or rather property law also reveals very distinctive characteristics. In addition to the legislation adopted in this area[58], case law continues to play a prominent role. Without going into the detailed rules of English property law, we will point out the key

[45] The term *epieikea* means that on moral grounds, equity is applied to someone with the result of a more favourable solution. The adjective *epieikés* ("reasonable, appropriate, fair") is used by Homer as well. The explanation of the word is found Aristotle's work entitled *Nicomachiosi ethica* (5, 14 [1137 b]), as a form of justice, if the adjustment of law becomes necessary. FÖLDI, András, *A jóhiszeműség és tisztesség elve (The Principle of Good Faith and Honesty. Brief History of Institutions from Roman Law to Today)*, Publicationes Instituti Iuris Romani Budapestinensis. Fasc. IX, Budapest, 2001, p. 19.

[46] FÖLDI, *op. cit.* p. 20.

[47] Equity is based on the principles of natural justice and honesty. MAITLAND – MONTAGUE, *op. cit.* p. 125. "The English concept of equity is built on the idea of *conscience* in that the courts consider conscience of the individual defendant in any particular case." HUDSON, Alastair, *Understanding Equity & Trusts*, London, New York, 2013[4], 2. "The substance of equity in such natural justice is only remotely, faintly reminiscent of Aristotle's *kalon kai dikaion* and *epieikea*, and of the Continental concept of equity derived from Roman law." UJLAKI, László, *Méltányosság a polgári jogban (Equity in Civil Law)*, Budapest, 1990, p. 34. From a different point of view, Visegrády argues that "equity began as equity in general, but became something else." VISEGRÁDY, Antal, *A bírói gyakorlat jogfejlesztő szerepe (The Developing Role of the Judicial Practice)*, Budapest, 1988, p. 28.

[48] O'CONNOR, *op. cit.* p. 75.

[49] MEAGHER – GUMMOW – LEHANE, *op. cit.* p. 8.

[50] KECSKÉS, *op. cit.* p. 103.

[51] SCOTT – FRATCHER, *op. cit.* p. 5.

[52] HOLDSWORTH, Sir William Searle, *A History of English Law I – XVII*, London, 1956[7], Vol. I, p. 556.

[53] While common law regulates remedy in the form of *damages, common law tracing* and *money had and received*, equity provides remedy within a much wider scope, introducing rules of *compensation, equitable tracing, specific performance, injunction, rescission, rectification, imposition of constructive trust, imposition of resulting trust, subrogation,* and *account*. See HUDSON, *op. cit.* p. 7. HOLDSWORTH, *op. cit.* Vol. I, p. 458.

[54] In the Jones v. Lipman ([1962] 1 WLR 832) case, for example, both the seller and buyer were obliged to fulfil specific performance, where, with a view to avoid specific performance, the natural person sold the claimed item to the company under his control. Good faith plays a central role in the judgement of specific performance. O'CONNOR, *op. cit.* p. 72.

[55] "The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy." AMES, *op. cit.* p. 262.

[56] DAVID – BRIERLEY, *op. cit.* p. 344.

[57] NEWMAN, *op. cit.* p. 31.

[58] The provisions of the following acts are central to this area: Law of Property Act 1922, Land Charges Act 1925, Settled Land Act 1925, Trustee Act 1925, Administration of Estates Act 1925, Land Registration Act 1925, and amendments of these acts, e.g. Law of Property Act 1969, Land Charges Act 1972, Land Registration Acts 1966, 1986, 1988, Land Registration and Land Charges Act 1971 and the Law of Property (Miscellaneous Provisions) Acts 1989, 1994.

taxonomical differences with the apparent aim of elucidating some of the logic behind diverging regulation.

The development of use in England – the historical antecedent of the trust – is in close correlation with the characteristics of real property law.[59] English property law shows significant variation from property law regulated in the Continental European systems of private law. There is no uniform codified legislation; there is no sharp division from other legal institutions. Property law is less defined by a conceptual approach, than by characteristics determined by particular rights. Accordingly, property law is associated with the use of things, the collection of fruits, profits from them, and the right of disposal.

English property law is divided into the main categories of real property and personal property. Rights are further distinguished as exercised over corporeal, tangible and incorporeal, intangible property. Corporeal property is defined as objects within the category of personal property, while the right over incorporeal property is defined as choses in action.[60]

Ownership in the Middle Ages was also characterised by duality; there was the right of ownership over real property (seisin), and the right to personal property (possession). English law did not recognise an absolute title to real property; all real property ultimately constituted the property of the king.[61] It follows that the estate acquired from the king establishes dependence between the lord and the tenant. The reversion of real property for the benefit of the lord was wittily defined as the "postal pigeon" concept of real property ownership by Grosschmid, an outstanding figure in Hungarian private law.[62] Glenn assumes this has to do with the belief that God is the ultimate owner of the land, thus everyone else is left to enjoy its fruits.[63] "*Nul terre sans seigneur",* i.e. "No land without a lord"; this was one of the principles of estate law in feudal England. The estate constituted the property of the Crown; the barons, as tenants, were granted a leasehold by the king. All land was given in exchange for consideration.[64]

Following the Norman conquest, as part of the feudal social and economic establishment, the entire territory of the country constituted the property of the king; property was received from the king only as a tenure. The tenants held free tenures and non free tenures. The free tenures included the tenure in chivalry, which was given by the king for military service, the free socage, which was consideration for monetary payment, and ecclesiastical tenure (frankalmoin). The bound tenure (villeinage) was feudal service, given in exchange for monetary consideration. From the 14-15th century, the manorial courts registered these tenures and issued a document (copyhold). Many burdens were attached to the tenure, such as the right of reversion (escheat), the payment obligation vis-á-vis the heir to the tenant, relating to the change of estate, which amounted to one-fourth of the tenure (relief), the obligation to pay monetary support, e.g. if the lord knighted his first-born son, or his daughter married, he was required to pay ransom. If upon the death of the tenant, his child was still a minor (the boy under the age of 21, the girl younger than 14), the lord became his/her guardian (wardship), and hence, was allowed to collect full income from the tenure and to let his daughter marry.[65]

Free tenure was not limited in time. There were two versions: freehold of inheritance and freehold not for inheritance. In the case of a freehold of inheritance, the free tenure could be freely inherited by the descendants of the first tenant (estate in fee simple), and reverted to the lord only upon their death. Under the other version, it could only be inherited by the direct descendants of the tenant specified in the deed of gift (estate in fee tail), and was reverted to the lord upon their death.[66] The term "estate" generally refers to the duration of the right relating to the given property.[67] The life estate grants rights to the property during the lifetime of the given person. Gambaro defines the concept of estate with three factors: duration, right of alienation and the degree of the enjoyment of the property. It follows that the fee simple absolute is the absolute right; other rights are subject to limitations of law.[68]

There were three restrictions to the alienation of the tenure in the Middle Ages: restriction of free testament, restriction of alienation under public law, and mortmain laws. The tenant did not have the right to bequeath the tenure; this became possible only with the emergence of the institutions of use. In case of the restriction of alienation under public law, if the tenant received the tenure directly from the king (tenant-in-chief), or he re-

[59] SZLADITS, Károly Jr, *Az angol jogi trust-intézmény*, Budapest, 1939, p. 10. MURPHY, Tim – ROBERTS, Simon – FLESSAS, Tatiana, *Understanding Property Law*, London, 2012^{4}. p. 3.

[60] MURPHY – ROBERTS – FLESSAS, *op. cit.* p. 38 – 57.

[61] See GROSSCHMID, Béni, *Werbőczy és az angol jog (Werbőczy and the English Law)*, Budapest, 1928. p. 81. Grosschmid describes this with wit, as follows: "Such an owner, as we have seen, is bound from head to toe. His hands are bound by the time taken by the postal pigeon (in fact, the term), that is, the reversion. His feet are bound by the restrictive laws of the descendants and his nation." GROSSCHMID, *op. cit.* p. 84., and p. 169. See also MOFFAT, Graham, *Trusts Law. Text and Materials*, Cambridge, 2005^{4}. p. 34.

[62] GROSSCHMID, *op. cit.* p. 497.

[63] "Seisin will become eventually a simple fact; the law will be found in *dominium*, an abstract and absolute juridical power enforced through human justice and having its source in secular norms." Thus, seisin was not equivalent to ownership, but, rather, expressed possession and the collection of profits. As a result, *writ of novel disseisin*, serving protection, was *actio spolii*, established on the *interdictum unde vi*re of Roman law. GLENN, *op. cit.* p. 763 – 770.

[64] MURPHY – ROBERTS – FLESSAS, *op. cit.* p. 94.

[65] BAKER, Sir John, *The Oxford History of the Laws of England*, Oxford, 2003. Vol. VI, p. 653. SZLADITS JR, *op. cit.* p. 4 – 6.

[66] SZLADITS JR, *op. cit.* p. 5. KEANE, Ronan, *Equity and the Law of Trusts in the Republic of Ireland*, Dublin, 2011^{2}, p. 8 -10.

[67] "… an estate in the land is a time in the land, or land for a time, and there are diversities of estates which are no more than diversities of time, for who has a fee simple in a land has a time in the land without end." Walshington's case (1579) 2 Plowd. 547, 555. See KÖTZ, Hein, *Trust und Treuhand. Eine rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts*, Göttingen, 1963, p. 18.

[68] GAMBARO, Antonio, *Western Property Law*, In BUSSANI, Mauro – WERRO, Franz (eds), European Private Law: A Handbook, Berne, 2009, Vol. I, p. 57.

ceived it as a mesne tenant from a tenant in chief, in a capacity of mesne lord, he was permitted to alienate it by way of subinfeudation or substitution. In case of subinfeudation, the tenant-in-chief was denied many services, therefore, during the reign of Edward I, the statute *Quia Emptores*, issued in 1290, only permitted substitution, where the substitute acquired the status of the mesne tenant.[69] The only alternative to subinfeudation was the transfer of the tenure. Under this arrangement, the direct royal tenure (feodem simplex, fee simplex) became freely transferable without payment of a transfer fee (laudemium) to the king.[70] This prevented the emergence of a pyramidal relationship between the tenants[71], but also significantly restricted the free transfer of property. Thereafter, from 1256, all tentants-in-chief were prohibited from alienating the tenure. The rules were eased in 1327 to the extent that alienation was subject to a fine for alienation. The statute *De Viris Religiosis*, issued in 1279, reflected this trend. It stipulated the prohibition of the transfer of property to ecclesiastical bodies without the permission of the lord and the king. Moreover, it was not even possible to transfer property between spouses. Thus, if the husband wished to settle common property with his wife, he transferred the property to a trustee (feoffee), who was to enable the common use thereof for the spouses.[72]

In summary, and in a simple formulation, before 1926, English law distinguished three types of law relating to real property. The fee simple was the absolute right; there was also the life estate and fee tail, or entail. If someone held a fee simple, he had the right to transfer a life estate to someone else, which, however, was only held during the lifetime of the transferee; it ceased thereafter, that is, the fee simple was revived with full effect. If someone held a life estate and transferred it to someone else, the transferee could only enjoy the right during the lifetime of the transferor, in accordance with the *nemo dat quod non habet* principle. If someone received a fee tail (entail), ownership was in effect during his lifetime and the lifetime of the given class of his heirs (this was regulated with the formula: "to A and the heirs of his body"). It follows that upon the transfer of either a life estate or an entail by the holder of a fee simple, such transfer did not have indefinite effect, as such rights cease upon the death of the beneficiaries (or, in the latter case, his descendants). It follows that the owner (of fee simple) could, from time to time, practically "seize", whether successively, various (property) rights, of the absolute title, where the absolute title reverted to him or to his successors upon the lapse of such periods. Such future right or entitlement was called a remainder. For example, if "X", as owner of fee simple, transfers a life estate to "A", and similarly a life estate to "B" after the death of "A", and transfers an entail to "C" after the death of "B", then "A" holds a life estate in possessional, "B" holds a life estate remainder, while "C" holds an entail in remainder; "X" (or his successor) will be entitled to a reversion in fee simple, i.e. the fee simple will again take effect upon the death of "C" or his heirs without heirs.[73]

2.2 The legal structure and application of the use

The development of the trust is attributable to two important factors: fraud and fear.[74] This approach can be traced to the 14th century.[75]

The feudal ownership system and prohibitions of alienation lead to the emergence of the precursor to the trust: the use. The origin of the term use *(ad opus)* is embedded not in English, but in Germanic law.[76] The Latin word *opus* made its way into the English language through the French words *os* or *oes*.[77] According to Maitland, the term *opus* has its origin in Frankish Formulae and the Carolingian law of the Lombards.[78] It is interesting to observe that all of the sources indicate a declaration of trust

---

[69] SZLADITS JR, *op. cit.* p. 6. JUDGE, Stephen, *Business Law*, London, 1995, p. 232 – 234.

[70] See RUSZOLY, József, *Európa jogtörténete (History of European Law),* Budapest, 1996, p. 327.

[71] "… the act of Edward I, called Quia Emptores (1290), which, in a sense, functions as the principal beam of the current English concept of 'fee simple', and is thus, to some extent, such foundation of the contemporary (1914) English estate. […] [if] A sells, that is, transfers the real property as fee simple to B, B will not become a tenant of A, but upon the release of the latter from his feudal burdens, B will become tenant of whom A was a tenant." GROSSCHMID, *op. cit.* p. 181.

[72] PLUCKNETT, Theodore F. T., *A Concise History of the Common Law*, London, 1956[5], 577. Pursuant to the estate laws of 1925/26, the copyhold was to be abolished within ten years. Thereafter only the crown held ownership of property; everyone else was only entitled to legal estates. The latter category was divided into two forms: the estate in fee simple absolute in possession, and the leasehold, term of years absolute.

[73] MURPHY – ROBERTS – FLESSAS, *op. cit.* p. 75 – 78.

[74] "*… two inventors of uses, fear and fraud; fear in times of troubles and civil wars to save their inheritances from being forfeites; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc.*" Sir Edward Coke in Chudleigh's case (1954) 1 Co Rep 113 b at 121 b. Similarly: "English jurists centuries ago suggested that the parents of the trust were fraud and fear and that the court of conscience was its nurse." Attorney-General v. Sands, Hardres 488, 491 (1669). HESS – BOGERT – BOGERT, *op. cit.* Vol. 1, p. 19. SCOTT – FRATCHER, *op. cit.* p. 7. Attorney General v. Sandres, Hard 488 (491), 145 E.R. 563 (Exchequer, 1668). HELMHOLZ, Richard – ZIMMERMANN, Reinhard, *Views of Trust and Treuhand: An Introduction*, In HEIMHOLZ, Richard – ZIMMERMANN, Reinhard (eds.), Itinera Fiduciae. Trust and Treuhand in Historical Perspective, Berlin, 1998, 42.

[75] Jeromos, Epistolae 52,6. See also HELMHOLZ – ZIMMERMANN, *op. cit.* p. 42.

[76] "The term 'use' is a curious one; it has, if I may say so, mistaken its own origin. You may think that this is the Latin opus. From remote times – in the seventh and eighth centuries in barbarous or vulgar Latin you find 'as opus' for 'on his behalf'. It is so in Lombard and French legal documents. In old French this becomes al oes, uses. In English mouth this becomes confused with 'use'." HOLDSWORTH, *op. cit.* p. Vol. IV, p. 411[8]. Under the arrangement, "A tenet ad opus B", i.e. A holds (the property) for the benefit of B. PLUCKNETT, *op. cit.* p. 576. MOFFAT, G. – CHESTERMAN, M. – DEWAR, J., *Trust Law. Text and Materials*. Butterworths, London, 1998, 25.

[77] *Ad opus Johannis* and *ad usum Johannis* are equivalent; both mean "to the disposal of Johannis". The two were often used together, e.g. *ad opus et ad usum Johannis.* Many sources are referenced in POLLOCK – MAITLAND, *op. cit.* p. 228.

[78] In the Codex Diplomaticus written by John Kemble, Maitland notes three examples of the occurrence of *opus*. See also VERBIT, Gilbert Paul, *The Origins of The Trust*, USA, 2002, p. 24.

for religious and church purposes. Verbit assumes this is attributable to the fact that only natural persons could be owners in this period. It is, nevertheless, unlikely that such transfers fell within the competence of ecclesiastical courts, as legal historians agree that the trust evolved before secular courts. Verbit is of the view that the term *ad opus* is not related to the church.[79] Since a written document was not required for transfers, the available sources are scarce.

Common law also recognised the *ad opus suum proprium* criterion – if someone used entrusted property as his own.[80] Use – based on the English feudal estate – was the medieval antecedent to the trust. The tenant of the land had the right to possess the land (seisin), and he enjoyed a certain degree of protection from his lord; as consideration, he was obliged to provide services to the lord. This system of estates was established on ideological foundations; the land was owned by the king, and his subjects disposed of the land only with rights granted by the king. With regard to rights granted by the king, the tenant-in-chief received land directly from the king; he could transfer such rights to others, possibly resulting in entire chains of tenure (tenant in demesne, mesne lords).

The development of the trust is traced to several periods; the crucial point in its history is generally identified by authors as the enactment of the Statute of Uses. The classification below provides greater detail and points of orientation:

- development of use,
- general enforcement of use by the Court of Chancery (from the 14th century to 1536),
- period in which the title of the beneficiary is recognised on the basis of use (from the enactment of the Statute of Uses, from 1536 to the 17th century),
- the period of the revival of use in the form of "trust" (from the 17th to the 19th century),
- establishment and development of the rules of the modern trust (from the 19th century until today).[81]

The legal institution of use is regarded as the precursor to the trust.[82] In Anglo-Saxon law, the modern trust developed from equity.[83] With the weakening of feudal forms of ownership, there was growing demand to allow the tenant to transfer land to his heirs by testament or to living persons, without the need to request approval from the lord. This led to the creation of use.[84] Under the terms of use, the feoffor entrusted the feoffee with the land to the use of himself, as cestui que use, or for the benefit of persons designated by him. The feoffor could designate other users through a last will, or other preliminary measure. The land would, thus, become transferable inter vivos and in the event of death, without approval by the lord. The feoffee enjoyed legal protection against third parties, albeit not in the form provided under the modern trust.[85] Defined as the origin of the institution of use, the knights going on the Crusades entrusted their property to a trustworthy person (feoffee to use), for the benefit and in the interest of themselves and their family (cestui que use). This arrangement, however, also enabled the evasion of the feudal burdens.

The Domesday Book was compiled twenty years after the Norman conquest for surveying the value of property and land held by natural persons. Maitland is of the view that the use of the term *ad opus* is not rare in the book.[86] Two of the sources provide examples of something other than the division between legal and beneficial ownership. Verbit examined thirty-one additional occurrences of the term *ad opus* in the Domesday Book. He concludes that the term *ad opus* was used to denote the user of the estate, and is not correlated with divided ownership.[87] He maintains that for this reason, the phrase *ad opus* cannot be used in general to mean the division of ownership.[88]

The emergence, development of medieval use, and many of its rules have yet to be adequately researched.[89] Use had two distinctive features: firstly, it was applicable in relation to the freehold (as opposed to the bailiff and lessee), and secondly, it chiefly signified a land estate, and not chattels.[90]

Some authors hold the view that this legal instrument was first used by friars who took a vow of poverty.[91] The *Statute of Mortmain (Statute De Viris Religiosis)*, adopted in 1279, initially prohibited the church from acquiring ownership of real prop-

---

79 VERBIT, *op. cit.* p. 25-26.

80 POLLOCK – MAITLAND, *op. cit.* Vol. p. II. 230.

81 SCOTT – FRATCHER, *op. cit.* p. 12.

82 *"The trust is the most original institution of English law. Its development was intertwined with life and changes in the Anglo-Saxon world. […] The trust is […] a unique device of English real property law; we may argue that it developed to remedy the lack of such law."* SZLADITS JR, *op. cit.* p. 3.

83 For the relationship between equity and common law and the statute, see HAYTON, D. J., *Hayton and Marshall Cases and Commentary on the Law of Trust*, London, 1991[9]. p. 7. POUND, Roscoe – PLUCKNETT, Theodore F. T. (ed.), *Readings on the History and System of the Common Law*, Rochester, 1927[3], p. 208.

84 HUDSON, *op. cit.* p. 15.

85 MOFFAT – CHESTERMAN – DEWAR, *op. cit.* p. 29.

86 MAITLAND lists three examples. MAITLAND, *op. cit.* p. 132.

87 VERBIT, *op. cit.* p. 34.

88 "What appears to be the case is that the phrase is used in a descriptive or literal sense rather than as the term of art indicating divided ownership." VERBIT, *op. cit.* p. 35.

89 BIANCALANA, Joseph, *Medieval Uses*, In Helmholz, Richard – Zimmermann? Reinhard (eds.), Itinera Fiduciae. Trust and Treuhand in Historical Perspective, Berlin, 1998. p. 111.

90 BIANCALANA, *op. cit.* p. 111.

91 The bull *Exiit qui seminat* of 1279 states that the *usus* did not constitute property, hence it was not in conflict with the vow of poverty. HOLDSWORTH, *op. cit.* Vol. IV, p. 416. Plucknett disagrees with Holdsworth on this question, arguing that it was not forbidden for friars to own property, only to make income bearing investments. PLUCKNETT, *op. cit.* p. 577[3]. Others argue that the legal instrument applied by the Franciscan friars should not be regarded as an antecedent to use. BIANCALANA, *op. cit.* p. 113.

erty, then permitted such acquisition a few months later, but only with the permission of the Crown. Permission was bound to an expensive and lengthy process that could take up to thirty years.[92] For the interim period, the church entrusted a feoffee to acquire ownership of the property. The issue of the *Statute of Mortmain* is associated with the option of the property transferred not to the order, but to a feoffee.[93]

In 1207, Francis Bernardone (1181–1226) took a vow of poverty, which is regarded as marking the beginning of divided ownership in the Franciscan order. Saint Francis served as an example for him, similarly to Jesus Christ and the Apostles, who lived without any property. Thus, the Franciscans were not permitted to possess property or touch money. Saint Francis joined the fifth Crusade against Egypt in 1219, presumably to die as a martyr. During this time, he had the opportunity to acquaint himself with the Islamic institution of the wakf, although this is not evidenced by written documentation.[94]

Following the appearance of the Franciscans in England, land (fee simple) were often transferred not directly, but indirectly to them. The first documentary evidence of such a transaction is probably the conveyance by Johannes (John) Iwyn in 1225, where he donated the property to the city of London, for the benefit of the Franciscans.[95] There was no general formula applied to different transfers of this nature, although the descriptions commonly included the condition of "communitati civitatis […] ad hospitandum fratres minores". There is no immediate proof, however, that the development of use in English law is definitively attributable to the adoption of the formula applied by the Franciscans. Verbit is, rather, drawing a parallel in this respect.[96]

The Christian church has adopted the general doctrine that wealth does not lead to final salvation.[97] The church also applied the concept of the trust, based on the teachings of St. Thomas Aquinas.[98] This, however, substantially varies from the legal instrument, as the three poles are lacking, and there are no enforceable legal devices to ensure compliance.[99] In the Confessions, Saint Augustine notes that man's place on earth is only temporary and land is ultimately the property of God.[100]

In 1280, the Franciscan brother Pierre Olivi, in his work entitled *Questions of Evangelical Poverty*, elaborated his theory of the *usus pauper* (poor use); in his view, poverty means that possession and use may only extend to essential needs.[101] Thereafter, the principal members of the Franciscan order turned to Pope John XXII to clarify the issue. Pope John XXII was not a theologian, but a jurist, thus he studied poverty purely within a legal context in his work entitled *Ad conditorem canonum.* It was posted on the door of the Avignon cathedral on 8 December 1322. He pronounced that *usus* is equivalent to ownership in the case of *res consumptibiles*. In the bull *Cum inter nonnullos*, in November 1323 he proclaimed as false the belief that Christ and his followers did not possess anything, as the Bible contains several references to their possession of things.[102]

The popes proclaimed that the Franciscans were permitted to enjoy usufruct or use, but not ownership. If ownership was transferred to them, the Catholic church was entitled to it, and representatives of the church *(procuratores)* acted in related disputes. The bishop was a type of guard *(custos)*, the pope an administrator *(dispensator),* who as a diligent family father (bonus et diligens paterfamilias) managed the property for the benefit of the church and the welfare of the soul *(utilitas ecclesiae et salus animarum)*.[103]

In many cases, the lords going on the Crusades entrusted the church to safeguard their property.[104] According to Verbit, the feoffe would be more of a manager, while the beneficial owners were the beneficiaries.[105] The lords provided for this arrangement to protect the interests of their minor children, and ensure their rights to the property, in case they did not return from the Crusade.[106]

The involvement of English lords in the Crusades is also relevant in terms of their possible awareness of the Islamic institution of the wakf.

---

[92] VERBIT, *op. cit.* p. 198.
[93] NEWMAN, *op. cit.* p. 24.
[94] VERBIT, *op. cit.* p. 202.
[95] "… communitati Londoniae […] ad inhospitandum […] puperes fratres minorum quamdiu voluerint ibi esse". In a similar case, in 1226, a miller named Richard provided a house to the city for use by the Franciscans; three years later, in 1229, William of Wileford sold his house and the related personal property in Oxford to the Mayor of Oxford, to serve as a haven *(ad hospitandum)* for Franciscans until the end of time. VERBIT, *op. cit.* p. 213-214.
[96] VERBIT, *op. cit.* p. 216.
[97] See the letter of Peter to Simon, 8:20; the gift of God cannot be bought with money.
[98] On the basis of the Summa Theologica of St. Thomas Aquinas, Pope Benedict XIV wrote: "res ecclesiae sunt papae, ut principalis dispensatoris non ut domini et possesoris." The property of the church belongs to the pope, as the principal servant, and not as owner or possessor. HERMAN, Shael, *The Canonical Conception of the Trust*, In HEIMHOLZ, Richard –ZIMMERMANN, Reinhard (eds.), Itinera Fiduciae. Trust and Treuhand in Historical Perspective, Berlin, 1998. p. 86.
[99] HERMAN, *op. cit.* p. 87.
[100] "While anyone may rightfully (iure privato) acquire possessions – 'private property', to use the traditional pleonasm – this ius divinum allows no man to claim them as exclusively and unreservedly his. Rather, he must always recollect that both in the first instance and in the last resort, 'the earths is the Lord's', and its treasures come to him from God as to a steward or dispenser… on this account… he should be ever ready to 'communicate', viz to distribute to others in their need." HERMAN, *op. cit.* p. 90.
[101] The Franciscan theologians in Paris judged this theory to be false and dangerous. VERBIT, *op. cit.* p. 210.
[102] VERBIT, *op. cit.* p. 211.
[103] HERMAN, *op. cit.* p. 97.
[104] According to Herman, this is reminiscent of *fiducia cum amico*. HERMAN, *op. cit.* p. 104[64].
[105] VERBIT, *op. cit.* p. 24.
[106] Biancala refers to two such specific cases. BIANCALANA, *op. cit.* p. 115.

Medieval feudal law in England reveals many similarities with Continental law. It is centred around the knight-service, which was compensated by the king through the granting of feudal rights. The lord had recourse to tenant rights, such as guardianship and the payment of relief. Verbit argues that if the two assumptions hold true, namely, that the adoption of the Continental feudal systems in England was the outcome of the Norman conquest, and the trust served to dampen the conflict between the king and the nobility, the hypotheses relating to the Anglo-Saxon origin of the trust are weakened. Verbit also concludes that the development of the feudal system in England was the result of the gradual development of the Anglo-Saxon social establishment. This has its principal origin in the system of succession, where the heir was required to pay relief on the inheritance. The Magna Carta was the first written document with the purpose of limiting, abolishing this practice. The Magna Carta also limited guardianship. The provisions of chapter 6 of the Statute of Marlborough (52 Hen. 3), issued in 1267, suggest that conveyance in good faith (enfeoffment) limits the rights of the lord. With the institution of the trust, the rules of primogeniture could also be broken. In the case of *subinfeudination by frankalmoign*, conveyance to the church also opened up the possibility of evading the feudal burdens, as the church was not subject to feudal burdens, because the transfer was made firstly to God, and only secondly to the church.[107]

Verbit argues that on the basis of the research of sources, the term *ad opus* does not qualify as proof of the duality of ownership, and, hence, of the origin of the trust. On the basis of functional analysis, the origin of the trust can be traced to the evasion of feudal burdens.[108]

Use was also popular during the War of Roses as protection against the seizure of property.[109] The owners entrusted the ownership of their real property to their trustee (feoffee) *(feoffement de trust, feffez de trust, feoffment of trust),* and under a secret agreement, the feoffee would own the property for the benefit of the transferor (feoffor) *(ad opus suum,youse and behoff, thuse and behove, use and behove, use and behouf)*.[110] This arrangement was even more favourable if the property was transferred not to one, but to several feoffees, as in the event of the exclusion of any of them, the others retained ownership of the property, owing to the right of survivorship *(ius adcrescendi).*[111] The involvement of several feoffees bolstered the security of the beneficiary to protect against any unfair acts of the feoffee, as the feoffees controlled each other.[112]

The use was suitable for circumventing the prohibition of the tenure's alienation[113], to provide for the appropriate administration of the property of the lord, who went on a Crusade, to circumvent the mortmain laws, and to provide for the financial security of friars taking a vow of poverty.[114] The use had, thus, the advantage of allowing to provide for real property in the event of death, which, with certain exceptions, was not permitted under common law. This arrangement also permitted the feoffe to sell the real property, and to make various payments (e.g. settlement of debt) from the sale, as provided for by the feoffor. It was also an appropriate instrument to provide proceeds earned from the property to unincorporated bodies.[115] By the end of the 15th century, a use had been established on most properties in England.[116]

In the analysis of the work of C. Palmer, entitled *English Law in the Age of the Black Death*, Verbit notes that the dower also contributed significantly to the emergence of the use at the time of the plague (1348-1381). At the time of the Black Death, with the centralisation and strengthening of royal powers, the dependence of the wife on the property of her husband also played a role.[117] This was replaced by joint ownership (jointures), which, as a quasi marriage settlement, ensured the independence of the wife.[118]

The proliferation of the use is also attributed to its function of providing an adequate legal instrument for the spendthrift gentry to arrange for the settlement of debts outstanding to creditors in the event of their death. In the event of death, the primary property of the debtor, his real property, was conveyed to his heirs, while the creditors were paid with goods and chattels. Under use, the property serving as collateral for debt owed to creditors could be extended to include real property.[119]

---

[107] At least, in the view of Bracton. VERBIT, *op. cit.* p. 46. Article 39 of the Magna Carta restricted such transfers, permitting them only to the extent that the transferor had sufficient property to satisfy the feudal burdens.

[108] The *ad opus* was a descriptive terminology and not a legal institute. The earliest written document containing the expression "use" was the statute of Richard II. VERBIT, *op. cit.* p. 48.

[109] MAITLAND, *op. cit.* p. 223.

[110] BAKER, *op. cit.* p. Vol. VI, p. 654. SZLADITS JR, *op. cit.* p. 9.

[111] The feoffees, namely, were deemed to be joint tenants. BAKER, *op. cit.* Vol. VI, p. 653[3].

[112] PLUCKNETT, *op. cit.* p. 580.

[113] The application of the use led to the sharp decline in the enforcement of feudal burdens. BAKER, *op. cit.* p. Vol. VI, p. 653.

[114] In 1279, a papal decision was passed to the effect that the application of the use by Franciscan friars as beneficiaries is lawful and does not breach their vow of poverty. PLUCKNETT, *op. cit.* p. 577.

[115] PLUCKNETT, *op. cit.* p. 582.

[116] BAKER, *op. cit.* Vol. VI. p. 654.

[117] According to the maxim of common law, in medieval English law, "[h]usband and wife are one in law, and the one is the husband". In the words of Blackstone: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything." BLACKSTONE, Sir William, *Commentaries on the Laws of England, Oxford, 1765–1769.* I, Ch. 15, III, 442.

[118] VERBIT, *op. cit.* p. 64.

[119] At the time of the plague, liability for obligations acquired a new meaning in society, and greater emphasis was placed on the fair satisfaction of obligations. VERBIT, *op. cit.* p. 65.

Biancala considers three possible origins of the use from the 14th century. Firstly, the extension of the function of the testamentary executor, secondly, the transfer of land to a strawman, which is to be returned by him, and thirdly, conditional conveyances. The application of use among different generations served preservation and control. The use was also suitable for the management of debts.[120] In addition, it became possible to bridge the rules of primogeniture and to provide property to daughters as well.[121] In the case of use, the moral obligation of the feoffee to satisfy the requests of the feoffor was recognised on a gradual basis.[122] The applicability of use was enabled through the Court of Chancery and equity, as it was not confined by the rigidity of common law.[123]

3. Regulation and case law of the use

The institution of the use was not recognised by common law. Thus, if the feoffee failed to fulfil his obligations, neither the feoffor, nor the beneficiary could take action against him.[124] We should note that in case of both the trust and the use, common law did not prohibit the judicial protection of the interests of the beneficiary.[125] As a result of the transfer, the feoffee held full title to the property, together with all obligations and responsibilities related to ownership.[126] Thus, if the feoffee did not fulfil his conscientiously assumed obligations, the feoffor and the beneficiaries did not have recourse to remedy before the courts of common law, as the feoffee was the legal owner.[127] The chancellor, however, the "conscience of the King", took action against the legal owner to enforce the agreement under the terms of equity.[128] Under the terms of equity, the feoffee was obliged to exercise ownership so as to serve the interests of the cestui que use. The beneficiary could enjoy all benefits attached to the property without assuming the burden of obligations arising from the property.The feoffee had the obligation to distribute the profits collected from the property to the beneficiary, to decide on the possession of property in accordance with the prior instructions of the feoffor, and to take necessary legal action against persons interfering with the property or the estate.[129] The feoffee also had the right to claim, whether from the beneficiary, the reimbursement of his costs incurred in connection with the management of property. From the 15th century, such claim could be made not only against the feoffee, but against third parties, who were aware of the use, yet acquired the conveyed property from the feoffee, or who gratuitously acquired the property. Thus, the right of the cestui que use *(cestui qui oes le feffement fut fait)* was converted into equitable ownership. In the course of time, the terms "confidence" and "trust" were used to mean use.

In the course of regulating the use, the chancellor analogously applied the rules of common law, principally on the basis of rules relating to the bailment of personal property and the payment of money, and the sale of personal property. A distinction was made between a verbal commitment to transfer and a gratuitous transfer. A similar institution for a gratuitous transfer was not found in common law, therefore equity was not invoked in such cases, either, unless the transfer was made in writing. Equity recognised the transfer of real property, whether by feoffment or sale, according to the model of the bailment of personal property and money regulated by common law. According to the judicial opinion put forth in the Sharrington v. Strotton case, consideration is recognised within the relationship between those[130] in a blood relation or marriage.[131]

[120] Biancalana notes that the application of use does not exempt the heirs of the feoffor from their liability vis-á-vis creditors. BIANCALANA, *op. cit.* p. 117-124.

[121] The governing principle of "Gut geht wie das Blut" shaped the medieval systems of succession, ensuring the primacy of male succession, with preeminence given to the first-born son. See WEISS, Emilia, *A túlélő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban (Historical Development and Trends of the Legal Status of the Surviving Spouse Under Laws of Succession)*, Budapest, 1984, p. 25.

[122] Judicial proceedings date back to 1379 in relation to the use. In a case in 1409, the Court of Chancery ruled in favour of the beneficiary. In the Petition of Joan Waterfall v. Swetnam case (Early Chancery Proceedings, File 16, No. 17 [P. R. O.]). Disputes arising from the use and heard before the Court of Chancery became commonplace during the chancellorship of Thomas Langley (1417–1422); by 1426, they accounted for the most important group of cases. Between 1432 and 1443, cases relating to the use accounted for 35% of disputes; this ratio jumped to 90% during the reign of Henry IV (1422–1461; 1470–1471). VERBIT, *op. cit.* p. 51.

[123] The early Year Book on the year 1371 already mentions litigation relating to use. We may, thus, conclude that the Court of Chancery had begun dealing with the institution of the use. HOLDSWORTH, *op. cit.* Vol. IV. p. 418-420.

[124] BAKER, *op. cit.* Vol. VI, p. 655. "… the Chancellor so developed the duties of the feoffees to uses, that is the persons to whom property had been conveyed on trust, that the interest of the cestui-que use, that is the person for whose benefit the property was conveyed, became a form of equitable ownership of a sort which has no parallel in any other systems of law… It imparted a much needed element of elasticity into the mediaeval land law, and gave to landowners far wider powers over their property than they possessed at common law." HOLDSWORTH, *op. cit.* Vol. I, p. 545. For the judgements of the courts of common law and Courts of Chancery, see KIRALFY, A. K. R, *A Sourcebook of English Law*, London, 1957, p. 260.

[125] The protection of equitable interest established under equity does not infringe the rules of common law in the case of trust, either. DAVID – BRIERLEY, *op. cit.* p. 342. Toward the end of the 13th century, Henry II practically abolished the issue of new writs, thus the courts of common law had to judge cases on the basis of the existing writs. HANSMANN, Henry – MATTEI, Ugo, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 New York University Law Review 434 (1998) p. 439.

[126] HOLDSWORTH, *op. cit.* Vol. IV, p. 430.

[127] Maitland argues in favour of the likelihood that in the course of time, the courts of common law would have also found a legal basis for protection against the unconscionable actions of the feoffee. MAITLAND, *op. cit.* p. 224.

[128] The chancellor's granting of protection to the beneficiary under the terms of equity became general practice from the reign of Henry V (1413–1422). MAITLAND, *op. cit.* p. 224.

[129] HOLDSWORTH, *op. cit.* Vol. IV, p. 417-431.

[130] Sharrington v. Strotton, Plowd. 298 (1565).

[131] AMES, *op. cit.* p. 268-270.

From a legal point of view, the institution of the use was initially regarded only as a personal, in personam relationship. In 1483, however, its legal assessment changed. The Court of Chancery laid down the rule that the feoffee's original obligation of conscience is governing with respect to the heirs of the feoffee and all persons who gratuitously purchase property from them, that is, the obligations arising from the use are applicable to them as well.[132] Thus, the use constituted more than a binding relationship, even though it did not become fully equivalent to the absolute in rem relationship.[133]

The use could be expressly created, according to the operation of law, and implied by the acts of the parties. The transfer could be in the form of feoffment, fine or recovery, by the will of the parties. Since the risk of misuse was high in the case of a feoffee, the transfer was made simultaneously to several feoffees.[134] The transfer could be made either verbally or in writing, but in the vast majority of cases, it was effected in the testament of the feoffor.[135] The use was established by legislation in cases, where the transfer was made, but the feoffor maintained his right to instruct. During the reign of Edward IV, the rule was drawn up in the second half of the 14th century that if someone transferred his land without explicit instruction of the feoffee, this also resulted in a use. As external proof of this practice, the property remained in the possession and use of the feoffor. If the feoffee also acquired the estate, the court determined whether the transfer was made for valuable consideration or gratuitously. In case of a gratuitous transfer, the Court of Chancery determined the establishment of use, and not as a sale between the parties. According to the doctrine emerging in the early 16th century, if someone sold or exchanged a thing, this resulted in implied use for the benefit of the buyer, until the buyer acquired possession as well.[136] Neither the king, nor a corporation could be a feoffee, as it does not have either a body or soul, and is, thus, not responsible for the breach of trust.[137]

The legitimacy of use without valuable consideration was justified on the grounds of natural love and affection.[138] According to a rule introduced by the Statute of Uses, the corporation with a licence to indefinite ownership (mortmain) could act as the cestui que use. Initially, the attainted were similarly barred from becoming feoffees because they did not hold a right to action. This rule was revoked in 1488. If in the service of the king, villeins had the right to become a feoffee, and even beneficiaries from 1503 to 1540. Neither minors, nor married women were permitted to be either feoffees or beneficiaries. A woman was not permitted to be the sole beneficiary until the 17th century. The heir or successor to the feoffee remained bound by the use, with the exception of persons purchasing property for valuable consideration, unaware of the use.[139]

In terms of its purpose, the use was regulated as lawfully permitted, unlawful or as in conflict with public policy; there were cases, where it was not possible to determine whether it was lawful or serving a public interest. Use applied as a device to circumvent creditors was deemed unlawful; the related rule was adopted as early as 1377. Use serving the circumvention of the Statute of Mortmain was similarly unlawful, as in the case of establishing use for the benefit of a corporation. This practice was prohibited from 1391.[140] It was similarly prohibited to convey property to highly ranking lords in the form of use to prevent them from acting in disputes concerning the title to property.[141] Charitable uses were invalid, as the parish and monastic orders were not legal entities, hence, they were barred from disposing of property.[142]

During this period, the most pronounced differences in view were related to the status of the beneficiary. The question was what the beneficiary should be defined as: an owner or the "greatest stranger"?[143]

Legislation responded to case law only later; the first act that regulated the use is dated 1377.[144] In 1402, the House of Commons initiated the prohibition of the use, if used to defraud the lords. The statute adopted between 1483 and 1484 legalised conveyance on behalf of the beneficial owner, and permitted the

[132] Everybody, except the bona fide purchaser should take into consideration the use. HOLDSWORTH, *op. cit.* Vol. IV, p. 4.

[133] "It was a unique form of ownership which the chancellor had thus developed from a conscientious obligation of a very personal kind. It was not a true *jus in rem* because it was not available against the whole world. There were or might be many persons as against whom it could not be asserted. Then, although it rested on the chancellor's power to proceed against the person whose conscience was affected by notice of the use; it was far more than a mere *jus in personam*. A right of so peculiar a kind could probably never have been invented by lawyers who had a firm hold of the Roman distinction between *dominium* and *obligatio*, or of the modern distinction between jura in rem and jura in personam. The interest of the cestuique use was a very relative kind of ownership. His power of compelling the feoffees and others bound by the trust to use their legal powers for his benefit, gave him practically all the rights of an owner against these persons, as against the world in general; but he had none of these rights as against certain defines persons." HOLDSWORTH, *op. cit.* Vol. IV, p. 4.

[134] HOLDSWORTH, *op. cit.* Vol. IV, p. 422.

[135] PLUCKNETT, *op. cit.* p. 580.

[136] In the English law of the 15th century, the sale or exchange concluded on personal property also transferred ownership, but pursuant to common law, this rule was not valid in relation to real property. In this respect, equity followed the rules governing personal property, and stipulated the establishment of use for the benefit of the buyer in relation to a contract of sale or exchange. HOLDSWORTH, *op. cit.* Vol. IV, p. 423-425.

[137] PLUCKNETT, *op. cit.* p. 581.

[138] Sharington v Strotton (1565) and Callard v Callard [(1597) 2 Anderson 64]; in the latter case, the establishment of use was bound to a seal. HOLDSWORTH, *op. cit.* Vol. IV, p. 426.

[139] "Moreover, the heirs of the feoffees are bound by the use, but not purchasers for value without notice of the use, disseisors, abators, lords taking by escheat, or those who take by a title paramount." PLUCKNETT, *op. cit.* p. 581.

[140] 15 Rich II, c. 5. PLUCKNETT, *op. cit.* p. 578.

[141] HOLDSWORTH, *op. cit.* Vol. IV, p. 443-444.

[142] BAKER, *op. cit.* Vol. VI, 659. See BENNET, T., *Free Churches and the State. II. Property and Trusts*, The Law Quarterly Review CXXXIV (1918) p. 176.

[143] Frowyk used this phrase: "… by the course of the common law he has no more to do with the land than the greatest stranger in the world". Dod v. Chyttynden (1502) 2 Caryll 395, 396. BAKER, *op. cit.* Vol. VI, p. 657.

[144] 50 Edward III, c. 6.

living feoffor to take action against the feoffee, if he breached the instructions or committed fraud.[145] The Court of Chancery recognised the right of the beneficiary to action from the end of the 14th century. The cestui que use was first granted protection during the initial period of the reign of Richard II (1377–1399), although it was relatively limited in scope.[146] The regulation was amended in 1451; in the case of the alienation of property and the establishment of a new use, the feoffee was also permitted to take action against the new feoffee for the benefit of the cestui que use.

The use became a general legal institution in the 14th century.[147] The legislature made efforts to curb misuse; during the reign of Edward II (1308-1327) and Richard III (1483-1485), certain statutes defined the cestui que use as the de facto legal owner.[148] In the period of the Tudors, the legislature dealt with the institution of the use in several instances. In 1487, for example, the use and trust serving the management of personal property - where the settlor was the beneficiary - was annulled.[149] According to a rule enacted in 1489, guardianship and redemption also extends to heirs, who are the beneficiaries of military lands.[150] As of 1504, execution could extend to lands used by someone as a beneficiary, as he was deemed to be the beneficial owner.[151] The "greatest stranger" doctrine was debunked by High Court judge Thomas Frowyk; he argued that the beneficiary has the right to build a brick in a house and rent out the trust property, hence he is the de facto owner.[152]

4. The importance of the Statute of Uses

The use was clearly detrimental for the king. Thus, in 1535, Henry VIII issued the Statute of Uses (27 Henry VIII. c. 10.), which referred the judgement of the use to the courts of common law and bound the transfer of free tenure to certified registration.[153] As a result, the use was reclassified, i.e. the ownership due to the feoffee was interpreted as the property of the cestui que use. The Statute of Uses clarified the legal issue by stipulating that the beneficiary is the beneficial owner.[154] Importantly, the Statute of Uses also aimed at binding the transfer of freeholds and uses relating to real property to registration.[155]

The Statute of Uses was issued mainly for financial reasons.[156] The use did not fit into the feudal system and deprived the lords, and the king, in particular, of their feudal rights. This was an adverse development particularly for the king. Pursuant to the first bill, drawn up in 1529, only the fee simple would have been retained of land ownership, with the exception of the properties of peers, who would have had the privilege of entailing their lands. It would have been laid down that such lands could not infringe the rights of the Crown, and the properties of peers could be alienated only with the permission of the king and subject to registration. Both the large landowners and lawyers explicitly opposed the bill.[157] In comparison to the earlier bills, Henry VIII needed to reach a compromise, as the landowners did not wish to waive their rights to secret conveyance and the conclusion family settlements.[158] Moreover, the abolition of the use did not serve the interests of the lawyers, either, because they assumed the role of feoffee, and participated in the establishment of the uses, which was a profitable activity.[159] Henry VIII used the petition he received in connection with the slow administration of common law and public administration to address parliament and condemn common lawyers and abuses of public administration, implicitly prompt-

[145] I. Richard III c. 1.

[146] "The original nature and scope of *cestuy que use*'s remedy is as obscure as any other question of medieval equity practice, but we do know that it had one very serious limitation: the *subpena* did not lie against the alienee of a feoffee." BARTON, J. L., *The Medieval Us*e, The Law Quarterly Review 81 (1965) p. 569.

[147] The first, far from detailed case relating to the use was recorded in the case of a tax collector, who, on his death bed, transferred his property to a feoffee to settle his debt vis-á-vis the Crown. PLUCKNETT, *op. cit.* p. 578.

[148] The statute issued by Henry VII in 1485 (1 Hen. VII, c. 1.) similarly regulates the case, where the feoffor transferred his right to the feoffee so as to restrict enforcement by the lessor. PLUCKNETT, *op. cit.* p. 579.

[149] 3 Hen. VII, c. 4.

[150] 4 Hen. VII, c. 17.

[151] 19 Hen. VII, c. 15.

[152] Before 1500, other lawyers also regarded the beneficiary as an owner; this view was rendered definitive with the grounds for the judgement and through legislative measures. "The use was therefore no longer merely an interest in conscience, nor even a mere power, but a form of property or ownership governed by legal rules noticed by the courts of common law." BAKER, *op. cit.* Vol. VI, p. 658.

[153] The act was not applicable to personal property or to use settled in relation to term of years. SZLADITS JR, *op. cit.* p. 14.

[154] 27 Henry VIII c 10. The aim was the restoration of fiscal feudalism, to provide for funds necessary for the king's religious and trade wars. MOFFAT, *op. cit.* p. 39.

[155] HAMBURGER, P., *The Conveyancing Purposes of the Statute of Frauds*, American Journal of Legal History 27 (1983) p. 356.

[156] For the background to its enactment, see HOLDSWORTH, *op. cit.* Vol. IV, p. 450.

[157] "The large landowners who did not happen to be peers found themselves deprived by these proposals of the right to entail or to make secret settlements or alienations; all details of their family arrangements were to be proclaimed in the parish church, confirmed by the parish priest, and sealed by the mayor of the county town. Feudal incidents were to be rigorously exacted from them as from the peers, only the commoners got nothing in return. As for the common lawyers they saw in this arrangement the ruin of their profession; it left them no more interesting topic of study than a fee simple, save in the very few cases of peers, and at this moment there were but fifty peers of the realm." PLUCKNETT, *op. cit.* p. 584.

[158] Under the family settlement, the inheritance of several estates was arranged for family members who were party to the same transfer transaction. The family settlement, which did not always take the form of a trust, played an important role in conveyances to heirs to avoid taxes and limit the rights of heirs with respect to the property. According to the decision passed by the courts of common law in 1312 with respect to the family settlements, the property could be bound for up to three generations, and the fourth generation acquired the right to alienation. VERBIT, *op. cit.* p. 56.

[159] BAKER, *op. cit.* Vol. VI, p. 654.

ed by misuses of the use. As a result, the newly submitted bill was approved.[160]

To curb the anti-feudal institution of the use, in 1535, Henry VIII – with the active collaboration of Cromwell – passed the Statute of Uses through the English parliament. With a few exceptions, under the statute, the beneficiary was not conferred various rights against the feoffee or against persons conferred rights by the feoffee, who would have been granted protection by the chancery; he only held the title to take action against the feoffee. The feoffee was practically reduced to a vehicle for the conveyance, and the beneficiary was deemed to be the de facto owner. In 1540, however, by way of the Statute of Wills (32 Hen. VIII, c. 1.), Henry VIII upheld the applicability of the use in relation to real property, with respect to all lands acquired not through military service/non-military tenure, and to two-thirds of properties acquired through knight-service.[161]

The Statute of Enrolments (27 Henry VIII. c. 16.) – supplementing the rules of the Statute of Uses – prescribed that as of the last day of July 1536, an exchange or sale of real property is not valid if not concluded in writing and recorded in the Record of the royal court of Westminster, or in the county where the property is located, within six months from signing. The Statute of Uses did not aim to abolish the use.[162] On the other hand, the Statute of Uses was not applicable to all uses; it did not extend to personal property, or apply to active use[163], and, as we will observe later on, it could be circumvented with the arrangement of the use upon use. The statute represented a victory of common lawyers over the chancery, as the use would be interpreted in accordance with common law.[164] The Statute of Wills was adopted in 1540 out of the king's intention to compromise.[165] Under the Statute, common law properties not used for military purposes (non-military tenure), and 2/3 of properties received for knight-service could be freely transferred. With respect to the transferred properties, the Crown continued to impose the feudal burdens that would have arisen in case of inheritance, with the exception of properties received for knight-service. Owing to the two statutes, the transactions subject to common law gained flexibility, the feudal character of real property diminished, and the institution of the use weakened. And this marked the origin of the modern trust.[166]

Under the Statute of Uses, the scope of the trust extended to chattels personal, copyhold land, leases and freehold land. The trust serves the evasion of feudal burdens, charitable purposes, protection of persons with a limited capacity to act, securing of property in case of political persecution, securing of the property of married women, and the distribution of family property.[167]

5. The trust takes over the function of the use

Approximately one hundred years after the issue of the Statute of Uses, the concept of the use was revived with the name "trust".[168] In 1532, before the Statute of Uses, a decision was passed that the use could not be further encumbered with a use, that is, the Court of Chancery did not recognise chains of fiduciary relationships.[169] In 1536, jurisprudence once again focused on the trust. This is attributable to the consolidating finances of the king in the 17th century, and strengthening opposition to the prohibition of the free testamentary arrangement of real property.

Dyer and Van Loon trace the word "trust" to the Scandinavian word "troast", which is a cognate form of the English words "trow" and "true". Feldthusen traces the term to the Danish

[160] "Under his arrangement the King secured his feudal dues, but the price he paid was to the common lawyers instead of to the nobility and Chancery. Indeed, it was the common lawyers who gained most by the Statute of Uses. After a great deal of difficulty and some concessions from the Crown the statute finally passed." PLUCKNETT, *op. cit.* p. 585. "Maitland (Equity, p. 35, the author) has truly said that the Statute of Uses 'was forced upon an extremely unwilling Parliament by an extremely strong-willed King'. But I think that the evidence shows that this strong-willed King was obliged first to frighten and then to conciliate the common lawyers in order to get the statute through the House of Commons; and that probably their opposition caused the failure of his well-considered scheme for the registration of conveyances." HOLDSWORTH, *op. cit.* Vol. IV, p. 461. See also BAKER, *op. cit.* Vol. VI, p. 672.

[161] The victory of Henry VIII achieved with the Statute of Wills was short-lived; it was a setback in comparison to the Statute of Uses. BAKER, *op. cit.* Vol. VI, p. 657-673.

[162] "What it did intend to do was to execute or turn into legal estates the uses to which it applied, in order that the various evils which the preamble attributed to the division between the legal and equitable ownership might be avoided." HOLDSWORTH, *op. cit.* Vol. IV, p. 463.

[163] In the case of active use, the feoffee has obligations to be fulfilled. In such a case, A transfers the property to B, B is obliged to collect the lease fees, and make payments from such fees to the beneficiary.

[164] "Its object was to avoid the inconveniencies which were caused by having two forms of ownership, one legal and the other equitable, by declaring that the beneficiary shall have a complete legal estate and that the feoffee to use shall have none at all. This altered the character of the use, but did not destroy it. The statute did not apply to active uses, nor to uses out of chattels real or personal. The great merit of the arrangement was that the greater freedom in conveyancing by means of the use was preserved and made available to common lawyers." PLUCKNETT, *op. cit.* p. 586.

[165] The landowners reclaimed their right to bequeath all their property, by their subjective right, and the right of the king to guardianship was limited to one-third in case of the death of a tenant leaving behind an infant heir. VERBIT, *op. cit.* p. 55.

[166] MOFFAT, *op. cit.* p. 39. The Statute of Uses was repealed by the Property Act of 1925. English law recognises absolute right of ownership only over personal property; feudal divided ownership remains in force with respect to real property; the Law of Property Act 1925 left this intact.

[167] JONES, Neil, *Trusts in England after the Statute of Uses: A View from the 16th Century*, HEIMHOLZ, Richard – ZIMMERMANN, Reinhad (eds.), Itinera Fiduciae. Trust and Treuhand in Historical Perspective, Berlin, 1998. p. 177.

[168] "*… the gladsome light of jurisprudence has shone but dimly over trusts."* The witty expression "gladsome light of jurisprudence" of Coke is mentioned. JONES, *op. cit.* p. 173. The Statute of Uses was "the starting point of modern law of uses and trusts". HOLDSWORTH, *op. cit.* Vol. IV, p. 409.

[169] "Under the decision, in case of the property being transferred to A to the use of B to the use of C, the court recognised only the first use as valid; it ignored the second use as being incompatible with the first one. […] This decision was reinforced after the issue of the Statute of Uses, in the Jane Tyrrel's Case of 1557, where it was ruled that the establishment of a second use is invalid in all cases. It followed that, under the provisions of the Statute, A was excluded, while B acquired legal ownership, and C did not receive anything." SZLADITS JR, *op. cit.* p. 14. HOLDSWORTH, *op. cit.* Vol. IV, p. 469.

word "trøst" or the Norwegian expression "traust", which were used with a similar meaning.[170] These are related to the Dutch and German words "troosten" and "trosten", respectively, which mean to comfort, to console.[171]

In the Tyrell case, Jane Tyrell permanently sold her lands to her son George and George's heirs for 400 pounds, provided Jane would remain, under certain restrictions, entitled to their use as beneficiary during her lifetime.[172] Based on the grounds expounded by Chief Justice Saunders, the Bench of Common Pleas concluded that the restriction of the use is void, as the sale in itself establishes a use, hence, the further encumbrance of the use is incompatible with the first use, and the restriction of the use with other uses is not permissible. The Court of Chancery drew the same conclusion.[173]

Owing to the revival of the use under the name trust[174], in the Sambach v. Dalston case, the chancellor enforced, under the terms of equity, the second use, which he now called trust, on grounds of fraudulent deception. Thereafter, the chancellor granted legal protection to the trust of the form "to A upon use to B upon trust to C".[175] The validity of the second trust depended on whether it was established for valuable consideration. If yes, it was deemed invalid; if such trust was established gratuitously, it was deemed valid.[176] There is general consensus in English legal literature that this arrangement was introduced to circumvent the Statute of Uses.[177] Plucknett holds the view that contrary to general belief, the emergence of the use upon use did not serve the circumvention of the Statute of Uses. He argues that the development of the modern trust did not originate from the Sambach v. Dalston case, but was part of a process, in which this case plays only a minor role.[178] It is agreed that after the Civil War, during the Restoration, the Tenures Abolition Act enacted in 1660 abolished the feudal burdens attached to lands provided for military service, which led to the de facto elimination of feudal burdens. Thereafter, the Court of Chancery declared, under the terms of equity, the second use as valid in the case of use upon use.[179]

The trust is defined by two key criteria: firstly, the duality of ownership, and secondly, the right of the beneficiary against the legal owner. The legal status of the beneficiary was defined as the equitable estate in property; in some interpretations, it is converted into an incorporeal thing.[180]

The central element of the trust is personal relation, "… for in common sense a man cannot trust one whom he does not know."[181] It follows that a legal person was still not recognised as a trustee.[182]

Lord Nottingham is recognised as providing a classification of the trust, introducing the doctrine that there can be no "clog on the equity of redemption", drafting the Statute of Frauds 1677, and bolstering the proprietary nature of the trust, as opposed to its being merely a chose in action.[183] The Statute of Frauds was important in its aim of creating transparency for the trust, mainly in cases where it involved the transfer of real property. Pursuant to Sec. 7 of the Statute, the transfer of land in the form of a trust was bound to a written document[184], while Sec. 10 sets out rules against the fraudulent application of trust and the circumvention of creditors.[185] It is not clear in the Statute as to who is required to sign the transfer. It was agreed that the joint signature of the beneficiary and trustee is not necessary, only that of the latter.[186] If the trust was not made in writing, it remained valid, but was not enforceable.[187] Lord Nottingham also made an important contribution to the drafting of the rule against perpetuities[188], and he is attributed with removing the Court of Chancery from under the control of the monarchy.

---

[170] The word trustee is derived from the old Norse expression "braustr". FELDTHUSEN, R. K., *National Report for Denmark*, In HAYTON, D. J. – KORTMANN, S. C. J. J. – VERHAGEN, H. L. E. (eds.), Principles of European Trust Law. Law of Business and Finance Vol. 1, The Hague – Deventer, 1999, p. 173.

[171] VERBIT, *op. cit.* p. 55[169].

[172] Tyrrel's case (1557) Dyer, 155. See BAKER, *op. cit.* Vol. VI, p. 685.

[173] According to Ames, this rule had been in place even before the Statute of Uses. AMES, *op. cit.* p. 270.

[174] "The word 'trust' had a more general meaning, however, and this vaguer sense has had great influence in the establishment of the modern trust; this broader sense seems to apply to any case where one person was under a moral duty to deal with property for another's benefit." PLUCKNETT, *op. cit.* p. 598.

[175] Sambach v. Dalton (1633–1634) Tothill 188.

[176] HOLDSWORTH, *op. cit.* Vol. VI, p. 641.

[177] HESS – BOGERT – BOGERT, *op. cit.* Vol. 1, p. 29.

[178] PLUCKNETT, *op. cit.* p. 599.

[179] "One did so by simply using the formula 'to A to the use of B to the use of C' or simply 'unto and to the use of B to the use of C'. In both the cases, B took as trustee for C." MOFFAT, *op. cit.* p. 41.

[180] JONES, *op. cit.* p. 191.

[181] 1 Plowd. 356 at 352.

[182] "… because it is a dead body, although it consist of natural persons: and in this dead body a confidence cannot be put, but in bodies natural". Chudleigh's Case (1954) (sub nom. Dillon v. Fraine) Poph.70 at 71. JONES, *op. cit.* p. 193-194.

[183] MOFFAT, *op. cit.* p. 42.

[184] "… all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law entitled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect…" Sec. 7. Statute of Frauds 1677.

[185] See HAMBURGER, *op. cit.* p. 376. YOUDAN, T. G., *Formalities for Trusts of Land, and the Doctrine in Rochefoucauld v. Boustead*, Connecticut Law Journal (1984) p. 306.

[186] YOUDAN, *op. cit.* p. 317.

[187] This interpretation basically concurs with the judgement passed in the case Roucefoucauld v Boustead (1897) 1 Ch. 196. YOUDAN, *op. cit.* p. 320.

[188] Duke of Norfolk's Case (1683) 2 Swan 454. MOFFAT, *op. cit.* p. 42.

In the famous opinion of Lord Nottingham: "With such a conscience as is only naturalis et interna this court has nothing to do: the conscience by which I am to proceed is merely civilis et politica and it is infinitely better for the public that a trust, security or agreement should miscarry than that men should lose their estates by the mere fancy and imagination of a Chancellor."[189]

Growth of trade and industry in England picked up pace and the financial sector gained strength from the 17th century; the dominance of the agricultural industry was clearly diminishing. During the rule of the Tudors (1485-1603), it became possible to invest in joint-stock companies. The industrial revolution opened up new opportunities from the middle of the 18th century. Investments were implemented principally within the legal framework of the partnership, the deed of settlement company and the joint-stock company. The unit trust was established through the deed of settlement company.[190] In the case of the deed of settlement company, the directors and the auditor were elected similarly to those of other companies; according to subsequently introduced regulation, shareholders were liable for the company's debts only for up to the value of their shares. This, of course, was applicable vis-á-vis third parties only if and to the extent that third parties were aware of this.[191]

The founding of joint-stock companies became difficult in particular after the South Sea Bubble, although they were bound to authorisation by Parliament or the king even before 1720. This is one of the reasons for the proliferation of the trust, as it became possible to establish unincorporated organisations based on the model of the trust.[192]

The sharp distinction between incorporated companies and unincorporated companies dates back to the second half of the 17th century. Many joint-stock companies were established solely by arrangement as unincorporated companies; they used a corporate seal, and enabled the exchange of holdings in the undertaking to shares.[193] Shares could be more or less transferred freely in accordance with the provisions of the contract.[194] The companies drew up by-laws, which are traced to the model used by guilds.[195] The by-laws principally served the objectives of the company, regulating the activity of members and, in many cases, matters concerning property and liability.[196] These companies, however, did not limit the liability of their members, contrary to the appearance they sought to give.[197]

The South-Sea Company lost its privilege in 1815. The Sierra Leone Company and the Levant Company were wound up in 1824 and 1825, respectively.[198] The vacuum left by companies that lost their privileges was filled by new, freely competing companies. These operated in an unincorporated form, i.e. as a partnership, and as deed of settlement companies, using opportunities afforded by the legal institution of the trust.[199]

As a major breakthrough, from the middle of the 19th century it was possible to establish a joint-stock company within the framework of the normative system. These legal instruments permitted investors to manage their property, which was not possible in relation to real property managed as a trust. The institution of the trust was transformed to accommodate changing needs; the activity of the trustee was not limited to the possession and management of certain things, mainly agricultural lands and property, but also extended to the conclusion of contracts of a commercial and investment nature.[200]

The trust, as a collective form of investment, gained particular relevance in 1868. As part of the background to this development, Overend, Gurney, Ltd[201] declared insolvency on 10 May 1866; this led to a steep decline in the popularity of

[189] Cook v Fountain (1676) 3 Swan 585; 36 ER 984 at 600. BUTLER, *op. cit.* p. 7.
[190] SIN, Kam Fan, *The Legal Nature of Unit Trust*, Oxford, 1997, p. 8.
[191] SIN, *op. cit.* p. 14.
[192] KÖTZ, *op. cit.* p. 23.
[193] The companies used the corporate seal only for their most important contracts, that is, the use of the seal was not a prerequisite for the validity of the written representation given in the name of the company (e.g. the Bank of England and the East India Company did not affix a seal to their accounts). For details on the use of the seal, see WILLISTON, Samuel, *The History of the Law of Business Corporations Before 1800*, In MAITLAND, Frederick William – BRYCE, James Viscount, Select Essays in Anglo-American Legal History I–III, Boston, 1909, p. 211.
[194] Shares of specific nominal value were issued on holdings in the company, which incorporated the rights and obligations of members relating to the company. The issue of shares marked a break from the earlier notion that members could directly own the property of the company. Thus, members, in the capacity of a cestui que trust, entrusted, as co-owners, the company to manage their property, and the company acted as a trustee, and not as an owner. For details see WILLISTON, *op. cit.* p. 217.
[195] WILLISTON, *op. cit.* p. 215.
[196] In the *Child v Hudson's Bay Company* case (2 P. Wms. 207.), the court proclaimed in principle that the by-laws may regulate anything that serves the interests of commerce, unless the given rules are unreasonable or unlawful. Thus, in the given case, the company could lawfully mortgage the shares of its members in the possible case of their insolvency.
[197] Holdsworth maintains an opposing view. He argues that in the 15th century it had become clear that the founding natural person would not be personally liable for the debts of the legal person; this rule was enacted in the second half of the 17th century. HOLDSWORTH, *op. cit.* Vol. VIII, p. 203-204.) This position is based on the fact that the payments of additional capital (leviation) ordered by companies could be enforced by creditors, if necessary, i.e. they were in the position, albeit indirectly, to enforce their claims against the members of the company (see *Salmon v. The Hamborough Company* [1671] I Ch. Cass. at pp. 206, 207.). Members, however, were permitted to omit the obligation of the payment of additional capital in the company's deed of foundation. Under this arrangement, the contract concluded between the company and its members allowed members to limit their liability to the amount of their financial contribution.
[198] SÁNDOR, István, *A társasági jog története Nyugat-Európában (History of Company Law in Western Europe)*, Budapest, 2005, p. 116.
[199] HOLDSWORTH, *op. cit.* Vol. XIII, p. 368.
[200] MOFFAT, *op. cit.* p. 44.
[201] On the day that came to be known as Black Friday, this event shocked investors at unprecedented levels, leading to the bankruptcy of many banks and investment companies within a matter of weeks. SIN, *op. cit.* p. 22.

limited liability, which was held to be the principle cause of the bankruptcy.[202] As a result, sentiment gradually soured against the corporate form of the joint-stock company. The Foreign and Colonial Trust was established in 1868, offering exclusively fixed interest to investors. Thus, the unit trust became an alternative to the joint-stock company. In the unit trust, the trustee was responsible for operational control and management; his powers extended to portfolio sales. The units were deemed to be shares in all respects.

The changed function of the trust resulted in substantial modification of regulation. The chancery drafted investment guidelines concerning the operation of trusts to curb speculative investments. Thus, unless provided otherwise by the settlor, the trustee did not have the right to make financial investments other than in government securities or a first mortgage. The delegation of the right of representation was also regulated for brokers and agents, in case the trustee was unable to perform such duties. The trustee position was increasingly filled by professional firms.[203] The Court of Chancery drew up the norm for the trustee's diligence: The trustee was responsible for the reinstatement of trust property vis-á-vis the beneficiary. With respect to the trustee's procedure, he was required to "… conduct the business of the trust in the same manner that an ordinary man of business would conduct his own".[204] English legal practice practically abandoned the earlier concept, represented by Lord Nottingham, that "… no man can require or with reason expect a trustee to manage his property with the same care and discretion that would his own".[205]

The fiduciary nature of the trustee's legal relationship emerged in the 18th century, although he had been expected to put aside his private interests in the past. In the Saunder v Vautier [(1841) 4 Beav 115] case, Lord Langdale MR permitted the early termination of the trust. The discretionary trust and protective trust became common to guard against the squandering of the beneficiary.[206]

We have to mention that the Property Acts of 1925 and the Trustee Act of 1925 brought about significant changes. As of 1 January 1926, only the fee simple absolute in possession and the fee simple term of years remained in force as lawful forms of ownership and possession; the life estate and the entail were abolished. Legislation in 1925 stripped the trust arrangement of the word "use", and amended the doctrine of the resulting trust. These legislations brought new chapter in the development of the trust which would deserve a new study.

[202] Of the 7,056 joint-stock companies established since 1844, only 2,967 companies survived in 1868. SIN, *op. cit.* p. 23.

[203] The amateurs of the aristocracy were replaced with property managers, who were experienced in the day-to-day affairs of this business and held the professional experience required for such position. SELBIG, Sabine, *Förderung und Finanzkontrolle gemeinnütziger Organisationen in Großbritannien und Deutschland. Rechtsformen, steuerliche Förderung und Finanzkontrolle*, Tübingen, 2006, p. 180.

[204] Speight v Gaunt (1883) 22 Ch D 727 at 739. See MOFFAT, *op. cit.* p. 46.

[205] Harden v. Parsons (1758) 1 Eden 148. MA, Michael, *Modernizing Trust Law in Hong Kong*, In CAMPBELL, Dennis (ed.), The Comparative Law Yearbook of International Business, Vol. 32 (2010), Alphen an den Rijn, 2010, 645.

[206] MOFFAT, *op. cit.* p. 45.

Bona fides exuberans. A New Legal Concept of Twelfth Century Legal Scholarship*

*Péter Bónis***

Abstract

It is said that the dualist interpretation of good faith (bona fides) clearly distinguishes subjective good faith (guter Glaube, goede trouw) from objective good faith (good faith and fair dealing, Treu und Glauben, redelijkheid en billijkheid). When has this new distinction emerged in the legal history? In this paper it is argued that objective good faith was named by the Glossators of the 12th century, who coined the new legal term of bona fides exuberans. This new legal concept has appeared in the 1150's, and it is probably attributable to Bulgarus.

Key words: *bona fides exuberans; ius commune; glossator; societas; Treu und Glauben.*

1. Preliminary remarks

The notion of bona fides has gained a wide interest among the contemporary legal historians. Important volumes[1] have been published on this legal issue, but the origins of this legal notion has still remained unknown.

Recently András Földi has published an article regarding the traces of the dualist interpretation of good faith in the ius commune until the end of the sixteenth century.[2] In his view the dualist interpretation of good faith (bona fides) clearly distinguishes subjective good faith (guter Glaube, goede trouw) from objective good faith (good faith and fair dealing, Treu und Glauben, redelijkheid en billijkheid). Even in the Middle Ages and in the early modern age the majority of jurists interpreted good faith in a monist manner. According to Földi, the dualist interpretation of good faith first appeared - in the form of a certain „protodualism" - in a work by Franciscus Aretinus in the second half of the fifteenth century. Modern dualism appeared in the first half of the sixteenth century in works of Medina and Rebuffus. More than three centuries passed before modern dualism gained wide currency after the publication of Wächter's monograph in 1871.[3]

If there is a dualist interpretation of good faith (bona fides) that clearly distinguished subjective good faith from objective good faith, it is to be asked: When has this new distinction emerged in the legal history?

In the course of his very limited research so far Földi has not found indications that the dualist interpretation of bona fides appeared before the fifteenth century. According to him, the dualist interpretation of bona fides first appeared, in the form of protodualism, in a work by Franciscus Aretinus (1418-1486) in the second half of the fifteenth century.

For everyone who has a thorough knowledge of medieval legal scholarship this statement sounds a bit unbelieveable. Franciscus Aretinus was not amongst the most original minds of the legal science, his works are often a simple collection of other's views. It is hard to believe that Franciscus Aretinus has created this new approach in the legal history or at least in the Middle Ages.

2. The new concept: the bona fides exuberans

In fact, if Földi had used all identifiable sources for the area, he would have realised that this distinction emerged many centuries earlier than he thought.

For example, *Wilhelmus de Cabriano* in his Casus Codicis, which is believed to be the description of the lectures held by Bulgarus during the academic year 1156-1157, points out that „there is a good faith which protects the substance of every plea and agreement, therefore all contracts. But there is also another faith called exuberant and abundant, which includes many performances based on equity about which the parties have not

* This article was supported by the Bolyai János Research Scholarship of the Hungarian Academy of Sciences.

** Dr. habil. Péter Bónis, PhD, associate professor of legal history, Károli G. University, Budapest, Hungary.

1 Gordley, James, *Good faith in contract law in the medieval ius commune*, in Zimmermann, Reinhard-Whittaker, (ed.), *Good Faith in European Contract Law*, Oxford 2000, 94.; Garofalo (ed.), *Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*, I-III (2003) 229 ff.

2 Földi, András, *Traces of the dualist interpretation of good faith in the ius commune until the end of the sixteenth century*. Fundamina, vol.20, no.1, (2014) 312-321.

3 Wächter, *Die bona fides insbesondere bei der Ersitzung des Eigenthums*, Heidelberg 1871.

agreed, and this is required in the bonae fidei contracts. The first type, however, is required in every contract, because a contract that was not entered into with good faith, but was due to deceit is void or voidable."[4]

As the author of this magnificent edition of this early legal lecture points out, „these Casus Codicis are a kind of lecture notes, in which Wilhelmus de Cabriano summarised the teaching on Justinian's Code of his master, the Glossator Bulgarus de Bulgarinis, which took place during the academic year 1156-1157."[5] As Wallinga explains us, Wilhelmus de Cabriano did not make a verbatim report (a lectura) of his master's voice, but only wrote down – or, in any case, published – what he considered most important. Textual variants, for instance, are hardly ever mentioned, and he concentrates on the legal argumentation. Even so, the reader of the Casus Codicis practically finds himself in Bulgarus' lecturing hall: he can see which texts Bulgarus treated – some of them briefly, others very elaborately. The Casus Codicis, in other words, are a direct and especially a very detailed source of Bulgarus' opinions.

An other legal work, an early Lectura Institutionum from the 12th century confirms that this distintion between the aforementioned two types of bona fides has emerged around the middle of the 12th century, and the authorship thereof can be sought in the circle of the four pupils of Irnerius.

Indeed, the *Lectura Institutionum Vindobonensis* has a similar legal reasoning: „Every action is equitable, if bona fides means the opposite of mala fides, because in all pleas bona fides, and not mala fides should prevail. Indeed, every legislator intends that nothing else than justice and equity take place in law-suits. But sometimes we speak of bona fides in a special sense, which means that a party to a contract has to do for the other party not only was agreed, but whatever he has to do on the basis of equity. Therefore some actions are of bona fides, namely exuberans, where a party has to do more than it was agreed by the contract."[6]

The Summa Institutionum Vindobonensis is a medieval legal compilation, probably of the middle of the 12th century. It survives in four manuscripts conserved in Bologna, Grenoble, Vienna, and Klosterneuburg. The creation of the Summa appears to belong to a pattern of revived interest in Justinianic legal texts. It has two versions, the first is called Summa Institutionum Vindobonensis, the second version (survived only in the Vienna manuscript) is called *Lectura Institutionum Vindobonensis*, and it is thought to be a kind of lecture notes, but it was edited in 1913 in footnotes (as an apparatus of glosses).

Little is known about the author of this compilation. Legal historians expressed various views about the attribution of the summa and the lectura. It was argued that Bulgarus[7], or Martinus, or Placentinus[8] was the author of the Summa, whereas the author of the Lectura should be sought in the circle of Martinus' pupils,[9] but other historians did not agree with these attributions. Sometimes the lecture adheres to the opinion of Bulgarus, but the legal reasoning seems to be much more in accordance with the legal views of Martinus.

However, it is undoubted that this is a very early witness of the legal teaching of the middle of the 12th century, because various authors have favoured seeing this legal text as originating in a teaching context. As a nearly contemporary legal material with the Casus Codicis of Wilhelmus de Cabriano, the Lectura Vindobonensis seems to make it sufficiently clear that the dualist interpretation of bona fides has its roots in the 1150's.

3. The correlation of the societas with bona fides exuberans

Another early compilation of the medieval legal tradition, the Summa Codicis Trecensis did also cite the bona fides exuberans.

The author of the Summa Trecensis is unknown, although Fitting made an edition under the name of Irnerius. According to Gouron, this summa was written in Provence, in Arles by a pupil of Irnerius, namely Geraudus. Around 1135 he had compiled it using the glosses of his teacher, Irnerius, but later, in the 1140's he revised the summa using the glosses of Bulgarus and Martinus. The final edition was made probably in the 1150's.[10]

As the unknown author of this summa explains, the judicial power in this case is very large, because of the specific nature of the partnership contracts, since a contract of partnership is preeminently one of good faith.[11]

This is an echo of the Codex Iustinianus 4. 37. 3 where it is stated that since good faith should prevail in partnership contracts, it is demanded by the rules of equity that the profits should be equally divided between the partners; and if the Governor of the province should find that your father belonged

[4] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano*, Frankfurt am Main 2005, 248.: „Est autem fides bona, que tuetur substantiam omnium placitorum omniumque conventorum, ergo omnium contractuum. A genere in speciem: est et alia fides que dicitur exuberans et magis abundans, per quam prestatur etiam id de quo inter contrahentes actum non est, et hoc in contractibus bone fidei desideratur, ut infra Pro socio, Cum (C. 4. 37. 3). Prima vero in omni contractu spectatur, quoniam contractus qui non bona fide, sed dolo malo est initus aut ipso iure est irritus aut irritandus."

[5] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano and the Dissensiones Dominorum*, in *Revue internationale du droit de l'antiquité* (2009) 194.

[6] Palmerius, Johannes Baptista (ed.), *Wernerii Summa Institutionum cum glossis Martini, Bulgari, Alberici aliorumve*, in *Bibliotheca Iuridica Medii Aevi*, Bononiae 1914, Add., vol. I. 166.: „omnes itaque actiones sunt bone fidei, si bona fides intelligatur ad differentiam male fidei, quia in omnibus iudiciis non mala, sed bona fides debet verti. Est enim cordis legislatoribus in iudiciis nihil aliud, quam iustitiam et aequitatem locum habere. Accipimus autem quandoque bonam fidem speciali significatione, qua reus prestat non tantum quod convenit, quam etiam quod eum ex aequo et bono prestare oportet. Actionum ergo quedam sunt bone fidei, idest exuberantis, in quibus ampliora intelliguntur vel desiderantur quam in contractu comprehendatur."

[7] Kantorowicz, Hermann, *Studies in the Glossators of Roman Law*, Cambridge 1937, 59-77.

[8] Haenel, Gustav, *Dissensiones Dominorum, sive controversiae veterum iuris Romani interpretum, qui glossatores vocantur*, Lipsiae 1834, XL

[9] Meijers, E. M., *Sommes, lectures et commentaires (1100 à 1250)*, in *Atti del Congresso Internazionale di Diritto Romano* (Bologna e Roma), Pavia 1934, 464ff.

[10] Gouron, A., *L'auteur et la patrie de la Summa Trecensis*, in *Ius Commune* 12 (1984) 1—38.

[11] Summa Codicis Trecensis 4.37, ed. Fitting, *Die Summa Codicis des Irnerius*, Berlin 1894, 113.: „Iudicis offitium, cum in hoc iuditio exuberans fides desideretur, latissime porrigitur. Ideoque utrosque ad collationem compellet et ad lucra communicanda et ad dampna resartienda."

to a partnership organized for the working of salt-pits, and died before having received his share of the common profits, he will order that portion of them to which you are actually entitled to be paid to you.[12]

This passage of the Codex refers only to fides, without the usual adjective „good" (*„bona"*), therefore it is not clear that the ancient Romans had intended this sentence as the Glossators did. However, the decisive step was made by the medieval Glossators of Roman Law when the anonymous Glossator interpreted fides as bona fides.[13] But not only he has added an adjective to the word „fides", but he has identified the recently created legal term, the *bona fides exuberans* with equity (*aequitas*).[14]

This was a very important step in the legal history of contract law in Europe, because it was the first time when bona fides was meant as an objective requirement of fair dealing and honesty, not only the subjective absence of dolus.

As to the author of these glosses, obviously it is not easy to say who wrote these glosses. Older witnesses than Accursius confirms that these glosses were written in the 12th century. The printed edition of Azo's lectura on the Codex Iustinianus refers to this gloss, too.[15]

Older manuscripts have these glosses, too. However, these glosses are anonymous, and we have to content ourselves with a general statement that this interpretation has emerged in the 1150's, and it is attributable probably to Bulgarus, or to anyone of the four pupils of Irnerius. As to any further conjecture regarding a supposed authorship of Irnerius, we must be careful. The glosses of Irnerius were generally not signed, or at least, the legal historians in the 20th century disputed about their authenticity, therefore it seems to be wise to avoid conjectures.

4. The *pactum appositum incontinenti* or *ex intervallo*

In Roman law, pacts were agreements not made in the form recognized by law, and therefore, were not enforceable by action. However, agreements collateral to equitable contracts, called *pacta adiecta* by the Glossators in the Middle Ages, such as sale, lease, a seller and purchaser might agree that the former had the right to repurchase the property sold, or that he should give a bond against eviction, or should put the property in good condition. If any such collateral agreements were made as part of the main contracts, they were, in time, made actionable; if not so made, they were unenforceable.

As Codex Iustinianus 2. 3. 13 stated, in the case of equitable (bonae fidei) contracts an action arises on a pact made in connection therewith only if the pact is made as part of the same transation; for whatever is agreed on thereafter, gives rise not to a claim, but to a defense only.[16]

Although the emperor had mentioned only the bonae fidei contracts in this fragment, the glossators thought that the same rule is to be applied to the stricti iuris contracts, too. According to Iacobus, also the pacts not following immediately upon the main bonae fidei contract (*pacta ex intervallo*) [17] were enforceable because of the bona fides exuberans.

Glossators asked why the emperor mentioned only the bonae fidei contracts, and why he omitted the stricti iuris contracts. According to the Lectura Codicis of the Bibliothčque Nationale of Paris, ms. Lat 4546, which Savigny attributed to Roffredus, but which Meijers showed to be due to his teacher, Karolus [18] de Toccus, a contemporary of Azo, the difference between bonae fidei and stricti iuris contracts is due to the bona fides exuberans, which is required in these contracts.[19] He refers to the „philosophical" reason of Wilhelmus de Cabriano who said that it is because of the fides exuberans that only the bonae fidei contracts were emphasized.

Indeed, this was the opinion of Wilhelmus de Cabriano, because the printed edition has a reference to this legal opinion.[20] This reasoning is cited also in a medieval manuscript conserved in Great-Britain and edited by Kantorowicz.[21] Dolezalek made

---

[12] Codex Iustinianus 4. 37. 3.: Cum in societatis contractibus fides exuberet conveniatque aequitatis rationibus etiam compendia aequaliter inter socios dividi, praeses provinciae, si patrem tuum salinarum societatem participasse et non recepta communis compendii portione rebus humanis exemptum esse reppererit, commodum societatis, quod deberi iuxta fidem veri constiterit, restitui tibi praecipiet. (In this paper all translations of Roman law texts were made using the translation by P. Scott and the translation by Fred H. Blume, although with some changes.)

[13] Gl. *fides* ad C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis 1569, coll. 816.): „Fides] scilicet bona, ut supra de acti. et oblig. l. bonam."

[14] Gl. *aequitatis* ad C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis 1569, coll. 816.): „Aequitatis] idest bonae fidei."

[15] Azo, *Lectura* in C. 4. 37. 3., *pro socio*, l. *cum in societatis* (Parisiis, 1581, 335.)

[16] C.2. 3. 13.: In bonae fidei contractibus ita demum ex pacto actio competit, si ex continenti fiat: nam quod postea placuit, id non petitionem, sed exceptionem parit.

[17] Gl. *in bonae fidei contractibus* ad C.2. 3. 13., *de pactis*, l. *in bonae fidei contractibus* (Parisiis 1559, coll. 230.): „dicas idem in stricti iuris, ut infra eo. l. petens (C.2. 3. 27) et ff. si cer. petatur l. lecta § dicebam (D.12. 1. 40). Sed in his, scilicet bonae fidei, maxime videbatur valere etiam ex intervallo appositum propter exuberantem fidem, quae in his desideratur."

[18] Meijers, E. M., *Sommes, lectures et commentaires (1100 ŕ 1250)*, in *Atti del Congresso Internazionale di* Diritto Romano (Bologna e Roma), Pavia 1934, 464, 488-494.

[19] von Savigny, Friedrich Carl, *Geschichte des römischen Rechts im Mittelalter*, Heidelberg 1850, IV 534.: erroneously attributed by Savigny to Roffredus, Lectura in Codicem 2. 3. 13., (ms. Paris 4546): „W. philosophicam rationem ponit in casibus. Ideo dicit de his, quoniam propter exuberantem fidem quae in his desideratur puta etiam ex intervallo facta inesse videbantur eis."

[20] Wallinga, Tammo, *The Casus Codicis of Wilhelmus de Cabriano*, Frankfurt am Main 2005, 42-43.: „Que in continenti fiunt, sive sit contractus bone fidei sive stricti iuris, insunt et novam actionem pariunt… Set cum idem sit tam in stricti iuris contractibus, quam bonae fidei, quare de his dicit et de illis subtacet? Quod forte ideo fit propter exuberantem fidem que in his desideratur."

[21] Kantorowicz, Hermann, *Studies in the Glossators of Roman Law*, Cambridge 1937, 296. (ad C. 2. 3. 13): „Pactum de natura contractus est, cavere de evictione cum pignore vel fideiussore. Si in continenti factum est, veterem informat actionem et parit novam actionem, scilicet prescriptis verbis. Si vero ex intervallo, exceptionem tantum, ut huiusmodi: vendidi domum; ex intervallo convenit, ut liceat michi habitare; si sum in domo, habebo exceptionem; si autem extra, nullam actionem, quod non esset, si in continenti facta esset. Quare in contractibus bone fidei et non stricti iuris dixit? Quia in his non dubitatur, set stricti iuris, si in continenti, parit actionem novam, veterem informat; si ex intervallo, exceptionem. In bone fidei dubitatur propter exuberantem fidem, que celebratur. Semper separari debere propter uberiorem fidem."

clear that Kantorowicz had erroneously attributed this text to Wilhelmus de Cabriano, and he conjectured that the passage discovered and edited by Kantorowicz might be of Provencal origin.[22]

Glossators asked why the pacts annexed to the bonae fidei contracts differ from those annexed to the stricti iuris contracts. Some of them thought that those pacts differ because of the bona fides exuberans. But not all of them agreed, some of the Glossators had different opinions on that. Martinus and Albericus thought that subsidiary conventions annexed to an agreement remedied by bonae fidei action were enforceable.[23] Iacobus and Placentinus went further. They thought that not only those pacts are enforceable which are annexed to an agreement (contract) remedied by bonae fidei action, but also those annexed to stricti iuris contracts, if they were made at the same time that the main contract was made. In their views there is no difference between pacts annexed to bonae fidei and stricti iuris contracts, if the pact followed immediately upon the main contract (*pacta incontinenti*), but pacts not following immediately upon the main stricti iuris contract, were not enforceable (*pacta ex intervallo*).

The Dissensiones dominorum edited by Haenel has a slightly different version in the collection of Rogerius and the so-called Vetus collectio.[24] However, these differences are not significant. The text of the Vetus collectio is much more corrupted, therefore it is impossible to say whether Irnerius took a position in this dispute or not.

5. The restitution of deposited things to the thief

Alongside the afore-mentioned legal topics, we can cite another debated legal question in the 12th century in order to illustrate the application of this new legal concept in the practice.

D. 13. 6. 16 stated already that „even if a thief or a depredator lends property he will be entitled to an action on loan"[25], but the ancient Roman lawyers were not referring to the bona fides to support this legal rule.

D. 16. 3. 1.39 stated that „if a depredator or a thief makes a deposit, either of them will lawfully be entitled to an action on deposit; for it is to his interest to have it, because he may be held liable."[26] A reference to bona fides in order to support this statement is lacking here, either.

According to the Glossators, the rule that even a thief or a depredator makes a deposit is entitled to an action on deposit, has a strict correlation with the bona fides. They explained that this legal rule is strictly correlated with the bona fides, but they also stated that this rule is specifically connected to a special type of bona fides, the bona fides exuberans. This bona fides exuberans is an objective measure, and it is referring to the parties' obligations stemming from a contract on the basis of „natural equity", an objective requirement of fair dealing and honesty, and this *bona fides* is not only the absence of personal dishonesty or improbity.

This legal reasoning appeared probably in the second half of the 12th century. Placentinus explains that even a thief or a depredator who lends property or makes a deposit is entitled to an action on loan or deposit, yet not because of his dishonesty, but because deposit and loan (commodatum) are contracts plentiful of good faith.[27] And this is a clear reference to the bona fides exuberans.

A 12-13th century legal compilation, the Liber iuris Florentinus compiled between 1180 and 1234, most probably around 1200, has a similar legal reasoning. The anonymous author of this work points out that even if a thief who makes a deposit

[22] Dolezalek, Gero, *Die Casus Codicis des Wilhelmus de Cabriano*, in Studien zur europäischen Rechtsgeschichte, Frankfurt 1972, 25-52.

[23] Scialoja, Vittorio, *Di una nuova collezione delle dissensiones dominorum*, in *Studi e documenti di storia e diritto* 12 (1891) 272.: „[D]issentiunt, utrum sit idem pactum, si fiat in continenti, tam in bonae fidei iudiciis quam in stricti iuris, id est ut novam pariat actionem et veterem informet. Dicit Mar[tinus] et Al[bericus] in bonae fidei iudiciis pactum in continenti factum, sive sit de natura contractus sive non, novam parit actionem, scilicet praescriptis verbis, et veterem informat ex eo contractu, ut C. de pact. 1. in bonae fidei [C. 2, 3, 13] et D. de pact. Iuris §. Sed cum [D. 2, 14, 7, 4]. Ia[cobus] dicit et Plac[entinus] et U[go] idem esse in stricti iuris iudiciis, quod in bonae fldei, et e contrario, ut novam actionem pariat pactum appositum in continenti, scilicet praescriptis verbis, et veterem, quae fuerat, informet; et argumentum suum prň hac sententia ei proficiens est in C. de pact. 1. petens [C. 2, 3, 27] et D. si certum pe. lecta [D. 12, 1, 40]; illas quidem leges, quae loquuntur in bonae fidei iudiciis, sic determinat, quasi non videantur loqui ad differentiam stricti iuris iudic[iorum]; sed quia cum essent bonae fidei, videbatur quod pactum etiam ex intervallo factum debet parere novam actionem et veterem informare, quod removet… Dominus Ug[o] dicebat, quod pactum in stricti iuris iudiciis in continenti appositum novam parit actionem, sed veterem non informat, ar. D. de pact. iuris §. sed cum [D. 2. 14, 7, 4] et de condi. e. d. 1. ult. [D. 12, 4, 16]. Quod aliis non placet: et manifeste eius sententia reprobatur in D. si certum pe. lecta [D. 12, 1, 40].

[24] Haenel, Gustav, *Dissensiones Dominorum, sive controversiae veterum iuris Romani interpretum, qui glossatores vocantur*, Lipsiae 1834, 38.: „Dissentiunt in eo, utrum sit idem, si pactum fiat in continenti, tam in bonae fidei iudiciis, quam stricti iuris, ad hoc, ut novam pariat actionem et veterem informet; et dicit Martinus in bonae fidei iudiciis pactum in continenti factum, sive sit de natura contractus sive non, novam parere actionem, scilicet praescriptis verbis et veterem informare, scilicet ex eo contractu, ut C. de pactis, l. in bonae fidei (C.2. 3. 13) et D. de pactis, l. Iuris gentium, § Sed cum (D.2. 24. 7.4). I. do. dicit, in stricti iuris iudiciis, si pactum sit de natura contractus; si vero extra, dicit, tantum novam parere, scilicet praescriptis verbis, veterem non informare. Iacobus autem dicit, idem esse in stricti iuris, quod in bonae fidei iudiciis, ut et novam pariat actionem pactum factum in continenti in stricti iuris iudiciis, scilicet praescriptis verbis et veterem quae fuerat, informet, et argumentum suum pro hac sententia facere C. de pactis, l. petens (C.2. 3. 27) et D. si certum petatur, l. Lecta est (D.12. 1. 40). Illasque leges, quae loquuntur in bonae fidei iudiciis, sic determinat, quasi non videantur loqui ad differentiam stricti iuris, sed quia, quum esset bonae fidei, videbatur quod pactum etiam ex intervallo factum deberet novam parere actionem et veterem informare, quod removet." The dissensio of Rogerius at page 86.

[25] D. 13. 6. 16 Ita ut et si fur vel praedo commodaverit, habeat commodati actionem.

[26] D. 16. 3. 1.39 Si praedo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos: nam interest eorum eo, quod teneantur.

[27] Pescatore, Gustav, *Placentini Summa de uarietatibus accionum*, Greifswald 1897, 43.: „Et sciendum est, quia etiam furi et predoni conpetit accio commodati set et depositi, ut D. eod. 1. Ita (13, 6, 16) et D. depositi 1. I. §. Si predo (16, 3, 1, 39). ex inprobitate tamen nec fur nec predo consequitur agendi potestatem, set ratione contractuum in quibus bona fides exuberat.

will be entitled to an action on deposit because of the exuberant faith that resides in this contract.[28]

There is another point where the anonymous author mentions the bona fides exuberans. In the chapter dedicated to loan (commodatum), the author helds that an utilis actio is entitled to a thief who lends others' property because of the exuberant faith that resides in this contract.[29]

6. Conclusion

It is clear that the afore-mentioned 12th century authors distinguished between bona fides exuberans and ordinary bona fides, they did not treat bona fides as a unified notion, as Földi stated. A new legal term has emerged, the bona fides exuberans. As to the meaning of this new legal term, it is an objective requirement of fair dealing and honesty. The ordinary bona fides means the absence of dolus of the contractant parties.

The distinction between the two types of bona fides is probably to be ascribed to Bulgarus. The afore-mentioned sources are evidences that this distinction can not be ascribed to Franciscus Aretinus (1418-1486), as Földi erroneously thought. The 12th century glossators of Roman Law have created a new legal term that survived along the centuries.

[28] Conrat, M., *Das Florentiner Rechtsbuch: Ein System römischen Privatrechts aus der Glossatorenzeit*, Berlin 1881, 114.: „Directa actio depositi conpetit ei qui rem suam deponit et eius heredi. Conpetit etiam furi propter exuberantem fidem."

[29] Conrat, M., *Das Florentiner Rechtsbuch: Ein System römischen Privatrechts aus der Glossatorenzeit*, Berlin 1881, 112.: actio „utilis datur ei qui commodat rem alienam, etiam propter exuberantem fidem que exigitur in commodato competit furi ad petendam rem commodatam furtivam."

The Birth and Youth of the Modern Hungarian Private Law

György Képes *

Abstract

1848 was a turning point in Hungary in all senses of legal development. It is not only the emblematic year of beginning of the constitutional monarchy based on separation of powers, popular sovereignty, governmental responsibility and civil liberties, but in general, 1848 can be considered as the start year of modern Hungary. From the point of view of private law, the abolition of seigneurial relationship between landlords and peasants and the abrogation of traditional legal institutions of property and inheritance law hindering the free disposition on goods has to be mentioned. After the fall of the 1848 revolution, the introduction of the Austrian civil law also catalysed the process of modernisation, and finally, after 1861, the modern Hungarian private law was born, without the adoption of a civil code, strongly based on the jurisdiction of the courts.

Key words: *Hungarian legal history; Hungarian private law; Aviticitas; Restrictions on property; Freedom of property; Legal modernisation in Hungary.*

As the conclusion of the Reform Era marked with sessions of the old Hungarian diet full of new spirit in the 1830's and 40's (the "reform diets"),[1] a series of laws was adopted by the parliament in the second half of March 1848, right after the revolutionary demonstrations in Vienna on 13 March, and in Budapest on 15 March 1848. The laws were sanctioned (or, as we say in the Hungarian public law, "sanctified") by King Ferdinand V (1835–1848), on 11 April 1848. That is where their name "the April Laws" derives from.[2]

The *April Laws* can be divided into three groups, the first two of which, i.e. the laws establishing the new, "recognizably parliamentary form of government" of Hungary[3] (Acts III–V of 1848), and the ones declaring the fundamental liberties of the Hungarian citizens (such as the famous Act XVIII of 1848 on the freedom of the press and on the abolition of censorship, by the way, demand number one of the Hungarian revolutionary movement of 1848), together form the new constitution of the Kingdom of Hungary without having been incorporated in a single constitutional charter as it had been the case in other contemporary monarchies like France (e.g. 1791, 1814, 1830), Norway (1814) or the one obviously serving as the model for the *April Laws*, the 1831 Constitution of Belgium.

The third group of the *April Laws* is about the elimination of the remains of the "feudal" (or rather, estate based) social and legal institutions. This third group of laws includes two, rather declaratory acts, Act IX of 1848 on the abolition of the seigneurial obligations, i.e. the services of the peasants towards their landlords,[4] and Act XV of 1848 on the abolition of *aviticitas*, the "traditional system of noble landholding",[5] a very restrictive institution of the medieval Hungarian law.

This latter act suspended and prohibited all legal disputes based on *aviticitas*, and at the same time – on the proposal of the new Minister of Justice *Ferenc Deák*[6] – it obliged the government to prepare a civil code and to submit the draft "to the next parliament".[7] The new Hungarian government, the so-called *Ministerium* – the first accountable government in the Hungarian constitutional history, led by *Count Lajos Batthyány*[8] appointed by the King on 17 March 1848 to the position of Prime Minister the first time in Hungary – had no possibility to deal with the matter of the civil code. Although Deák had

* György Képes, Ph.D, senior lecturer, Department of Hungarian Legal History, Eötvös Loránd University of Budapest, Hungary.

1 RADY, Martyn, *Customary Law in Hungary: Courts, Texts, and the Tripartitum*, Oxford, 2015, p. 219.

2 POMOGYI, László, *Magyar alkotmány- és jogtörténeti kéziszótár*, Budapest, 2008, p. 60.

3 RADY, *Customary Law in Hungary*, op. cit., p. 221.

4 BÉLI, Gábor, *Magyar jogtörténet. A tradicionális jog*, 2nd ed., Budapest–Pécs, 2009, p. 307.

5 RADY, *Customary Law in Hungary*, op. cit., p. 222.

6 *Ferenc Deák* (1803–1876), jurist and politician, Minister of Justice of the first Hungarian government in 1848, father of the Austro-Hungarian Compromise of 1867 and leader of the so-called "Deák party" until his death.

7 MÁDL, Ferenc, Magyarország első polgári törvénykönyve — az 1959. évi IV. törvény — a polgári jogi kodifikáció történetének tükrében, *Az MTA Társadalmi-történeti Tudományok Osztályának Közleményei X.*, (1–2), 1960, 3–88., p. 50. See Section 1 of Act XV of 1848. Available in Hungarian: http://1000ev.hu/index.php? a=3 & param=5283 [Accessed 7 July 2016]

8 *Count Lajos Batthyány* (1807–1849), president of the first accountable government in Hungary in 1848, executed after the fall of the revolutionary war, on 6 October 1849.

formally mandated the excellent jurist, *László Szalay*[9] to prepare the draft, there was no time to complete the work.[10]

As *Mária Homoki-Nagy*, professor of legal history at Szeged University established, "1848–49 were not suitable for peaceful and calm legislation", but she also emphasises that in 1848, when the most important "feudal" restriction of property, the *aviticitas* had been abrogated (Act XV), and the serfs had been finally liberated (Act IX), actually the fundaments of the entire old Hungarian private law had been abolished.[11]

1. Retrospection: the characteristics and restrictive institutions of the traditional Hungarian private law

The traditional era of the Hungarian private law dates back to the Middle Ages, at least to the 13–14th centuries (Golden Bull of 1222, laws of Louis the Great of 1351), and as we have seen above, it lasted until the 19th century. The main source of the traditional Hungarian customary law is the great compilatory work of *István Werbőczy*,[12] the famous *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* (literally "A Work in Three Parts on the Customary Law of the Renowned Kingdom of Hungary"), in a popular abbreviated form called the *Tripartitum*.[13]

1.1 The Tripartitum

In 1514, Werbőczy's work had been approved by the diet and supported by King Wladislas II (1490–1516) as well, but it was not formally sanctified by the latter, officially because he suddenly had to leave the diet, but probably rather as the result of a successful sabotage of the high nobility (the *Barons*), who strongly opposed the idea of the "one and equal liberty" of the Hungarian nobility (*una eademque libertas*, expressed under section 7 of Part I, Title 9).[14]

Without the royal sanction, the *Tripartitum* could not be constitutionally enacted into the Hungarian statute law, therefore the author (in 1514 a deputy judge besides the Justice of the Realm, in 1516 – after the death of Wladislas II – nominated by the royal council to the position of *Personalis*, representative of the king in the judiciary[15] and, *ex officio*, the chairman of the Royal Table, the second highest royal court in the late medieval and early modern Hungary)[16] decided in 1517 to print the book at his own expense and send it out to the counties for proclamation and further use.[17]

As the legal historian *Andor Csizmadia* wrote in a study in 1983, the *Tripartitum* "remained till our times the recognised source of the Hungarian customary law".[18] A year later, another Hungarian legal historian, *Ödön Both* called the *Tripartitum* "the legal Bible of the Hungarian nobility".[19] As *Jean W. Sedlar*, professor of history at the University of Pittsburgh also emphasised in her book published in 1994 on the medieval history of East Central Europe: "for many centuries it served the Hungarian elite as a constant point of reference".[20]

Until the end of the 19th century, the work was published in more than fifty editions.[21] The first, yet incomplete Hungarian

[9] *László Szalay* (1813–1864), jurist, historian and politician, one of the most prominent figures of the Hungarian legal modernisation.

[10] BALOGH, Judit, Magánjog a XIX. század végén Magyarországon (Katona Mór 1899-es kiadású rendszeres magánjoga elé), In: KATONA, Mór, *A mai érvényű magyar magánjog vezérfonala* (1899). Közjegyzői füzetek – Studia Notarialia Hungarica, Tom. VII., Budapest, 2008, IX–XXIV., pp. XII–XIII.; CSIZMADIA, Andor, A jogi hagyományok, mint a jogi reformok korlátai Magyarországon a XIX. században, *Jogtudományi Közlöny*, 1 (1979), 30–40., p. 33.; HORVÁTH, Attila, *A magyar magánjog történetének alapjai*, Budapest, 2006, p. 54.

[11] HOMOKI-NAGY, Mária, A magyar magánjog kodifikációja a 19. században, *Jogtörténeti Szemle*, 1 (2004), 4–7., p. 5. See also KAJTÁR, István, *A 19. századi modern magyar állam- és jogrendszer alapjai*, Budapest–Pécs, 2003, p. 219.

[12] *István Werbőczy* (c. 1465–1541), royal judge, *Personalis* (representative of the King in the judiciary) since 1517, later (in 1525–26) *Palatine* of the Kingdom of Hungary.

[13] CSIZMADIA, Andor, Hungarian Customary Law before the Bourgeois Rebellion of 1848, *The Journal of Legal History*, 4 (1983), 3–37., pp. 22. and 28–29. [conclusions]; ZLINSZKY, János, Two Questions about the Adaptation of Juridical Models: The XII Tables and Hungarian Reception, In: *Acta Juridica Hungarica*, Vol. 33., N° 1–2., Budapest, 1991, 39–56., p. 52. In a modern English translation see BAK M., János – BANYÓ, Péter – RADY, Martyn (eds.), *The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts Rendered by Stephen Werbőczy*, Los Angeles, 2005. (Translated by János Bak M.)

[14] See eg. CSIKY, Kálmán, *Werbőczy István és Hármaskönyve*, Budapest, 1899, pp. 34–35.; CSIZMADIA, Hungarian Customary Law, op. cit., pp. 16–17. and 20.; HAMZA, Gábor, A Tripartitum mint jogforrás, In: MÁTHÉ, Gábor – ZLINSZKY, János (eds.), *Degré Alajos emlékkönyv*, Budapest, 1995, 77–85., p. 79.; HERCZEG, Mihály, Magánjogi codificatiónk hajdan és mostan, *Jogtudományi Közlöny*, 48 (1877), 373–375., p. 373.; ILLÉS, József, *Bevezetés a magyar jog történetébe. A források története*, Budapest, 1910, pp. 132–133.; MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 40., RADY, Martyn, Stephen Werbőczy and his Tripartitum, In: BAK M., J. – BANYÓ, P. – RADY, M. (eds.), *The Customary Law of the Renowned Kingdom of Hungary*, xxvii–xliv., p. xxxix., etc.

[15] In Martyn Rady's English translation: "judge of the personal presence", See RADY, Martyn, Judicial Organization and Decision Making in Old Hungary, *The Slavonic and East European Review*, 3 (2012), 450–481., p. 464. Pál Engel simply calls the position "Personal". See ENGEL, Pál, *The Realm of St. Stephen: A History of Medieval Hungary, 895–1526*, New York, 2001, p. 364.

[16] ECKHART, Ferenc, *Magyar alkotmány- és jogtörténet*, Budapest, 2000 [Original edition: 1946], p. 157.; MEZEY, Barna, Az 500 éves jogkönyv, *Jogtörténeti Szemle*, 4 (2014) – 1 (2015), 1–12., p. 9.

[17] See e.g. BÉLI, *Magyar jogtörténet*, op. cit., p. 29.; CSIZMADIA, Hungarian Customary Law, op. cit., p. 17.; ECKHART, *Magyar alkotmány- és jogtörténet*, op. cit., p. 159.; HAMZA, A Tripartitum, op. cit., p. 79.; HORVÁTH, *A magyar magánjog*, op. cit., p. 135.; ILLÉS, *Bevezetés a magyar jog történetébe*, op. cit., p. 135.; MEZEY, Az 500 éves jogkönyv, op. cit., pp. 10–11.; RADY, *Customary Law of Hungary*, op. cit., p. 19. etc.

[18] CSIZMADIA, Hungarian Customary Law, op. cit., p. 16.

[19] BOTH, Ödön, A magyar feudális tulajdon fő vonásai a kései feudalizmus idején, *Jogtudományi Közlöny*, 6 (1984), 328–333., p. 331. See also ENGEL, *The Realm of St. Stephen*, op. cit., p. 350. ["the favourite reading, if not the Bible, of the nobility"]; JOBBÁGYI, Gábor, Werbőczy és a Hármaskönyv, *Jogtudományi Közlöny*, 9 (1989), 466–469., p. 467.; POMOGYI, *Magyar alkotmány- és jogtörténeti kéziszótár*, op. cit., p. 401.; MEZEY, Az 500 éves jogkönyv, op. cit., p. 11. ["Bible of the nobility"]

[20] SEDLAR, Jean W., *East Central Europe in the Middle Ages, 1000–1500)*, Seattle–London, 1994, p. 332.

[21] HORVÁTH, *A magyar magánjog*, op. cit., p. 135.; ILLÉS, *Bevezetés a magyar jog történetébe*, op. cit., pp. 137–138.

version was published by *Balázs Weres* in 1565 in Debrecen, and a revised and more complete Hungarian edition by *Gáspár Heltai* in 1571 in Kolozsvár (now Cluj, Romania).[22] The *Opus* was translated by *Ivan Pergošić*, that time the notary of the city of Varaždin,[23] into Croatian (or more precisely, into Slavonian)[24] language in 1574,[25] and in 1599 it was published in Vienna in German translation as well.[26]

As a very important development, the *Tripartitum* was inserted into the publication of Hungarian laws first in 1628, to the beginning of the book,[27] and then to the first edition officially called *Corpus Juris Hungarici* in 1696 as well. It was also added to the Transylvanian compilation of laws at the end of the 17th century. When the *Corpus Juris Hungarici* was published in a ceremonial edition in 1896, a bilingual (Latin and Hungarian) version of the *Tripartitum* was issued as a separate volume, with glossary.[28]

Werbőczy's "Work in Three Parts" primarily deals with the rights of the noblemen, as it seemed unnecessary and, to a certain extent, impossible to harmonise the norms of customary law related to peasants or burghers on a national level. In Part I, consisting of 134 Titles, the private law of the noblemen (and primarily the rules regarding noble landholding)[29] is presented in detail, but some criminal law institutions are also referred to (e.g. the cases of *infidelity*, mentioned in relation to the confiscation of property, see Part I, Title 14). Part II is about procedural rules, mainly from the point of view of the enforcement of the norms of private law, and especially in order to protect the rights of noblemen.[30] The so-called "particular rights", such as the rights of the peasants, burghers, and also some regulations held valid for Dalmatia, Croatia, Slavonia, and for Transylvania, are delineated in Part III.[31]

From the "Three Parts", obviously *Prima pars* has the greatest importance, for it was unquestionably the primary source of the Hungarian private law until the 19th century.[32] In the following, we try to summarise the characteristics of this traditional period of the Hungarian private law very briefly, in order to promote the understanding of the significance of the changes of 1848.

1.2 Law of persons

The law of persons of that era can be typified with one word: inequality. It means that, until 1848, some factors of personal status, such as gender, nationality, religion (if someone followed the state religion, or later the so-called *religiones receptae*, "established religions"), "legitimacy" (i.e. if someone was born in a valid marriage or not), and – above all – the social status (if someone belongs to any of the social estates, and primarily to the *una eademque nobilitas*) determined the extent of the legal capacity of the given person.

As the Romanist lawyer and legal historian *Béla Szabó* underlines concerning Werbőczy's doctrine on the uniform nobility: "it drew a sharp dividing line between the nobles and the non-nobles".[33] Of course, it does not mean that a peasant (serf) could not have any property (or other personal rights), but it actually means that his position in all areas of law, in private law relationships as well as before criminal authorities, was far from identical to that of a nobleman. This inequality was abolished by the Hungarian diet by the adoption of Act IX of 1848.

1.3 Acquired and ancient property

The property law also had a similar, restrictive characteristic, and this is, quite ironically, the lack of property. There was no "property" in the modern sense of the word (ownership) in the traditional Hungarian private law, or, more precisely, *proprietas* as an exclusive right on goods existed only on moveable assets (*res mobiles*) and on "acquired goods" (*bona acquisita*).[34] In the

---

[22] RÁCZ, Lajos, Werbőczi István Tripartitumának első fordításai, In: MEZEY, Barna – RÉVÉSZ, T. Mihály, *Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére*, Budapest, 2006, 453–466., pp. 455–456.

[23] BLAZOVICH, László, A Tripartitum és forrásai, *Századok*, 4 (2007), 1012–1023., p. 1015.; ŠTEFANEC, Nataša, Pergošić's Translation of the Tripartitum into Slavonian, In: RADY, Martyn (ed.), *Custom and Law in Central Europe*, Cambridge, 2003, 71–85., p. 75.

[24] ŠTEFANEC, Pergošić's Translation, op. cit., pp. 75–76.

[25] Croatian title in contemporary spelling: *Decretum koteroga je Werbeuczi Istvan diachki popiszal*. The newest edition is BARTOLIĆ, Zvonimir, *Ivanuš Pergošić: Decretum 1574. – hrvatski kajkavski prijevod editio princeps*, Čakovec, 2003, 203–390.

[26] This 1599 edition is available as a free ebook at https://books.google.hu/books?id=619XAAAAcAAJ. A Hungarian version from 1643 is also available as a free ebook thanks to Google Books, see https://books.google.hu/ books?id=stJdAAAAcAAJ [Accessed 20 July 2016]

[27] SZLADITS, Károly, *A magyar magánjog vázlata 1.*, 4th revised ed., Budapest, 1933, p. 8.

[28] ECKHART, *Magyar alkotmány- és jogtörténet*, op. cit., p. 159. and 265.; GÖNCZI, Katalin, Werbőczy's Reception in Hungarian Legal Culture, In: RADY, Martyn (ed.), *Custom and Law in Central Europe*, Cambridge, 2003, 87–99., pp. 96–97.; ILLÉS, *Bevezetés a magyar jog történetébe*, op. cit., pp. 138–139.; MEZEY, Az 500 éves jogkönyv, op. cit., p. 11.; RADY, *Customary Law of Hungary*, op. cit., p. 20.; PÉTER, László, The Irrepressible Authority of Werbőczy's Tripartitum, In: *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Pespective. Collected Studies*, Leiden–Boston, 2012, 134–152., p. 138.; RADY, Stephen Werbőczy and his Tripartitum, op. cit., p. xl.; SZABÓ, Béla, Development of Law in Hungary: the First Eight Centuries, In: Gergely, András – Máthé, Gábor (eds.), *The Hungarian State. Thousand Years in Europe*, Budapest, 2000, 130–167., p. 143.

[29] JOBBÁGYI, Werbőczy és a Hármaskönyv, op. cit., p. 469.; RADY, Stephen Werbőczy and his Tripartitum, op. cit., p. xxxv.

[30] SZABÓ, Development of Law in Hungary, op. cit., p. 144.

[31] ECKHART, *Magyar alkotmány- és jogtörténet*, op. cit., p. 160.; JOBBÁGYI, Werbőczy és a Hármaskönyv, op. cit., p. 469.; MEZEY, Az 500 éves jogkönyv, op. cit., p. 10.; RADY, Stephen Werbőczy and his Tripartitum, op. cit., pp. xxxvi–xxxvii.

[32] HOMOKI-NAGY, Mária, *A magyar magánjog történetének vázlata 1848-ig*, Szeged, 2001, p. 7.; HORVÁTH, *A magyar magánjog*, op. cit., p. 137.; SZILÁGYI, Ferenc, National Report on the Transfer of Movables in Hungary, In: FABER, Wolfgang – LURGER, Brigitta (eds.), *National Report on the Transfer of Movables in Europe*. München: Sellier, 2011, pp. 409–702., p. 431.; SZLADITS, *A magyar magánjog vázlata 1.*, op. cit., p. 8.

[33] SZABÓ, Development of Law in Hungary, op. cit., p. 161.

[34] ECKHART, *Magyar alkotmány- és jogtörténet*, op. cit., p. 283.; KÁLLAY, István, A nemesi tulajdon kötöttségei, *Jogtudományi Közlöny*, 8 (1981), 702–706., p. 702.

case of the land and some other valuable goods (qualifying as *res immobiles* under the old Hungarian private law), some traditional institutions restricted the owner's rights, first of all the right of disposition (*ius disponendi*), which is indeed the most significant right of the owner in the modern interpretation of private law.[35]

The most important restrictive institution was the already mentioned *aviticitas*. In order to understand the significance of Act XV of 1848 in the formation of the modern Hungarian private law, we have to understand the meaning of this institution. In the medieval Hungary, very probably since the Hungarian conquest of the Carpathian Basin in the 890's,[36] there had been a tradition to make a distinction between *acquisitum* (goods newly acquired) and *aviticum* (goods inherited from the ancestors).

1.4 Inheritance law

If something had been inherited from an ancestor (*avus*)[37] according to the rules of intestate succession ("from father to son"), it became an *aviticum*, which meant that the given asset became the property of the family or, in broader sense, that of the kindred or kinship (*gens*).[38] The difference between *acquisitum* and *aviticum* is that, while the first could be freely sold and purchased, and the owner could freely dispose on it in his will as well, the latter had to be preserved as the property of the family.

In the inheritance law, it meant that the *bona avitica* (literal translation of the Hungarian term *ősi javak*: "ancient goods" or "ancient property")[39] were always inherited according to the order of intestate succession, i.e. the testamentary succession was excluded. In the event of lack of descendants, the other branches of the family would inherit.[40] Citing Béla Szabó's words again: "The guiding principle concerning the ancient property was that [...] every family should keep what came from the given family".[41]

1.5 Property law

It is even more interesting to examine the legal consequences of the *aviticitas* in the property law. Here, the protection of this institution actually created something like the restraint on alienation and encumbrance is in the modern civil law.[42] If a nobleman intended to alienate its property classifying as *aviticum* (which meant over time a very small portion of the ancient common property of the family), he had to offer it to the members of his family (*praemonitio*), which meant in practice that the consent of all kinsmen had to be obtained for the transaction.[43]

The lack of consent of any, even unknown member of the patrilineage[44] could lead to the consequence that years, or even centuries after the act of alienation, this "son of the father" (*atyafi*),[45] or any of his heirs had the right to claim the property back.[46] As the historian *Martyn Rady* emphasises in his book on the Hungarian nobility, the law of *aviticitas* was "the law of collective rights over properties inherited from a common ancestor".[47] According to a contemporary paper written by the enlightened writer and political thinker, *György Bessenyei*[48] in 1804, "There is no landed nobleman [in Hungary] who would not be tousled by ten or twenty litigations".[49] Let us add: litigations initiated by his own kinsmen.

This restriction and the consequent risk that the new owner may lose the property years, decades or even centuries later, made the *bona avitica* basically non-marketable. As *Count István Széchenyi*[50] highlighted in his famous work, *Hitel* (Credit) published in 1830,[51] the *aviticitas*, the "conservation of the families" is an obstacle to the development of the country, primarily because no one would accept a good as a credit guarantee, as a cover for the credit itself, if such good cannot be freely alienated.[52] In his other programmatic work, *Stádium* (first published in Leipzig, 1833)[53] he expressed that "*aviticitas* would be abol-

---

35 HORVÁTH, *A magyar magánjog*, op. cit., p. 266.
36 KÁLLAY, István, Kötetlen kötöttség a feudális magánjogban, *Jogtudományi Közlöny*, 7 (1982), 527–530., p. 527.
37 RADY, *Customary Law in Hungary*, op. cit., p. 85.
38 FÜGEDI, Erik, Some Characteristics of the Medieval Hungarian Noble Family, *Journal of Family History*, 1 (1982), 27–39., p. 29.; FÜGEDI, Erik, *The Elefánthy: The Hungarian Nobleman and his Kindred*, Budapest, 1998, p. 20.; HORVÁTH, *A magyar magánjog*, op. cit., p. 266.; KÁLLAY, A nemesi tulajdon kötöttségei, op. cit., p. 704.; SANTA-PINTER, J. J., The »Decretum unicum« of Louis the Great and his Kassa (Koszyce) Privilegium, *Ungarn-Jahrbuch. Zeitschrift für die Kunde Ungarns und verwandte Gebiete*, Band 12 (1982–1983), 87–108., p. 90.
39 SZABÓ, Development of Law in Hungary, op. cit., p. 158.
40 HOMOKI-NAGY, *A magyar magánjog*, op. cit., pp. 79–80.; ZACHÁR, Gyula, *A magyar magánjog alaptanai*, Budapest, 1912, pp. 61–62. and 332.
41 SZABÓ, Development of Law in Hungary, op. cit., p. 160.
42 BÉLI, *Magyar jogtörténet*, op. cit., p. 71.; GROSSCHMID, Béni, *Magánjogi előadások. Jogszabálytan*, Budapest, 1905, p. 649.
43 BOTH, A magyar feudális tulajdon, op. cit., p. 329.; HORVÁTH, *A magyar magánjog*, op. cit., p. 267.; KÁLLAY, A nemesi tulajdon kötöttségei, op. cit., p. 704.; SZABÓ, Development of Law in Hungary, op. cit., p. 160.
44 FÜGEDI, Some Characteristics, op. cit., p. 30.
45 Ibid., p. 30.
46 ILLÉS, *Bevezetés a magyar jog történetébe*, op. cit., pp. 208–209.; RADY, *Customary Law in Hungary*, op. cit., pp. 93. and 136.
47 RADY, Martyn, *Nobility, Land and Service in Medieval Hungary*, Basingstoke, 2000, p. 97.
48 *György Bessenyei* (1747–1811), poet and writer, political thinker of the Hungarian enlightenment.
49 BESSENYEI, György, Magyarországnak törvényes állása, In: *Bessenyei György válogatott művei*, Budapest, 1987, 691–816., cited by HORVÁTH, *A magyar magánjog*, op. cit., p. 267.
50 *Count István Széchenyi* (1791–1860), politician, leading personality of the Hungarian reform era called by the posterity as "the Greatest Hungarian", later Minister of Transport in the first Hungarian government in 1848.
51 Available in Hungarian: http://mek.oszk.hu/06100/06132/html/ [Accessed 7 July 2016]
52 GÖNCZI, Werbőczy's Reception, op. cit., p. 93.; RÁCZ, Lajos, Széchenyi István államtudományi gondolkodásáról, *Jogtudományi Közlöny*, 3 (1981), 171–178., pp. 175–176.; RADY, *Customary Law in Hungary*, op. cit., p. 220.
53 Available in Hungarian: http://mek.oszk.hu/06100/06135/html/ [Accessed 10 July 2016]

ished forever".[54] *Count Széchenyi* was the first politician in Hungary who proposed a complete legal reform, and as the part of it, a thorough modernisation of the Hungarian private law.[55]

2. The era of "individual liberalism": the first half century of the modern Hungarian private law

The *April Laws* made clear that the traditional social structures, and the old Hungarian private law based on them, cannot be maintained. With *János Zlinszky*'s words: in 1848 the reformers "had abolished the feudal constraints of the property with one stroke".[56] The Hungarian revolution and war of independence of 1848/49 failed in August 1849, but the Austrian occupying forces (and the new Austrian emperor, Francis Joseph himself) had no intention to reinstall the traditional "feudal" institutions in Hungary. They oppressed the idea of the independent constitutional Kingdom of Hungary by military force, but they did not oppose the social and economic modernisation of the country at all.

Consequently, the era of the so-called *Neo-Absolutism* (1849–1861/1867) was characterised by a very repressive political power, and at the same time by a quick modernisation of Hungarian law as well.[57] Abolition of the "feudal" restrictions of property and the obstacles of free commerce clearly coincided with the interests of the Austrian political and business elite. As the legal historian *Attila Horváth* mentions in his book on the history of Hungarian private law, a good example of this was the fact that the customs border had already been eliminated with effect from 1 October 1850.[58]

The Emperor's letter patent of 29 November 1852 ("*Avitizitäts-Patent*")[59] confirmed the abolition of *aviticitas* and eliminated the distinctions between "ancient" and acquired goods.[60] At the same time the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) of 1811 was introduced in Hungary, with effect from 1 May 1853.[61] The abolition of serfdom was also confirmed by the letter patent of 2 March 1853 (*Urbarial Patent*);[62] and the land registration was introduced with effect from 15 December 1855.[63] Concerning the latter, it is interesting enough to be mentioned that the application of the Austrian Land Register had already been ordered by the Emperor immediately after the fall of the Hungarian revolution, in October 1849, and the cadastral survey began in 1853.[64]

There is no doubt that all these norms of the Austrian law entered unconstitutionally in force in Hungary. Act XII of 1790/91 on the exercise of legislative and executive powers explicitly prohibited the governance of the country through "decrees or so-called patents".[65] However, the Austrian law helped to turn the country into a new direction: towards the modern era. Of course, the receipt of the unconstitutionally enforced legal norms in the Hungarian society was first rather negative,[66] but the Hungarian political elite, then already led by Ferenc Deák, the father of the Austro-Hungarian Settlement of 1867 on the Hungarian side, understood the positive effects thereof as well.

2.1 The Provisional Judicial Regulations

On 20 October 1860, Francis Joseph issued the *October Diploma*, promising to restore the constitutional integrity of Hungary within the Empire.[67] At the same time, he informed his Court Chancellor of Hungary, *Baron Miklós Vay*, that the Hungarian courts would be soon restored, and a legal conference would be convoked in order to make proposals regarding the details how the Hungarian jurisdiction should be reinstalled, and along what principles the restored courts should decide the new cases.[68] It was obvious, that the conflict between the traditional

---

[54] CSIZMADIA, Andor, Széchenyi István törekvései a feudális jogrend átalakítására, *Az MTA Gazdaság- És Jogtudományi Osztályának Közleményei*, Vol. 1., 3–4 (1966–67), 209–219., p. 213.

[55] HORVÁTH, *A magyar magánjog*, op. cit., p. 46.

[56] ZLINSZKY, János, Hungarian Private Law in the 19th and 20th Centuries, up to World War II, In: GERGELY, András – MÁTHÉ, Gábor (eds.), *The Hungarian State. Thousand Years in Europe*, Budapest, 2000, 305–334., p. 310.

[57] RADY, *Customary Law in Hungary*, op. cit., p. 222.

[58] HORVÁTH, *A magyar magánjog*, op. cit., p. 57.

[59] For the full Hungarian text of the letter patent see NIZSALOVSZKY, Endre (ed.): *Dologi jog* [Magyar magánjog mai érvényében. Törvények, rendeletek, szokásjog, joggyakorlat, Vol. II.], Budapest, 1928, pp. 259–272.

[60] BÉLI, *Magyar jogtörténet*, op. cit., pp. 308–309.; POMOGYI, *Magyar alkotmány- és jogtörténeti kéziszótár*, op. cit., p. 916.

[61] BÉLI, *Magyar jogtörténet*, op. cit., p. 310.; POMOGYI, *Magyar alkotmány- és jogtörténeti kéziszótár*, op. cit., p. 903.; VÉKÁS, Lajos, The Codification of Private Law in Hungary in Historical Perspective, In: *Annales Universitatis Scientiarium Budapestinensis de Rolando Eötvös Nominatae. Sectio Juridica*, LI (2010), 51–63., p. 52. Available: http://www.ajk.elte.hu/file/annales_2010_04_Vekas.pdf [Accessed 7 July 2016]

[62] ASZTALOS, László, A magyar burzsoá jog, kialakulásától 1918-ig. A magánjog és a kereskedelmi jog. In: CSIZMADIA, Andor – KOVÁCS, Kálmán – ASZTALOS, László, *Magyar állam- és jogtörténet*, Budapest, 1972, 451–502., p. 454.; CSIZMADIA, A jogi hagyományok, op. cit., p. 34.; RADY, *Customary Law in Hungary*, op. cit., p. 222.

[63] HORVÁTH, *A magyar magánjog*, op. cit., pp. 58. and 229.; VÉKÁS, The Codification of Private Law, op. cit., p. 54. For more detail see ASZTALOS, A magyar burzsoá jog, op. cit., pp. 455–456.; and BÉLI, *Magyar jogtörténet*, op. cit., pp. 308–312.

[64] SCHARR, Kurt, The Habsburg Cadastral Registration System in the Context of Modernization, In: SIEGRIST, Hannes – MÜLLER, Dietmar (eds.), *Property in East Central Europe. Notions, Institutions and Practices of Landownership in the Twentieth Century*, New York–Oxford, 2015, 100–116., p. 114. [Footnote No. 38.]

[65] Available in Hungarian: http://1000ev.hu/index.php?a=3 & param=4886 [Accessed 21 July 2016]

[66] See e.g. DEÁK, Ágnes, Társadalmi ellenállási stratégiák Magyarországon az abszolutista kormányzat ellen 1851–1852-ben, *Aetas* 4 (1995), 27–59., especially pp. 34–38.

[67] RADY, *Customary Law in Hungary*, op. cit., p. 224.

[68] CSIZMADIA, A jogi hagyományok, op. cit., p. 34.; HORVÁTH, *A magyar magánjog*, op. cit., pp. 62–63.; MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 53.

Hungarian law and the recently introduced legal institutions had to be resolved somehow.

The meeting, chaired by the Justice of the Realm[69] *Count György Apponyi*, and therefore usually referred to as the "Conference of the Justice of the Realm" (*Országbírói Értekezlet*),[70] began its work on 22 January 1861. The attendants of the meeting (judges, legal scholars and other prominent persons invited by Count Apponyi) established that the norms of the Austrian law could not apply in Hungary as sources of law, but also declared that "a *restitutio in integrum* of Hungary's laws was not possible".[71] On the last (18th) session held on 4 March 1861, the Conference proposed to the Hungarian courts to accept the letter patent of 2 March 1853 as valid, and to take into consideration in their decisions that *aviticitas* had been abolished.

Based on the recommendations of the congress, a special committee drafted a document titled Provisional Judicial Regulations (*Ideiglenes Törvénykezési Szabályok*, ITSz),[72] which was approved by the parliament (on 22 June 1861 by the majority of the house of representatives, and on 1 July 1861 by the upper house unanimously), but had never been enacted as a law, and was aimed to be kept in force as an auxiliary instrument for the courts until the adoption of the Hungarian civil code.[73] So it happened: as a customary law it remained effective until 1 May 1960, the date of entering into force of the first Hungarian civil code (Act IV of 1959).[74]

The Provisional Judicial Regulations consisted of no less than 311 sections, many of them dealing with several aspects of private law (and commercial law). The document practically saved the idea of the free property, preserving in its sections 20–21 (Book I) all relevant norms of the Austrian Civil Code concerning ownership (sections 353–379 of ABGB), and this made the land marketable.

It is important to mention that, according to section 3 (Book I) of the ITSz, the abolition of *aviticitas* implied the cease of the donational system as well,[75] thus in the interpretation of the Conference, the restrictions attached to the donated lands (goods acquired through *donatio*) had also been abolished in 1848.[76] This interpretation was at the same time the confirmation of sections 1–4 of the *Avitizitäts-Patent* issued on 29 November 1852.[77]

The Regulations maintained in force the rules of the Austrian law regarding mortgage and transfer of ownership of real properties, too. According to the modern principle represented by the Austrian Civil Code and the Land Registration Ordinance (*Telekkönyvi rendtartás*) effective from 1855 in Hungary, all encumbrances and changes in the ownership had to be inscribed in the land registry.[78] With Martyn Rady's words, "the ITSz provided a gateway through which further provisions of the [Austrian] Code might be deemed applicable to Hungary".[79]

2.2 Codification attempts and the role of statute law

The *April Laws* of 1848, the introduction of the Austrian private law in 1853 and the land registration in 1855, and, especially in the field of property law, the Provisional Judicial Regulations of 1861 altogether helped to form the modern, liberal system of private law in Hungary, without a single uniform civil code, indeed, in many aspects still based on customary law, the jurisdiction and legal interpretation of the courts.[80]

---

[69] The second highest office of the realm in the medieval Hungary (after the *Palatine*), re-established in November 1860 as the highest Hungarian office at that time, in lack of *Palatine* (*nádor*) and/or Prime Minister (*miniszterelnök*, a function established in 1848). In Pál Engel's translation: "Judge Royal", see ENGEL, *The Realm of St. Stephen*, op. cit., p. 92.; while in Martyn Rady's translation: "High Judge", see RADY, Judicial Organization, op. cit., p. 465. Actually, the Hungarian word *országbíró* means "Justice of the Realm", while the literal translation of the original Latin denomination of the position (*Iudex Curiae*) would be "Judge of the [Royal] Court".

[70] In a recent publication of the Hungarian supreme court of justice (*Curia*) it is called "Conference of the Lord Chief Justice", see http://www.lb.hu/en/history-and-judicial-reform [Accessed 7 July 2016], while in the English literature "High Judge Conference", see RADY, *Customary Law in Hungary*, op. cit., p. 224., "Lord Chief Justice Conference", see PÉTER, László, The Primacy of Consuetudo in Hungarian Law, In: RADY, Martyn (ed.), *Custom and Law in Central Europe*, Cambridge, 2003, 101–111., p. 106., or "Lord Judge Royal Conference", see PÉTER, The Irrepressible Authority, op. cit., pp. 143–144. Usage of such different terms can be really confusing, especially for a foreign reader. We prefer "Conference of the Justice of the Realm", see precedent footnote.

[71] BALOGH, Judit, Az osztrák magánjog hatása a magyarországi kodifikációra a XIX. században, *Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica*, XIV (1997), 55–68., *p.* 63.; HOMOKI-NAGY, A magyar magánjog kodifikációja, op. cit., p. 6.; RADY, *Customary Law in Hungary*, op. cit., p. 225.

[72] RADY, *Customary Law in Hungary*, op. cit., p. 228.; Prof. János Zlinszky called the document in an earlier publication in English "Provisional Rules for Administration of Justice", see ZLINSZKY J., Hungarian Private Law, op. cit., p. 307. (In this study we prefer Professor Rady's translation, because the document was formulated in order to assist the judiciary in general, not specifically its administration.)

[73] BÉLI, *Magyar jogtörténet*, op. cit., p. 314.; HORVÁTH, *A magyar magánjog*, op. cit., p. 65.; MEZEY, Barna, Horvát Boldizsár az Országbírói Értekezleten, *Jogtörténeti Szemle*, 3 (2005), 31–38., p. 38.; RADY, *Customary Law in Hungary*, op. cit., pp. 228–229.

[74] HORVÁTH, *A magyar magánjog*, op. cit., p. 65.; PÉTER, The Primacy of Consuetudo, op. cit., p. 108.; RADY, *Customary Law in Hungary*, op. cit., p. 229.;VÉKÁS, Lajos, Magánjogi kodifikáció kultúrtörténeti tükörben, *Magyar Tudomány*, 1 (2014), 80–89., p. 87.

[75] See NIZSALOVSZKY (ed.), *Dologi jog*, op. cit., p. 259.

[76] BÉLI, *Magyar jogtörténet*, op. cit., p. 314.; GROSSCHMID, *Magánjogi előadások*, op. cit., p. 642.

[77] See NIZSALOVSZKY (ed.), *Dologi jog*, op. cit., pp. 260–261.

[78] BALOGH, Magánjog a XIX. század végén, op. cit., p. XV.; BÉLI, *Magyar jogtörténet*, op. cit., pp. 314–315.; HARMATHY, Attila, *On Legal Culture of Hungary. Reports to the XVIIIth International Congress of Comparative Law*, Washington D.C., 2010, p. 14. Available: https://jak.ppke.hu/uploads/articles/11887/file/Angol%20 anyag%201.-%20Szil%C3%A1gyi.doc [Accessed 7 July 2016].; HORVÁTH, *A magyar magánjog*, op. cit., p. 63.; KAJTÁR, *A 19. századi modern*, op. cit., p. 220.

[79] RADY, *Customary Law in Hungary*, op. cit., p. 228. See also BALOGH, Az osztrák magánjog hatása, op. cit., p. 63.

[80] BALOGH, Magánjog a XIX. század végén, op. cit., p. XVI.; CSIZMADIA, A jogi hagyományok, op. cit., p. 35.

Even after the Austro-Hungarian Settlement of 1867, when finally a long peaceful and prosperous period dawned in the Hungarian history, all codification attempts remained unsuccessful.[81] Exceptions are the areas of commercial law, where "it was decided that a separate code was necessary for responding adequately to the needs of commercial life",[82] and family law, where the guardianship and some other important aspects of incapacity of minors and mentally disabled persons were regulated in statute law (Act XX of 1877), and matrimonial law was also codified, introducing the obligatory civil marriage (Act XXXI of 1894).[83]

The Commercial Code adopted by the parliament in 1875 (Act XXXVII of 1875) contained the norms related to commercial transactions, thus indirectly influencing the (still uncodified) law of contracts as well, and also regulated the establishment and operation of undertakings ("merchants"),[84] such as the different forms of business companies, the sole traders, and the cooperatives. The "Act on Commerce" (*Kereskedelmi törvény*) of 1875 drafted by *István Apáthy* relied strongly on the German commercial law (*Allgemeines Deutsches Handelsgesetzbuch*, 1861),[85] and eight sections thereof, regulating commercial vouchers (Sections 291–298), are still in force.[86]

Hungarian legal historians used to refer to the first epoch of the modern (but uncodified) Hungarian private law, lasting from 1848 to the crisis years after the First World War, as the epoch of "liberal capitalism",[87] or "individual liberalism".[88] The reason behind such names is that this was in fact the age of personal autonomy and civil liberties in the Hungarian private law.

2.3 Law of persons

The law of persons was based on legal equality or, as the political thinkers of the 1848 revolution called it, the "equality before the law" (*törvény előtti egyenlőség*). It means that all restrictions (and the different categories) of legal capacity had been abolished, there were no more persons having only a partial legal capacity, and there were no more privileges raising one person over the other.[89]

However, as the famous 19th century civilist *Imre Zlinszky* highlighted in his contemporary work on Hungarian private law, some differences between persons still had some legal relevance.[90] The most important example was the privileged position of the so-called "legitimate children", i.e. the children born in wedlock. According to the opinion of *Ferenc Mádl*,[91] expressed in one of his early publications, this kind of discrimination between legitimate and natural children reflected the traditional "feudal" approach.[92]

2.4 Property law

The freedom of property, originating in the modern rules of ABGB, became the basic principle of the new, liberal property law in Hungary. The owners had been granted the right not just to possess (*ius possidendi*)[93] and to use and make benefit of their property (*ius utendi-fruendi*), but also to dispose on it freely (*ius disponendi*). Thanks to the introduction of the land registration in 1855, the lands in the country and houses in the cities could now be freely sold and safely purchased, and they could also serve as credit guarantee.[94]

2.5 Inheritance law

The freedom of disposition altered the rules of the inheritance law as well, but this change was the less radical among all. As the already cited contemporary legal scholar, Imre Zlinszky emphasised in his work written at the end of the 19th century, "the basis of our inheritance law had always been the family connection", and "devise had only been a kind of tolerated institution in our domestic law".[95] This conservative approach (meaning the preferred position of the interests of surviving

---

[81] In English see HAMZA, Gábor, Roman Law and the Development of Hungarian Private Law before the Promulgation of the Civil Code of 1959, *Fundamina – A Journal of Legal History*, 1 (2010), 383–393., pp. 390–391. and RADY, *Customary Law in Hungary*, op. cit., pp. 233–234.; in greater detail in Hungarian: HOMOKI-NAGY, A magyar magánjog kodifikációja, op. cit., pp. 4–7. and HORVÁTH, *A magyar magánjog*, op. cit., pp. 105–111.

[82] KISFALUDI, András, The Influence of Harmonisation of Private Law on the Development of the Civil Law in Hungary, *Juridica International*, 14 (2008), 130–136., p. 131.

[83] CSIZMADIA, A jogi hagyományok, op. cit., pp. 30. and 37–38.

[84] KISFALUDI, The Influence of Harmonisation, op. cit., p. 131.

[85] HORVÁTH, *A magyar magánjog*, op. cit., pp. 62–63. and 382.; KAJTÁR, *A 19. századi modern*, op. cit., p. 221.; RADY, *Customary Law in Hungary*, op. cit., p. 232.; ZLINSZKY J., The Hungarian Private Law, op. cit., p. 311.

[86] As of 7 July 2016. See http://njt.hu/cgi_bin/njt_doc.cgi?docid=6.7 [Accessed 7 July 2016]

[87] See e.g. ASZTALOS, A magyar burzsoá jog, op. cit., p. 453.; CSIZMADIA, A jogi hagyományok, op. cit., p. 35.

[88] HORVÁTH, Attila, A polgári magyar magánjog történeti alapjai, 1848–1945, In: MEZEY, Barna (ed.), *Magyar jogtörténet*. 3rd ed., Budapest, 2004, 128–165., p. 131.

[89] HORVÁTH, *A magyar magánjog*, op. cit., pp. 55. and 191–192.

[90] ZLINSZKY, Imre, *A magyar magánjog mai érvényében, különös tekintettel a gyakorlat igényeire*, Budapest, 1888, p. 54. See also ASZTALOS, A magyar burzsoá jog, op. cit., pp. 463–464.

[91] *Ferenc Mádl* (1931–2011), since 1973 professor of international private law at Eötvös Loránd University in Budapest, between 2000 and 2005 the second President of the Republic of Hungary.

[92] MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 56.

[93] As the romanist lawyer, Prof. András Földi remarks, the right to possess (*ius possidendi*) as a part of the "property trias" is not used in the AGBG, the Austrian Code deals with the matter of possession separately. See FÖLDI, András, Adalékok a "tulajdonjogi triász" kérdéséhez, In: *Acta Facultatis Politico-Iuridicae Universitatis Budapestinensis*, XLII (2005), 23–64., pp. 47–48. [Professor Földi himself prefers and recommends to use "right to have" (*ius habendi*) instead of *ius possidendi* as a partial right of the owner. See Ibid., p. 62.]

[94] ASZTALOS, A magyar burzsoá jog, op. cit., p. 457.

[95] ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 662–663.

family members against the last will of the deceased) was generally accepted at that time, and it made possible only a very cautious progress.[96]

By the abolition of *aviticitas*, the principle of *successio universalis* could finally take its place.[97] So, in theory, any person could make a will concerning his entire personal property (not only regarding the moveable assets and acquired goods, as by virtue of the *Tripartitum*), but this right of disposition was far from unlimited. Above all, the fee tail (*fideicommissum*),[98] introduced in Hungary in the 17th century in order to keep the landed property in one hand (characteristically through the enforcement of the principle of *primogenitura*), had been maintained by the Conference of the Justice of the Realm "in order to preserve the light of the aristocratic families" (the *splendor familiae*).[99]

Although having confirmed the abolition of *aviticitas*, the Conference considered necessary to protect the interests of the descendants against other potential legatees. Therefore, in case of testate succession (and also concerning the gifts donated by the deceased when alive),[100] the so-called "divisional portion" (*osztályrész*) of the descendants was to be preserved, which meant that they had to remain entitled at least to the half of the assets.[101] Martyn Rady points out in his recently published comprehensive book on Hungarian legal history, that the usage of the word "divisional" instead of "obligatory" as the attribute of portion (in Hungarian that would have been *köteles rész*) reflected "the vocabulary of *aviticitas*".[102]

Another institution in the inheritance law established by the ITSz in order to protect the interests of the family was the so-called "branch inheritance" (*ági öröklés*).[103] It meant that, in case of lack of descendants, the property should be inherited by that branch of the family from which the given assets had been inherited by the legator (if a property was inherited from the father, in case of no descendants, it would revert to the paternal branch, and vice versa).[104]

Ferenc Mádl simply called the branch inheritance (or at least its unlimited form expressed in the Provisional Judicial Regulations) in his already cited publication "a special remnant of *aviticitas*".[105] During the unsuccessful codification works in the late 19th century, a draft bill on inheritance law prepared in 1881 by *István Teleszky* also urged to limit the branch inheritance to the succession of siblings, but this proposal was strongly criticised by leading conservative civilists like *Béni Grosschmid*, and some years later the draft was withdrawn from the agenda.[106]

2.6 Law of contracts

In the uncodified and quickly developing area of the law of contracts, freedom of contract started to prevail, thanks to the application of some specific norms on contracts of the Austrian Civil Code by the Hungarian courts.[107] It meant that the parties could decide at their own discretion whether (and with whom) they wanted to enter into a contractual relationship, and which type of contract, under what terms and conditions they wanted to stipulate.[108]

On the other hand, the late medieval formalities of contracting, first applied to the contracts on noble lands, then adapted to other legal relationships as well,[109] were largely replaced by the principle of concurrence of wills (*akarategység*). It is easy to see that, in lack of guarantees defined in legally binding norms, such wide interpretation of freedom of contractual intention could lead to abuses to the detriment of private persons ("consumers" in the terms of our time) and some smaller economic operators.

3. Outlook: new phenomena in the economy and social life of the late 19th century and the end of the "Age of Freedom"

At the end of the 19th century, so already in the first decades of the new, independent Hungarian private law, new phenomena appeared in the economy and in the social life, which suddenly made the modern liberal principles of private law adapted from the early 19th century civil codes out-of-date in some aspects. In the following, we would like to highlight three of these: the conflicts deriving from unlimited private autonomy of the "free owners", the need of protection of the weaker parties in contractual relationships, and the necessity of introduction of a stricter liability in tort law.

[96] ASZTALOS, A magyar burzsoá jog, op. cit., p. 497.
[97] HORVÁTH, *A magyar magánjog*, op. cit., p. 341.
[98] For more details see BÉLI, *Magyar jogtörténet*, op. cit., pp. 139–140., 322. and POMOGYI, *Magyar alkotmány- és jogtörténeti kéziszótár*, op. cit., pp. 177–178. A thorough analysis on the history of *fideicommissum* in Hungary is provided by Attila Tikász, notary public in Berettyóújfalu, see TIKÁSZ, Attila, Kötött tulajdoni formák egykor és ma, *Közjegyzők Közlönye*, 8 (2004), 3–12., pp. 3–9., and by the legal historian Zsuzsanna Peres in her recently published dissertation: PERES, Zsuzsanna, *A családi hitbizományok megjelenése Magyarországon*, Pécs, 2014.
[99] CSIZMADIA, A jogi hagyományok, op. cit., pp. 34–35.; TIKÁSZ, Kötött tulajdoni formák, op. cit., p. 3.
[100] See ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 770–771.
[101] GROSSCHMID, *Magánjogi előadások*, op. cit., pp. 210. and 652–653.; ZACHÁR, *A magyar magánjog alaptanai*, op. cit., p. 335. On the introduction of the obligatory portion in Hungary see MÁZI, András, Adalékok a kötelesrész magyarországi bevezetéséhez, In: MEZEY, Barna – RÉVÉSZ, T. Mihály, *Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére*, Budapest, 2006, 341–350.
[102] RADY, *Customary Law in Hungary*, op. cit., p. 227.
[103] HORVÁTH, *A magyar magánjog*, op. cit., pp. 341. and 343.
[104] ASZTALOS, A magyar burzsoá jog, op. cit., pp. 457–458.; ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 704–706.
[105] MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 56.
[106] CSIZMADIA, A jogi hagyományok, op. cit., p. 37.
[107] HOMOKI-NAGY, Mária, Megjegyzések a kartellmagánjog történetéhez, *Versenytükör*, Special Issue II (2016), 39–52., p. 41.
[108] ASZTALOS, A magyar burzsoá jog, op. cit., p. 474.
[109] HOMOKI-NAGY, Mária, Az adásvételi szerződés néhány sajátossága a 19. században, In: *Jogtörténeti tanulmányok* VIII., Pécs, 2005, 189–204., p. 190.

3.1 Property law

The freedom of property in its original sense meant the entirety of power (*plena potestas*) on the given goods, and included the possibility of arbitrariness as well, to the detriment of other private persons, or even of the public interest. According to Point 47 of *Rerum Novarum*, the famous encyclical issued by Pope Leo XIII on 15 May 1891, "the right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but by no means to absorb it altogether".[110] This new approach represented by the Pope quickly found followers among legal scholars.[111]

In Hungary, many laws introduced limitation of property based on the principle of the protection of public interest (e.g. law on water supply, mining law, etc.).[112] Another direction of limitation was the recognition of the so-called *jura in re aliena* (literally: "rights on others' goods"), a legal term elaborated by the German *pandectists*.[113] The Hungarian courts adapted this category to relationships created by the force of law cautiously, but some mandatory cases of servitude, usufruct and lien were still established.[114]

The third, most radical limitation of free property was expropriation, i.e. taking over someone's property for the purposes of public interest, which was regulated in separate written laws, in a limited form already in 1836 (construction of railway and drainage), then in a broader sense in 1868 (Acts LV and LVI of 1868), and finally in general in 1881 (Act XLI of 1881).[115] A common characteristic of these laws and those regulating other types of restrictions of property was that the right of ownership as a fundamental individual right could only be limited in exceptional cases, and such cases had to be regulated by laws (in the sense of acts of the Parliament). A further important aspect of expropriation is that the property could be taken against "actual and complete compensation" only.[116]

3.2 Law of contracts

In the law of contracts, the liberal interpretation of private autonomy (freedom of contract in its entirety) started to create conflicts by the appearance of large undertakings, such as banks and insurance companies in the financial sector, or monopolistic service companies (especially in the sector of public utilities like water or electricity supply). These large corporations started to apply standard contractual clauses (called *blanketta* in the contemporary Hungarian terminology, now "general terms and conditions", in Hungarian: *általános szerződési feltételek*), and some of them proved to be disadvantageous for the other, weaker contracting party.[117]

On the other hand, while refusing to enter into a contract is a natural part of the freedom of contract, if a monopolistic company refuses from contracting, the customer would be kept out of the enjoyment of the given service. The answer of the law to these phenomena was the introduction of the obligation to contract (obligation to provide services), and that in some specific laws the mandatory terms of contracts were also regulated. Some norms dealing with this problem already appeared in the Commercial Code of 1875,[118] but a more detailed regulation is the development of the 20th century in this field of private law as well.

In order to protect the contracting parties from the abuses of each other, and primarily to provide remedy to the weaker party against the terms and conditions applied by the stronger one, the courts also started to apply the principle (general clause) of "good faith and fairness" (*jóhiszeműség és tisztesség*).[119] According to the famous Hungarian civilist, *Károly Szladits*, the contracts infringing the principle of morality (*jó erkölcs* in the Hungarian legal terminology, literally: "good morality") are to be deemed void, and so are the contracts contrary to public interest, both because they are "indirectly breaching the law".[120]

A very good, though quite specific example of such practice is the protection of free and fair competition. The *Curia* deemed void the contracts having the purpose to restrict free competition as early as in 1893, and this decision was based on the general clause of morality.[121] Another, very popular example of this doctrine among the Hungarian law students is a decision of the *Curia* available in their reader, according to which a contract regarding the operation of a brothel was deemed void and consequently no claim could be based on it, for the services that are subjects of the contract were considered as infringing morality.[122]

Later, the prohibition of unfair competition laid down by Act V of 1923 set up an interesting special restriction of free-

[110] *Rerum Novarum*. Encyclical of Pope XIII on capital and labour. See http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html [Accessed 14 July 2016]

[111] HORVÁTH, *A magyar magánjog*, op. cit., p. 260.

[112] KOLOSVÁRY, Bálint, A tulajdonjog, In: SZLADITS, Károly (ed.), *A magyar magánjog 5., Dologi jog*, Budapest, 1942, 102–321., p. 147. See also HORVÁTH, *A magyar magánjog*, op. cit., pp. 261–264.; ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 210–214.

[113] NIZSALOVSZKY, Endre, Korlátolt dologi jogok, In: SZLADITS, Károly (ed.), *A magyar magánjog 5.*, op. cit., 321–834, pp. 322.

[114] ASZTALOS, A magyar burzsoá jog, op. cit., pp. 470–471.; HORVÁTH, *A magyar magánjog*, op. cit., pp. 288–300.

[115] RUSZOLY, József, *A kisajátítás törvényi szabályozásának története Magyarországon (1836–1881)*, Acta Universitatis Szegediensis de Attila József Nominatae, XXIV (1977), Fasc. 3., pp. 11–37.

[116] Ibid., p. 28. See also ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 209–210.

[117] ASZTALOS, László, Az ellenforradalom államának joga. A magánjog és a kereskedelmi jog. In: CSIZMADIA, Andor – KOVÁCS, Kálmán – ASZTALOS, László, *Magyar állam- és jogtörténet*, Budapest, 1972, 669–679., p. 673.; HORVÁTH, *A magyar magánjog*, op. cit., p. 312.

[118] See e.g. Sections 422–433 of Act XXXVII of 1875 (Commercial Code) on rail transport transactions, http:// www.1000ev.hu/index.php?a=3 & param=5692 [Accessed 14 July 2016]

[119] ASZTALOS, Az ellenforradalom államának joga, op. cit., p. 674.; HORVÁTH, *A magyar magánjog*, op. cit., pp. 314–316.

[120] SZLADITS, *A magyar magánjog vázlata 1.*, op. cit., pp. 154–155.

[121] Case No. C. 8377/1893. See HOMOKI-NAGY, Megjegyzések, op. cit., p. 45.

[122] Case No. C. 554/1906. See MEZEY, Barna (ed.), *A magyar jogtörténet forrásai. Szemelvénygyűjtemény*. Osiris Kiadó, Budapest, 2001, p. 669.

dom of contract from the point of view of the content of the agreements between undertakings.[123] According to Section 14, it was prohibited to agree in a contract that the customer would receive the given product or service only if he could recruit further customers for the supplier. The contracts containing such clause were called *hólabda-* ("snow ball…") or *lavinaszerződés* ("avalanche agreement").

Beyond the protection of the general principle of fairness and morality, in the crisis years after the First World War it became especially important to recognise and enforce the non-deterioration principle as well. A contractual interest stipulated in a loan agreement, or a periodically payable fee (such as a rent for example), could easily lose its value in a permanent relationship, if the inflation gets high or other economic circumstances occur that were not (and could not) be foreseen by the parties at the time of concluding their contract.

The courts first chose to apply the principle of *clausula rebus sic stantibus* in such cases, establishing that the substantial change in the business conditions rendered impossible (and would make unfair) the further enforcement of the contractual obligations stipulated in a completely different economic situation. This led to the conclusion that the contract could be terminated and the parties had to settle the accounts with each other.[124] Károly Szladits underlines in the revised edition of his book on Hungarian private law published in the interwar period that the application of such principle must be as exceptional as the circumstances were when it was elaborated.[125]

However, there was an even stronger (according to *Attila Horváth*'s opinion, actually the strongest) intervention to the private autonomy from the state (by law) or the courts (by the provision of a court decision) for the same purpose of maintaining the equivalence of the contractual services – the amendment of the terms and conditions of contracts through legislation or judgment. In such cases, the legislator or the court protects the interest of the party aggrieved by the unpredictable changes in a manner that it modifies the relevant term of the contract, e.g. adjusts the amount of the rent to the new economic environment or establishes a moratorium for loan payment.[126]

3.3 Tort law

Finally, in order to show the quick modernisation process in the Hungarian private law, the question of liability for non-contractual damages should also be investigated. As the famous Hungarian romanist lawyer and civilist, *Géza Marton* established, "the roots of the modern Hungarian tort law barely trace back to the times before 1848", and the formation thereof was in major part the result of the application of the Austrian Civil Code.[127] Until the mid-19th-century, an entire compensation of damages (extended to *lucrum cessans* in addition to *damnum emergens*) was ordered by the courts only in cases of intentionally caused damages.

The restoration of the effect of the Hungarian law in 1861 could not lead the courts back to this criminal-law-based approach. The influence of ABGB was kept, meaning in practice that the principle of entire compensation of damages was adopted by the Hungarian courts, in order to protect the property. However, the liability for all damages was extended to the cases of slight negligence not earlier than at the beginning of the 20th century.[128] The *Curia* established in 1921 that in case of an unlawful act, the injuring party had the obligation of full compensation.[129]

Another important development of the law of non-contractual liability was that the strict ("objective") liability was introduced, first by the Railway Act (Act XVIII of 1874) for the operators of the railway[130] and by the law on the protection of industrial workers (Act XXVIII of 1893).[131] It led the jurisdiction to the recognition of "liability for dangerous activities", saying that not only the old, criminal law-based liability, but neither a liability based on wrongful acts would be enough to balance the high level of risk of such activities (e.g. any kind of mechanical power) concerning the property and personal safety.

At the beginning of the 20th century, the *Curia* extended the strict liability to other dangerous activities (like e.g. ships, automobiles and other machine-powered vehicles) as well.[132] As a characteristic example, the supreme forum established in 1910 that the motorcyclist as the operator of a "dangerous activity" was liable for the damages deriving from an accident caused by the very loud sound of his motorcycle that had frightened the horse drawing a carriage.[133] Five years later the *Curia*

[123] ASZTALOS, Az ellenforradalom államának joga, op. cit., p. 675.; HOMOKI-NAGY, Megjegyzések, op. cit., p. 47.
[124] ASZTALOS, Az ellenforradalom államának joga, op. cit., pp. 673–674.; HORVÁTH, *A magyar magánjog*, op. cit., pp. 316–317.; SZLADITS, Károly, *A magyar magánjog vázlata 2.*, 4th revised ed., Budapest, 1933, p. 103.
[125] SZLADITS, *A magyar magánjog vázlata 2.*, op. cit., p. 104.
[126] HORVÁTH, *A magyar magánjog*, op. cit., p. 318.; SZLADITS, *A magyar magánjog vázlata 2.*, op. cit., p. 150.
[127] MARTON, Géza, *A polgári jogi felelősség*, Budapest, 1993, p. 170.
[128] HORVÁTH, *A magyar magánjog*, op. cit., p. 331.
[129] Case No. C. 1632/1921. See SZENDE, Péter Pál (ed.), *Kötelmi jog II. rész* [Magyar magánjog mai érvényében. Törvények, rendeletek, szokásjog, joggyakorlat, Vol. III.], Budapest, 1928, p. 552.
[130] HORVÁTH, *A magyar magánjog*, op. cit., p. 331.; MARTON, *A polgári jogi felelősség*, op. cit., pp. 170–171.; ZLINSZKY I., *A magyar magánjog*, op. cit., p. 544.
[131] MARTON, *A polgári jogi felelősség*, op. cit., p. 171.; PUSZTAHELYI, Réka, A veszélyes üzemi felelősség egyes kérdései az új Ptk. rendszerében, In: *Publicationes Universitatis Miskolciensis. Sectio Juridica et Politica*, XXXIII (2015), 306–325., p. 307.
[132] MARTON, Géza, Kártérítési kötelmek jogellenes magatartásból, In: SZLADITS, Károly (ed.), *A magyar magánjog 4., Kötelmi jog különös rész*, Budapest, 1942, 781–942., p. 846.; SZLADITS, *A magyar magánjog vázlata 2.*, op. cit., pp. 294–296. See also HORVÁTH, *A magyar magánjog*, op. cit., p. 332.; PUSZTAHELYI, A veszélyes üzemi felelősség, op. cit., p. 307.
[133] Case No. C. 817/1910. See MEZEY (ed.), *A magyar jogtörténet forrásai*, op. cit., p. 670.

made clear in a decision of principle that "it is a law based on jurisdiction of the courts that the operator of an activity, which is dangerous by nature, shall be liable for the damages deriving thereof, regardless of his fault".[134]

3.4 The Draft Private Law Code of 1928

As we could see from this last example as well, in the evolution of the modern institutions of the Hungarian private law, the role of the courts, and primarily that of the decisions of the *Curia*, had the greatest importance.[135] Queen Maria Theresa (1740–1780) was the first to order the systematic publication of such resolutions (*Planum Tabulare*, 1769), while Act LIX of 1881 established the competence of the full court of the *Curia* to decide in "disputed matters of principle".[136]

As there was no Civil Code in force in Hungary until 1 May 1960, the significance of these full-court decisions was indisputably the greatest in the field of private law. As we could see above, in civil law cases the Curia not only interpreted the law (as for example in criminal cases, where the Penal Code of 1878 had to be applied), but could form it, in many aspects similarly to the jurisdiction of the common law courts. However, the efforts of codification were continuous in the 20th century as well.

The first draft code, consisting of four parts (1. Law of persons and family law, prepared by *Bertalan Lányi*, Béni Grosschmid and *László Sipőcz*); 2. Property law, prepared by *Konrád Imling*; 3. Law of contracts and tort law, prepared by *Lajos Thirring* and Bertalan Lányi; 4. Inheritance law, prepared by *Gusztáv Szászy-Schwarz*)[137] was ready in 1900[138] – in the year of entering into force of the famous German civil code, the BGB – after two and a half decades of codification work, originally ordered by the Minister of Justice *Boldizsár Horvát* in 1876.[139] The draft code itself was compiled between 1897 and 1900 by a permanent committee of the Ministry of Justice, utilising the sections prepared separately in the 1870's and 80's,[140] but – at least partially – following the model of the German BGB as well.[141]

This draft was then revised and published in 1913 as the "second version",[142] and the Minister of Justice *Jenő Balogh* presented the third version ("the bill") to the Parliament on 8 October 1913.[143] The ad-hoc committee set up by the Lower House also proposed some modifications, and in 1915, already the fourth version ("the text of the committee") was at the table of the lawmakers.[144] The committee recommended to the Parliament to debate it after the end of the war, but in the years of revolutions and the Trianon peace treaty the matter of private law codification obviously had a lower priority than the political and constitutional issues ("history followed another course", as professor of civil law *Lajos Vékás* remarks).[145]

The codification work could finally restart in 1922, as a part of the consolidation process of the 1920's marked with the name of Prime Minister *Count István Bethlen*.[146] A new committee was appointed under the leadership of *Béla Szászy* (who had already took part in the 1913 works as well, and now he was the chairman of the committee in the quality of state secretary of the Ministry of Justice) and consisted of leading civilists like the already mentioned Béni Grosschmid, Károly Szladits and Lajos Thirring.[147] They prepared a fifth, broadly revised version in 1928,[148] that was also renamed, called now the Private Law Code of Hungary (*Magyarország Magánjogi Törvénykönyve*) instead of "Civil Code" (*Polgári Törvénykönyv*).[149] The new draft was presented to the Parliament by Minister of Justice *Pál Pesthy* on 1 March 1928.[150]

---

[134] Decision of Principle No. 547., 6743/1915. See SZENDE (ed.), *Kötelmi jog II. rész,* op. cit., p. 636.

[135] BALOGH, Magánjog a XIX. század végén, op. cit., p. XVII.

[136] VARGA, Norbert, The Practice of Leading Cases in the Hungarian High Court (Curia), with Special Attention to the Civil Procedure Act of 1911, In: BADÓ, Attila – BELLING, Detlev W. (eds.), *Rechtsentwicklungen aus europäischer Perspektive im 21. Jahrhundert*, Potsdam, 2014, 281–289., pp. 282–283.; ZLINSZKY I., *A magyar magánjog*, op. cit., pp. 36–38. [See Section 4 of Act LIX of 1881, substituting Section 5 of Act LIV of 1868 on the ordinance of civil jurisdiction. Available in Hungarian: http://1000ev.hu/index.php?a=3 & param=6016 [Accessed 21 July 2016)]

[137] *A magyar általános polgári törvénykönyv tervezete*, Budapest, 1900. Available online at https://archive.org/ details/amagyarltalnosp00hunggoog [Accessed 4 August 2016], for the authors see Pp. V–VI. of the Preface.

[138] *A magyar általános polgári törvénykönyv tervezete*, Budapest, 1900.

[139] HOMOKI-NAGY, A magyar magánjog kodifikációja, op. cit., p. 7.

[140] VÉKÁS, The Codification of Private Law, op. cit., p. 58.

[141] HORVÁTH, *A magyar magánjog*, op. cit., p. 108.

[142] MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 64.; see *A magyar polgári törvénykönyv tervezete. Második szöveg*. Budapest, 1913.

[143] MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 64.; see *A polgári törvénykönyv törvényjavaslata*. Az országgyűlés elé terjesztett szöveg. Budapest, 1914. The bill was also published in the collection of Documents of the House of Representatives: *Képviselőházi Irományok* 1910, Vol. XXXI., pp. 1–392. [Document No. 886., the reasoning for the bill see in two separate volumes, XXXII. and XXXIII.]

[144] HORVÁTH, *A magyar magánjog*, op. cit., p. 109.; MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 64.; see *Képviselőházi Irományok* 1910, Vol. XLVIII., pp. 249–640. [Attachment to Document No. 1192.] – We have to mention that "the bill" (third version) had practically the same wording as the "second version", so the "fourth version" of 1915 is the real third one. Following the numbering widely accepted in the Hungarian literature, we will still call it the "fourth version".

[145] VÉKÁS, The Codification of Private Law, op. cit., p. 58.

[146] *Count István Bethlen* (1874–1946), politician, Prime Minister of the Kingdom of Hungary between 1921 and 1931, in the 1930's and 40's the leader of the conservative anti-fascist current.

[147] HORVÁTH, *A magyar magánjog*, op. cit., p. 109.

[148] HOMOKI-NAGY, A magyar magánjog kodifikációja, op. cit., p. 7.; VÉKÁS, The Codification of Private Law, op. cit., pp. 60.

[149] *Magyarország magánjogi törvénykönyve: A M. kir. Igazságügyminiszter által 1928. március 1-én az Országgyűlés elé terjesztett törvényjavaslat*, Budapest, 1928. See also in *Képviselőházi Irományok* 1927, Vol. VIII., pp. 2–577. [Document No. 500.]

[150] *Magyarország magánjogi törvénykönyve*, op. cit. [Preface], p. III.; MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 67.

It is interesting to compare Section 1 of the original text of the draft Civil Code (1900) to the later versions. The 1900 text says: "The humans shall have legal capacity from their birth" ("*Az ember születésétől kezdve jogképes*").[151] According to the 1913 text: "All humans shall have legal capacity from their birth" ("*Minden ember születésétől kezdve jogképes*").[152] In the 1915 version: "All humans shall have legal capacity. The foetus shall also have legal capacity provided that he/she is born alive" ("*Minden ember jogképes. Jogképes a méhmagzat is arra az esetre, ha élve születik meg*").[153] The difference is material: the amended rule creates inheritance rights to posthumous children.

The Draft Private Law Code of 1928 literally repeats the wording of this last (fourth) version of the draft Civil Code ("*Minden ember jogképes. Jogképes a méhmagzat is arra az esetre, ha élve születik meg*"), however not in Section 1 but seven sections later (Section 8).[154] The explanation of this change of numbering is that, while the four versions of the draft Civil Code immediately began with the rules of legal capacity as the first chapter of law of persons, the codificators of the 1920's inserted an introductory part first (*Bevezető szabályok*, "Introductory provisions") as Sections 1–7, containing some basic principles and general clauses.[155]

Professor Vékás emphasises that the draft Private Law Code of 1928 was "of a high professional standard".[156] The Parliament adopted a law in 1931 (Act XXII of 1931) providing for the setting up a National Committee (*Országos Bizottság*), consisting of 30 members of the House of Representatives and 30 of the Upper House, "in order to prepare the parliamentary debate of the bill containing the private law code of Hungary".[157] This was quite a strange act of legislation: the lawmaker basically adopted a law on the necessity of making another law. Nevertheless, the Draft Code "shared the fate of the *Tripartitum*" [158] – it has never been enacted.

The further story of the Draft Code – referred to by the posterity with the popular abbreviation "Mtj." (*Magánjogi Törvényjavaslat*, literally: "Private Law Bill")– was also very similar to that of the *Tripartitum* (or the ITSz): the civil law courts began to cite its sections as they would have been norms of the statute law. "We have an uncodified code" – said the contemporary lawyer *Béla Reitzer*.[159] This "uncodified private law code" was a real masterpiece, and served in many (mainly unrecognised) aspects as the basis of the first enacted Hungarian Civil Code (Act IV of 1959) adopted under completely different political circumstances.[160]

[151] *A magyar általános polgári törvénykönyv tervezete*, op. cit., p. 1.
[152] *Képviselőházi Irományok* 1910, Vol. XXXI., op. cit., p. 1.
[153] *Képviselőházi Irományok* 1910, Vol. XLVIII., op. cit., p. 249.
[154] *Magyarország magánjogi törvénykönyve*, op. cit., p. 5.
[155] HORVÁTH, *A magyar magánjog*, op. cit., p. 110.; See *Magyarország magánjogi törvénykönyve*, op. cit., pp. 3–4.
[156] VÉKÁS, The Codification of Private Law, op. cit., pp. 60.
[157] See Section 1 of Act XXII of 1931. Available in Hungarian: http://1000ev.hu/index.php?a=3 & param=7881 [Accessed 9 August 2016]
[158] MÁDL, Magyarország első polgári törvénykönyve, op. cit., p. 67.
[159] See HORVÁTH, *A magyar magánjog*, op. cit., pp. 110–111.
[160] Ibid., p. 111. See also EÖRSI, Gyula, A magyar civilisztika 30 éve, *Gazdaság- és Jogtudomány*, 3–4 (1975), 301–314., p. 308.

The Theory of the Distribution of Powers and its Practical Implementation, in Particular with Regard to the United States

Csaba Cservák *

Abstract

There are two major forms of the democraticalexcercise of powers: the direct and the indirect democracy. The entire system of the separation of powers can be can ce classified within the scope of the indirect excercise of democracy, although in a broad sense methods of the direct excercise of the democracy can make up such division of powers, which can be used as a bance against the machine of power structures, which relys too much on the binary code of the government -opposition, and distances itself too far from the people. Here I would like refer to the legal instrument of the referendums, within which, it is possible to talk about a significant direct excercise of democracy. The American theory, the 'checks and balances' shall be equal to the concept mentioned above. Usually that concept named as a synonym of it, nevertheless according to some opinions that is considered to be different from it. The demand of mentioning the constitutional power as a separate factor can be arised after the question of creating the classic branches of power is transferred from theory to practice. Namely when not just scientific foundation but social legitimacy inevitably arise. Its importance is justified that the whole framework of the system of the exercise of power is specified by the constitution, which can't be only the ultimatum of the ruler or a particular social group, layer, class in a constitutional democracy.

As Bibó concisely said: 'It shall be a separated power from the legislative, specifying the distribution of competence of the other powers. The head of state appeared as a special branch of power in the theory of the government systems, because previously it was the depositary of the executive branch of power, but with the fulfilment of the parlamentarism, its importance was diminished first, afterwards it got a new role.What is the Constitutional Court? Can the question be raised, that it is an evidence for many.In general terms we could respond, it is a norm controling board, which looks at legal norms and state laws on constitutional grounds. In international comparison two basic constitutional models are known. In one of the modelsthe traditional courts - headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately push aside the statute in concern. So, in this scheme, quasi all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal organ of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range. Afterwards let us see how the classic triad of powers are formed in Hungary as there is no chance to form an overall picture from the reason of the diversity of national legislation. I've already pointed this question out in details in my study on the Hungarian governmental system.

Key words: *Hungarian public administration; distribution of powers; constitutional court; other social factors.*

There are two major forms of the democraticalexcercise of powers: the direct and the indirect democracy. The entire system of the separation of powers can be can ce classified within the scope of the indirect excercise of democracy, although in a broad sense methods of the direct excercise of the democracy can make up such division of powers, which can be used as a bance against the machine of power structures, which relys too much on the binary code of the government -opposition, and distances itself too far from the people. Here I would like refer to the legal instrument of the referendums, within which, it is possible to talk about a significant direct excercise of democracy, in case if the people can force the assignment of the referendum as well (Such as like in Hungary, where 200.000, or in Lithuania, where 300.000, or in Slovenia where 40.000 signatures are required for the intitiation to have so.) Hereinafter we are going to focus on the indirect form of excercising the democracy.

The distribution of power, the separation of powers and checks and balances are closely related concepts deriving from coherent theoretical basis. However, their usage is often inconsistent and mixed up frequently in the legal jargon. Therefore, it is necessary to clarify their meanings.

Although the theory of the distribution of power is a product of the Age of Enlightenment, its practical manifestation has been in existence for centuries. The divided power is necessarily restricted which is a prevention of the abuse of power and an institutionalized form of the protection against autocracy. Therefore it is unequivocal that the real implementation of the distribution of power had been in the center of efforts, much before it was defined.

* Dr. Csaba Cservák, Ph.D., Associate Professor, Faculty of Law, KárolíGáspár University of the Reformed Church in Hungary, Budapest, Hungary.

Contrary to popular belief, Montesquieu didn't establish the classic three branches of powers, but Aristotle did so. He mentioned deliberative body of public affairs, magistrates and judiciary which – considering the complex role of the parliament – is completely equal to the trinity of legislative, executive and judicial powers. Politeia was declared as the appropriate structure of power which is a mixture of democracy and oligarchy.

Cicero, in his work The State, committed himself to such type of it inwhich there is an intermediate structure among the monarchy, the rule of aristocracy and the democracy. These two theories can be confidently regarded as a preliminary concept of the distribution of power, because the mixed state can only exist through the precise delimination of the authority of various factors by involving them into the power in sociology-political sense.[1] Polübiosz went even further. His theories came up to the conclusions of the 'classical greek philosophers'. According to his point of view, the different social forces must check and restrict each other, which adumbrates the system of 'checks and balances'.[2]

Beside the legislative and the executive powers John Locke mentions a third-one, the federal power. It can be regarded as the equivalent of the head of state power which is considered a factor of the government system and posses a role of foreign policy as well.[3]

The great oracle Montesquieu distinguishes the legislative power, the power which falls within the scope of international law and executive power related to civil law issues. The latter mentioned is the judicial power and the second mentioned is referring to the monarch/head of state power, which is eventually equal to the trinity-system of Locke's. (It should be noted that in this era the depositary of the executive power was the monarch or the administration appointed by him. In the absence of the welfare state, the principal executive tasks tended to the foreign policy.) As an affirmation Montesquieu separates the legislative power into a bicameral National Assembly.[4]

For several aspect in the theory of the distribution of power, it may be more appropriate to use the concept of the separation of the functions of power instead of the concept of the separation of powers. Because on one hand these patrons of the idea practically envisaged the separation of the function of legislative, executive and judicial powers among different bodies. They fought against the concentration of these three functions in one node, so that their aim was not the abolition of the relation of powers.

On the other hand, this proposed concept is more compatible to the system of checks and balances. Latter mentioned can not only be achieved through the rigid separation of constitutional factors, but also by their legally institutionalized relationship-system. The theory of Montesquieu underlying the distribution of powers is also based on this principle. An important factor of the balance is that the individual branches of power, is that one branch should not overpower the other ones, which is guaranteed by the system of authorities of the various bodies controlled by each other. For instance the dismissal of the government and the potential of the dissolution of parliament. (By the motion of censure in the Hungarian government system and the exclusion of the dissolution of parliament could be mentioned as the distribution of powers, butit is not possible,because of the political identity in between the two concepts).

It is more appropriate to talk about the separation of the functions of powers because the number of branches of powers depends on the certain constitutional systems of the states, but organically only these three functions of power can exist. (Therefore the individual functions can be implemented into several branches, mainly the diffuse system of the executive power can be divided among several centers.)

The American theory, the 'checks and balances' shall be equal to the concept mentioned above. Usually that concept named as a synonym of it, nevertheless according to some opinions that is considered to be different from it. According to this, the various factors of power are in an interdependace with and mutually dependentfrom each other. The theory also distinguishes the functions of power from the branches of power. Not the decisions manifested in the resolutions of individual bodies which regarded as a whole, but all the decisions on the case which are taken into a unit by its procedure laid down.[5] According to Neustadt the US Constitution declares the distribution of power, but not the separation of functions. Moreover – and this is really different from the continental theory – the same functions should be distributed among several organisations. J. Merry says this based on a different principle from the principle of the distribution of power, because it declares the necessity of balancing out the political power with political power.[6] By the system of the 'checks and balances', an authority can recieves a variety of powers at the same time. This essentially different indeed from the classic distribution of power and regarded as a counterpart of the model of the rigid separation of the functions of power and establishing an institutionalized connection between the individual branches. In a certain sense the system of 'checks and balances' goes even further in the aspect of setting up of guarantees. In addition to the distribution of power – with its institutional system entiteled with the preventionfrom overpower – it prevents the functions from being expropriated by the individual branches of power. For my part I support to categorize the branches of power different from the principle of the balance of parlamentary system which falls in the wide scope of the term of the distribution of power.[7]

[1] See. SÁRI János: *A hatalommegosztás*. Osiris Kiadó, Budapest 1995. pp. 19-21.
[2] Sári János mentioned that after, Sabine és Louis Fisher insights. Ld. SÁRI i.m., p. 18.
[3] See SÁRI i.m. pp. 30-34.; Gábor MÁTHÉ: Die Problematik der Gewaltentrennung. Gondolat Verl., Budapest, 2004. p. 15-64.
[4] See SÁRI i.m. pp. 37-40.
[5] SÁRI János, i.m. pp. 46-47.
[6] This is no different than any of the separation of powers doctrine in my opinion.
[7] Lijphartmainly political science (and not constitutional) categorization distinguishes the separation of powers between the majority and the minority, the distribution of power (between the executive and legislative power, the Chambers - what constitutional law this call up the most power sharing!), a fair distribution of power (proportional representation) and formal restriction on the power (by the minority veto power). This highlights See Sartori, Giovanni. Comparative Constitutional Engineering, 2003, (translated by Elizabeth Soltesz), Academic Press, Budapest 2003, 96. p.

According to the theory in question – and of course its practice – the legislative and the executive power organizationally don't depend from each other. They come into being in different ways, the president is unremovable and the Parliament also can't be dissoluted by the executive power. The personal concentration is also precluded between the two bodies. Nevertheless the president can become the part of the legislative process with the right of veto, the members of the Supreme Court are appointed by the consent of the Senate. (The latter can be disputable that this kind of distribution of power is not the implementation of the non-reciprocal control of the bodies, but can be the separation of the judicial function itself.)

It is obligatory to distinguish in between the „de facto" and the „de iure" branches of powers. In the narrow sense only the latter ones are considered to be a seperate branch of powers. The legal ground of it, is that only tohose bodies are entitled to exercise the legally binding, enforcable, and official scopes of authorities of the states.(For instance neither the economy, nor the press is entitled to do so. The only reason why we can consider them to be so, is that because from the aspect of the entire society they can put a significant effect on human behaviour, and therefore they can practically force the obedience of the norms. The level of significance of these „de facto" braches of powers are mostly dependent from the customs of the local political culture.[8]

The branches of powers can be distinguished to those branches which do transfer powers, and to those ones which does not do so (merely exercising the power).The previous ones participate in the formation (through nominations and appointments) of other bodies exercising certain scopes of authority. The President of the State is typically such a participant (especially in Hungary). Moreover the Head of the State has almost more significant powers in evolving the other braches of powers, than exercising its own scopers of authorities.

Inthe Hungarian governmental system, the President with his suspensive veto becomes a part of the legislation which is reminiscent of the model of 'checks and balances'. (As the Constitutional Court – that just mentioned a special branch of power – implements the legislative function.) The judicial branch of power is independent, shall not be bound by any instructions, entirely separated from the executive power by creating the organization of the National Council (recently: National Judicial Office; hereinafter – OBH) However, it can be neutralized by the President's autonomous decision: the institution of pardon and with the countersign of the Minister of Justice. Thereby the executive power and the power of the head of state take over the function of judicial power thus the judiciary can be removed. The head of state has significant powers with regard to the appointments of certain officials of the executive power.

The classic parlamentary system realizes the concentration of the branches of power instead of separation, while it can be noticed the separation of functions between the branches of power. In the Hungarian model the institutional separation has a greater presence despite the personal concentration, while the separation of functions between the branches of power resembles the American theory.

It should be noted that the (former) Hungarian Constitution didn't even mention the concept of the distribution of power with a word, nevertheless it is present as almost an evidence int he practice of the Constitutional Court (hereinafter AB). It's interesting that one AB 31/1990 decision on the issue of interest rates of housing loan, which is irrelevant in our topic, concluded 'The Hungarian state organization is based ont he distribution of power.' However, one of the later dissent of Géza Kilényi regard the head of state as a part of the system of 'checks and balances' by his powers, namely Kilényi discerns the American organizing principle in the Hungarian form of government. (It is not entirely clear whether he uses the latter concept in relative or different meaning in relation to the concept of the distribution of power.). Altought the in thenew Constitution (AKA: Foundational Statute) it is explicitly written in Article C) paragraph (1) „The operation of the State of Hungary is based on the separaton of powers."The two classifications can be made parallel.[9] In other words the law can exlude the concentration of certain bodies (for example the unilateral dependence of the government from the parliament, the judiciary from the executive power) or that some people can be members of two branches of power at the same time.(The latter will be mentioned at the analysis of the relation of the parliament and the government.)

The actual political situation can make empty the legal distribution of power (besides the lack of personal distribution of power also can alsp empty the institutional one.), or vice versa, certain constitutionally non-existing branches of power can be made existing ones.

The modern distribution of power shall be tested in the lights of these new dimensions, because instead of the traditional separation of branches of power – depleted by the evolution of the classic distribution of power especially after the horrors of dictatorships – the need is increased again and this to create new power-sharing factors. Lets line up these factors with schematic panels. (The in-depth analysis of the constituent power is justified, because despite of its importance it is neglected inthe legal literature and essential to the foundation of the whole system of govrenment.

The constitutional power

The demand of mentioning the constitutional power as a separate factor can be arised after the question of creating the classic branches of power is transferred from theory to practice. Namely when not just scientific foundation but social legitimacy inevitably arise. Its importance is justified that the whole

[8] About the concept see SIMON János: *A politika értékválságban – a demokratikus politikai kultúra keresése*, L'Harmattan CEPoliti Press, 2013. Budapest, 7-17. p.

[9] The organizational division of power in political terms it means that a party dominated by an interest group at the same time in two different branches of power, position. However, only the probability can be reduced, for example, otherwise, selection of different periods (cf. Presidential systems, Israeli Prime Minister's choice). Personal power-sharing in a political sense, however, hardly be tested scientifically category, because of the dependence of a person so much due to the way that almost uncontrollable, opaque.

framework of the system of the exercise of power is specified by the constitution, which can't be only the ultimatum of the ruler or a particular social group, layer, class in a constitutional democracy. As Bibó concisely said: 'It shall be a separated power from the legislative, specifying the distribution of competence of the other powers.

First the English Civil War created the constitutional power institutionally, afterwards the U.S.A. and France followed it. Sieyés emphasized: 'The constitution can't be any part of the bodies which was created by itself.[10]

Numerous eminent members of the legal literature highlight the importance of separation of the constitutional power.[11] Claus Offe highlights this with a lifelike way: Not the players themselves should dictate the rules of the game that who is allowed to play.[12]

It's not quite often but examples are exist presently for separated constitutional power in the world's constitutional systems.[13] In Hungary, there isn't a separate constitutional power,[14] the Parliament can amend the Constitution with a two-thirds majority. Numerous opportunities were brought up for the adoption of the new scheme of the constitution. The accepted text – maybe amended with a two-third majority – should be reinforced by the next parliament. The possibility of a confirmatory referendum was brought up. The preliminary conceptual issues would be worth making it subject to a consultative referendum ensuring the success of the confirmatory referendum.

Because of the Constitution's constantly involved necessary renewal[15] consideration could be given to establish a constituent assembly which can be convened at anytime if it's necessary.[16] Instead of the two-thirds law, the possibility of a declaration of fundamental rights or a two-tier constitution[17] has already arosen. It could play its role more suitable by an individual institution, because of the high political dissension namely of the binary code of the government and opposition.[18]

The Head of State

In the presidential systems the Head of State is in charge of the Executive Branch. In the semi-presidential systems it is the most appropriate to talk about a „two-headed" law enforcement), where the President of the Republic also belongs to the Executive Branch.

The head of state appeared as a special branch of power inthe theory of the government systems, because previously it was the depositary of the executive branch of power, but with the fulfilment of the parlamentarism, its importance was diminished first, afterwards it got a new role. Actually it is not a seperate branch of powers but a part of the system of checks and balances, which controls the operation of the traditional branches of power or benefits the exercise of functions of power to some extent. It is possible to talk about its definitive functionning by having the knowledge of the substantive law.[19] Benjamin Constant illustrates the role of the head of state with a fair metaphor. The three (original) branches of power, each is like a train, which might collide, leave their rails and there must be a power that leads them back to their original ways. János Sári points out that afterwards the constitutional courts have been created, the head of state doesn't conduct activities in accordance in law, but decides ont he basis of political discretion. The theory of Constant describes the latter as a justice-logic activity.

In my view regarding to the power of the Head of the State a special level could be observed amidst the President of the parliamental democracy and the semi-presidential system. So what kind of scopes of authority could come up to strenghten the merely nominal powers of the President in the parliamental democracies?

In my opinion, it is noticeable that in certain parliamentary states during the recent years somesignificant controlling powers has been deployed to the heads of the states. (Sometimes sometimes it is not easy to distinguish from the semi-presidential states. According to my viewpoint from the aspect of the scope of authority the active head of state is considered as a form of the semi-presidential system, while the plethora of powers among the passive/ controlling roles features is a specific mean of the system previously discussed.

What kind of scopes of authority may arise in connection with confirmation of the head of state?

In Latvia, the president of the republic could declare a referendum about it, whether it be early elections. This double filtering does not allow to the head of the state *arbitrarily* the dissolution of parliament which is representing sovereignty, but in case of a huge shifting in people's will it means a great controlling possibility. At the same place President of the Republic shall be entitled (required third of the Members of Parliament) to sus-

[10] SAMU Mihály: *Alkotmányozás, alkotmány, alkotmányosság,* Korona Press, Budapest 1997., p. 45. Theoretical problem is that this formulation, we do not have the constitution to legitimize itself, on the other hand is not possible amendment of the Constitution.

[11] See. CSERVÁK Csaba: *A hatalommegosztás elmélete és gyakorlati megvalósulása*, Jogelméleti Szemle, 2002/1. sz.

[12] Referred by Samu Mihály, See For example: SAMU Mihály: Az alkotmányozás jellege és követelményeiIn CSIZMADIA László, NÉMETH Miklós Attila, KEMÉNY András: *Társadalmi szerződés*, Püski Press, Budapest 2010., p. 71.

[13] I mention as an example the Taiwanese Constitution, which calls up a special Constituent RMB in order to create and modify the Constitution. (In essence, similar to the role of the Bulgarian People's Congress High).

[14] In 1848, the Constituent Assembly created the laws, then gave way to the Legislative Assembly. See: István Stipta: Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle. Journal on European History of Law. Vol. 5. 2014. (2) pp. 73-79.

[15] The requirements for the constitution of permanent control. The 1791 French constitution would have given only the fourth cycle, the adjustment mode.

[16] The scope of the originators of course, should be regulated in depth. Thus, a specific number of representatives of the government, the president, what percentage of all the members of the Constituent Assembly, or a specified number of voters could be the subject of rights.

[17] KUKORELLI István: *Az alkotmányozás évtizede*, Korona Kiadó, Budapest 1995., p. 46.

[18] The second chamber is a way out. It could be that the constitution itself, possibly supplemented with other elements, non-governmental organizations, local government delegates.

[19] See CSERVÁK Csaba: *Milyen a magyar kormányzati rendszer? – A kormányforma fejlődése és problémái,* Jogelméleti Szemle, 2001/4.

pend the enactment of any new laws for a period of two months. If during this timeperiod, more than 10% of enfranchised people signs the application, an abrogative referendum must be held. The validity and effectivty threshold is very high.

In Lithuania, the head of state may raise the unconstitutionality of any valid and operative acts, and entitled to turn to the constitutional court, where the plenum could suspend the application of the law. This is an almost unique way of constitutional review, because ad absurdum the effectiveness of an act created 10-years ago could be suspended by the head of the state.It came up in professional circles that in case if the prime minister is voted out in Parliament, case of or through the course of a constructive vote of censure the President of the Republic should have some discretion.

The head of state may have stronger scope of authority than average in case of appointing. In Slovakia, the members of the Constitutional Court are appointed by the head of state and 10 judges will be selected by the Parliament of the 20 candidates. In France, the third of the plenum are appointed by the President of the Republic, and in Turkey all the members nominated by professional and judicial bodies.

The Constitutional Court

After the Austrian implementation in 1920, the continental system structured constitutional litigation, based on a separated organization, spreaded like a river backwash, mainly after the Second World War. Mentioning it as a separated factor of power is only possible in case of having a strong scope of authority. In such case it is a part of the legislative, so we can consider it as an element of the system of 'checks and balances'. Actually it performs law enforcement activity, it doesn'tjust compare the facts with the law, but the law with the constitution also. The courts don't take part in the developement of the relationship between the legislative and executive, nor in the normative settlement of living conditions. From the aspect of the governmental systems as a whole, the judicial system is typically not used to analyzed. The courts don't take part in managing the living conditions in longterm either, while the greater autonomy and freedom of the constitutional courts and the possibility of complete and general annulation of rules can put this type of body to the edge of politics.[20] The politicalization of the judges in Constitutional courts strongly depends on the set-up of if, and also from the method of their election.

What is the Constitutional Court?Can the question be raised, that it is an evidence for many. In general terms we could respond, it is a norm controling board, which looks at legal norms and state laws on constitutional grounds. In international comparison two basic constitutional models are known. Inone of the modelsthe traditional courts - headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately push aside the statute in concern. So, in this scheme, quasi all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal organ of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range.

Theothermodel is where, an individual body is set up to review legal acts, statutes in the light of the constitution. (Only in the latter, it is possible literally, and in the classical sense, to speak about constitutional court.) Obviously, beside this, there could be other spheres of authority, of bodies above mentioned. There is no separate constitutional court classically in the *UK, US, Australia, Canada, Denmark, Norway, Sweden, Japan.* Article 120 of the Dutch Constitution is a peculiarity: the courts - so that there is no separate constitutional court - do not rule on the constitutionality of a law!

As far as *Switzerland* is concerned, we might say, a particular mix of the classical European and American models mingle. Each court has the right - except the federal level - to examine the constitutionality of the laws. The Federal Court has the power to participate in individual constitutional complaints; however, it is authorised to destroy legal regulations on cantonal level.

The *Greek* form ofconstitutional type judiciary is also a curiosity; among members of the Supreme Court of the State and law professors, judges are appointed by drawing of lots. The judiciary only has the jurisdiction to control the acts, there is no authority for lower-level legislation, such as statutes. Also, it should be pointed out that other courts in their scope of discretion consider the constitutionality of the statutes.

In Hungary the mandate period of a member of the Constitutional Court is a twelve years term. Member of the Court cannot be re-elected. This represents a significant change compared to the previous law, under which, beside a nine-year term mandate, there was a one-time opportunity to re-election. However, this created a chance, at least in theory, that the constitutional judges (at least towards the end of their mandate), with their "behaviour", and their votes are trying to promote their re-election. In several states the mandate ends at the time of retirement. (eg: Austria, Bosnia and Herzegovina, Turkey, etc.). In Azerbaijan the first mandate period is a term of fifteen years! A one-time re-election is possible, but the second cycle can last only for 10 years. (See. Legény op. cit. 235 p.)

Suschpeolple are excluded from the membership of the Constitutional Court whom were members of the government, or were senior party officials within four years prior to the date of the election, or held state leadership positions.At least nine, and no more than fifteen Members of Parliament that form a nomination committee make a proposal for Members of the Constitutional Court. The committee must provide a seat for each representative of the parliamentary parties.

Another concern is the election of the judges. International practice usually shares the right of election. In many countries the head of state also has the option to delegate members. Bicameral parliaments also provide complex opportunities from this point of view.

In France, for example, the President of the Republic, the president of the National Assembly, and the President of the Senate shall appoint 3-3 members out of the possible 9. A third of the 15 members of the *Italian* Constitutional Court are delegated by the parliament, another third by the head of state, three colleges authorized through certain collegiums of the Supreme Court, one by the Council of State and the State Audit Office. This

[20] This evolution of the conditions, see the chapter on this below.

model is inherently provides that persons with a professional judicial experience could became a member of the body.

In *Austria* the president, the vice-president, the 12 ordinary members and half of the six alternates appointed by the President of the government designation. The Federal Council and the National Council recommends regular 9-9 and 3 or 6 alternates. One-third of whom also appointed by the President of the Republic.In *Slovakia* it is also the President of the Republic who appoints the 10 constitutional judges recommended by the National Council of 20 persons. The particularity of these two latter models is the plural designation system, that is, a few finally gain the membership, but there will be some disappointed, who are being considered, - would take the mandate, but do will not be initiated to office. On the one hand it partly reduces the prestige of candidacy, and the other hand results in the fact that the most appropriate persons probably will not undertake candidacy.

In *Spain,* the judges are appointed by the King. Four of them by the lower, another four, by the upper house are appointed based on a two-thirds majority, another four (2-2) are appointed by designation of government and the Judicial Supreme Council. Three members from the out of whole thirteen of the Portuguese Constitutional Court are already co-opted by the already elected ten individual. In my view this particular solution is welcomed, because, from inside candidates' expertise can be judged more objectively, on the other hand is more perceivable, what kind of expertise and skills are needed to get a better distribution of cases.

Very specific the *Belgian* model. Judges are appointed by the King with two-thirds majority of the Senate, from two different circles of candidates. Members of one of the groups spent have at least a five years of previous mandates in the high positions at the Court of Cassation, at the Council of State, at the Constitutional Court, or at least university teachers for at least five years. The second group, however, are formed by persons who were members of the Senate or the House of Representatives at least for 8 years, so here politics specifically channelled in, in stark contrast with the model that kept away majority of robed bodies from the world of politics! This solution, specifically makes the Constitutional Court a part of the power-sharing system system of checks and balances.

The *Turkish* model is highly specific. It is complete authority of the head of state to appoint the 11 regular members and four deputy members. It is the specificity of the model, that public institutions/organizations appoint judges. (These are higher courts, the State Council, the Higher Education Board, administrative professionals' organizations and bar associations.)

We could consider as a discrepancy from the classic "binary code" the solution -that is applied in *Bosnia and Herzegovina* - and what prevents from the inevitable comparison with the duality of government / and opposition. President of the European Court of Human Rights appoints 3 from the 9 members of the Constitutional Court. More Further exception that these members can not be citizens of neither the given state nor the those of neighbouring countries.

Costa Rica's constitutional structure is outstandingly interesting. The normative task is implemented by the Sala Courta, an individual plenum of the Constitutional Court. (The two bodies – with a relative autonomy - Intertwine interlocks.) The members are elected by a two-thirds majority in parliament for an eight-year term. Inasmuch the legislature with a two-thirds decision had not replaced the judges so mandates automatically extends. In my opinion, this model provides simultaneous manifestations of independence and control.

In Hungary, judges of the Constitutional Court are elected by the Parliament by a two-thirds majority. The entire origination of the post from parliament is a substantial nexus between the policy and the body. If one political side has a two-thirds support, then even the most prominent jurists could be stigmatised as "party soldiers". If, however, the proportion of two-thirds is divided among several political power, the situation is also subject of concern. In general, for the interest of consensus in the commission both sides mutually agree to one other's candidate, so it can be traced back, who recommended the individuals. That is why it would be appropriate to introduce multi-channel nomination of the members.

We focused on the protection of thefour freedomsnoting that the characteristics of individual constitutional courts, focal points can be judged only on thegroundsof all their jurisdiction. We may add, that not only the constitutional complaint and the normative control are related with fundamental rights, but the same could pertain to international treaties, as well as for consideration of the referendumsand election issues. If we refer to the name of the specific bodies, apparently as specific property names they should be entered uppercase; however as abstract doctrinal concepts, we specify these bodies as constitutional courts.

Municipalities

Some kind of self-government of the municipalities can not only be fitted into the classic original theory of distribution of powers, but it was exactly contradictory to that. On one hand the aversions against the feudalistic privileges of the cities, onthe other hand the connection between the concept of the distribution of power and sovereignty might be the main reason for this. The self-governance is in accordance with the voluntary restrict of sovereign contrary to the national sovereignty. Nevertheless it can be noted that the main branches of powers get their own authority by defining the sovereign, there is no obligatory legal basis for their independent existence. The trend representing the whole society broke away with the conception of liberalism according to which declares that individuals unify to a whole onthe highest level of the state and they began to respect the individual in the self-governance as a protecting system based onthe constitution against the state.[21] From the aspect of the society the autonomy of government is very important, but it is difficult to take into consideration at the analysis of the government systems, because it has so many parts, that a unified conclusion can't be drawn for the entire state.[22]

[21] SÁRI János, i.m. p. 237.; István Stipta: Die Versuche zur bürgerlichen Umgestaltung der Komitate. Vorschläge, Entwürfe, Gesetze 1844-1877. Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös nominatae. (Szerk.: Horváth Pál) Separatum Sectio Iuridica Tom. XXXV. Budapest, 1995. 167-176. p.

[22] In other words, as many political composition may occur relative to the government's attitude globally undetectable.

The Prosecutor's Office, the administration

As the judiciary is an independent branch of power, usually the independence of courts is meant to be, nevertheless the Prosecutor's Office is also an important part of the judiciary system. However, the Prosecutor's Office is independent from the courts. It is also independent from the government thus it can be regarded as an individual branch of power, despite it functions in a hierarchical system, the appointment of the General Prosecutor usually depends on the government or the legislature.

The organizational autonomy of the administration is justified by the separation of the political and social subsystem.[23] The top leadership of ministries belong to the world of politics but the apparatus is concerned with the legislation of civil service, the change of government is not necessarily associated with their dismissal. In the Hungarian legal system for instance the prohibition of withdrawing the authorities and the right for giving instructions in only procedural issues are beside the independence of the organization. Nevertheless we know at the time of switching cycle there is usually fluctuation in the apparatus in a huge percentage, in practice the instructions of the leaders determine the activity of the subordinate personnel. It is a rightful suggestion that the autonomous bodies can be regarded in a certain sense as a separated factors of power, because – though their functions are government related – rights for giving instructions doesn't apply for them. Their establishment are in relation to other branches of power (parliament, government, head of state), but – and this is the basis of their autonomy – they are non dismissible. Their judgement is similar to the prosecutor's office in this case, because generally they reflect the actual political combination. However, from the reason of their non-dismissibility they can be autonomous. This is especially true if the mandates of the persons who were appointed by the former government will be valid in the next cycle.[24]

The opposition

The concentration of the government and the majority in the parliament increasingly refers to the opposition like the counterweight of the executive. The range of two-thirds legislative items are the result of the involvement of the opposition into the legislative whereby a new factor of distribution of power is born. The all-time confrontation of the opposition and the government, which is a necessary corollary, makes this distribution of power to dysfunctional, because the opposition takes control over the professional control with an eternal and autotelic confrontation.[25]

The second chambers

Although this element had been featured in the theory of Montesquieu its renaissance is owed to the interlacement of parliament-government mentioned above. The federal-type second chamber namely a priori symbolize the independence of the member states, (as individual factors of distribution of powers) having their own sovereignty, which are manifesting in the role of their federal legislature and in the Member States' legislative subjects delimited by the constitution. The second chambers, involving corporate elements in themselves, are the expression of interests of the civil society, which are also remedy aginst the popular representation-based concentration of powers.

The people's participation

The entire system of distribution of powers can be classified into the institutional system of indirect democracy, while the instruments of indirect democracy can create distribution of powers against the power machine, which is sceded from the people and functioning too much accordingly to the binary code.

Distribution of powers between states

János Sári propounds the possibility of analyzing the distribution of powers between states and although here and now we are dealing with the governance within states, due to the junction to the European Union we also have to mention this in here.

In the integrational organizations, the authorities of the Member States and the EU, the judiciary system intended to enforce the community law, and paralell co-existence of the intitutions of the Community and the Member States existing can mean the basis of distribution of power.

Other social factors

'The media is the fourth branch of power!' 'The economy is the fourth branch of power!' It ~~is~~ can be heard frequently in the political journalism jargon. There is a little truth in the constitutionally naturally rejectable views, because the factors mentioned have impact to the power-political system. For example the media can significantly influence the results of the elections and this has a huge impact on the legislative power and on its composition. The independent functionning of the economy can specify the real margin of the executive. Nevertheless these factors are not part of the state, don't have the usage of monopoly of the legitimate violence, namely their will are not enforcable in the world of the constitutional law.[26]

The branches of power in our country

Afterwards let us see how the classic triad of powers are formed in Hungary as there is no chance to form an overall picture from the reason of the diversity of national legislation. I've already pointed this question out in details in my study on the Hungarian governmental system. Here and now I am only demonstrating the outline of my deduced train of thought. The three classic branches of power certainly is alive, furthermore the head of state with a slightly wider authority than ceremonial is also regarded as an individual factor, however he is not purely the depositary of the political power, but considered as

[23] In Hungary ORTT, The Economy Competition Office, and certain point of view the OVB.

[24] The above is not a state administrative body can be said as the National Bank, which works the same way, but plays some power with the power of the central bank through mandatory provision.

[25] Solving the Danish Constitution, however, offers a smart solution: 30% of the MPs propose referendum.

[26] This may justify the institutionalized separation and real factors, even in the name of dominance and power lines.

a neutral intermediary branch of power. His authorisations are either independent, rather interferal (ex.: appointments, signature of ministerial countersign, the signature of the laws…etc.) The principle of 'checks and balances' doesn't prevail because of our country's parlamentary system, the parliament overcome the other branches of power: it elects and dismisses the government, lays down the budget, which significantly specifies and gives limitations of the scope of the executive. Its legislative power extend to all, which is a controversial element of the Hungarian legal system, therefore it can distract the government's power of regulation of. The election of the Head of State and the Constitutional Court are also the tasks of the Parliament. The Constitutional Court with its specific activity reminiscent of the deliberation, does not expand the classic triad.

The whole system is based on the Constitution, the Constitution is the cornerstone of sovereignty. Imaging intuitively, the Constitutional Court is not derived from it, but it is a supporting factor. The classic baranches of the triad are not located paralett to each other but practically all grow out from the legislative. The head of state, based on the form of government, even points outside of the constitution, because he is the carrier and the bearer of the external sovereignty towards the publicity.[27] The separate analysis of the prosecution is not a common practice in the legal literature. However, due to its exclusion of being instructed, in vain the election of the Prosecutor General is an authority of the Parliament, it can be risked to mention, that it could be such an individual factor in the distribution of powers like the Constitutional Court. Lets have a brief look what kind of stages of development the peresent arrangement went through in our country.

An Outline on the Balance of Powers in the US History

The constitutional system of the United States and the separation of powers (functions) to this date are considered by the Constitutional Lawyer community as the typical instance of the presidental system of government and the principle of „checks and balances".

Constitution makers faced with immensely difficult tasks because in one hand they had to find a way of perfectly balancing the branches of powers and witholding them from hegemony, on the other hand they had to form a union of 13 different colonies in which those liberties should not have harmed that the American colonists had fought for. Well, we can say they did an outstanding job and made the system of separation of powers of the United States an example for other countries to draw from.

It is necessary to note as an indirect theoretical antecedent that the developement of the United States Constitution, of course, entails some English heritage, including the spirit of Magna Charta from 1215 and other documents linked to development of the English Constitutionalism as well.[28]

Researching for direct antecedents of the formation of the Constitution, range of examples can be found dating back to the beginning of the 17th century about the development and the progress of individual colonies. The form of government was not shaped uniformly in the colonies. Each had direct connections with the British government and the Crown, so several models evolved at the colonial level, which became later the level of federal states. Most of the colonies were known as royal colonies besides which we can identify two proprietary colonies like Maryland and Pennsylvania, which were under joint management with Delaware colony and two self-governing colonies such as Connecticut and Rhode Island.[29]

In Virginia's case the Ordinance and Constitution [30] in 1621 reaffirmed the right of the colonists to create a representative assembly which had power to decide on local matters [31]. It was called Assembly- name originated from the era of trade companies- and similar bodies enacted at other colonies too. The members of the Assemblies initially were elected indirectly (electoral way), direct election by the people was not typical at all.

Colonies were led by the governors with no exception who were officials appointed by the king. Governors took care of the law enforcement and the implementation of the king's will as well as the protection of the colonies. Governors of the royal colonial were appointed directly by the monarch, in the proprietary colonies the proprietor himself or his successors proposed somebody to the position, while self-governing colonies elected their governor freely, and the Crown only acknowledged their choice.

The governor was helped by the Council which at one time was the executive body and is also an advisory board to the governor. Council members of the royal colonies – with the exception of Massachusetts- were appointed by the monarch. In contrast, in the proprietary colonies the proprietor had the right to appoint them, while the self-governing colonies and Massachussets elected their Council members [32]. The colonies also had their own legislation, where the Legislative Assemblies held legislative power in hand.

In the early 17th century at the beginning of the formation of the local administrations and legislation colonies had unicameral legislature, but by the 18th century this form only lived on in Pennsylvania and Delaware. Legislative bodies had decision-making power about internal government, budgetary questions, taxation and military issues. The governor who represented the British government however could veto the accepted laws, and they had to be sent for a final confirmation to Privy Council of the Crown.

---

[27] Starting from the brake system of checks and balances, however, the Constitutional Court with regard to the legislative function of the power-sharing factor, because of negative legislation participate in the exercise. May be subject to similar terms of implementation.

[28] Katalin GÖNCZI: Amerikai alkotmány- és jogtörténet. In: Egyetem jogtörténet I. (Editor: HORVÁTH Pál) Nemzeti tankönyvkiadó. Budapest, 2007. 298-299. p.; KAJTÁR István: Az amerikai kontinens államfejlődésének alapvonalai. In: KAJTÁR István (editor) Egyetemes állam- és jogtörténet II. Dialóg-Campus Kiadó. Budapest-Pécs, 1998. 133-142. p.

[29] URBÁN Aladár: Köztársaság az Újvilágban p. 22-23; Charles A. BEARD: Az Egyesült Államok alkotmányának gazdasági értelmezése. Európa Könyvkiadó. Budapest, 1988. 43. p.

[30] BŐDY Pál-Urbán Aladár (editor): Rendelet Virginia számára, 1621. július 24. p53-54

[31] NAGYNÉ Szegvári Katalin: Fejezetek az amerikai alkotmány történetéből p11; HAMZA Gábor: Az Egyesült Államok alkotmányának és alkotmányfejlődésének sajátosságai. Jogállam. 1996. 1-2. sz. 125-137. p.

[32] URBÁN p23

We can see that the Founding Fathers could rely on relatively direct and hands-on knowledge of their own when they shaped the constitutional system and the practice of the separation of powers in the country and this work peaked at the creation of the Constitution in 1787 and still regulates the separation of powers mostly in the same way in the United States.

The Constitution of the United States was modified several times over the centuries with the so-called Amandments of which the first 10 came into force as early as 1791. These ten are predominantly declarations of first generation civil liberties therefore are less significant in terms of separation of powers.

Regarding out subject matter the 10th Amandment id quite significant because it regulates the balance of power between the member state and the federal state and declares important principles regarding member statehood.

The amendment states that the federal government has only those powers specifically granted by the Constitution. Any power not listed is, says the Tenth Amendment, left to the states or the American people. Local taxation, education, forming the state's juducial system laws affecting family relations, welfare and health issues are among those specifically reserved to the states or the people. Well-respected experts say this amandment is the source of the legislative power of the member states.[33]

Among the later additions to the Constitution because of its substantial effect on the function of the judicial branch the 11th Amendment can be significant for us. The 11th Amandment limits the powers of the federal courts: prohibits federal courts from hearing cases in which a state is sued by an individual from another state or another country. Such hearings are still possible in front of the courts of the individual states and the losing party will continue to have a right to appeal the decision to the federal court. The direct cause of this Amendment was a specific dispute, the Chisholm vs. Georgia case in 1793.[34]

Regarding the balance of power and the developement of the Constitution of the USA it is necessary to spare some words about the 12th Amandment that modified the way the Electoral College chooses the President and Vice President. Since the adoption electors cast a distinct vote for President and Vice President rather than giving two votes for President. In case of a tie, the President is decided in the House of Representatives and the Vice-President is elected by the Senate.

Looking at the Constitutional system created in 1787 it is necessary to note that the election of the legislative branch basically follows the method of classical relative majority voting – regardless we take the election system before or after the 12th Amandment – which is a principle that determines the very foundation of the voting right in the US. The form of government established by the Constitution, as we mentioned in the introduction, the typical instance of the presidential system and represents a textbook example for the manifestation of the theory of separation of powers. The branches are separated from each another: it is not the Parliament which elects the President and the President cannot dissolve the House of Representatives. However, they exercise the functions of power in a shared way; just think of the President's right for veto or to the appointment of the members of the the apex body of judicial branch. President who has been elected by Electoral College after the 12th Amendment is the head of the government and the head of state in one person. The president can appoint autonomously the senior officials of the executive branch such as ministers and state secretaries. He has a strong veto power: when the President returns the bill to the originating house, Congress can override the veto only via a two-thirds vote with both houses. He nominates justices to the Supreme Court who are then heard and elected by the Senate. Bicameral legislature (state and federal) weakens the chance of having too much power furthermore. The institution of the referendum on the member state level is significant in such a way that numerous local officials (e.g. prosecutors in different states, sheriffs) are elected directly.[35]

The way of electing the President –after the 12th Amendment- may receive some criticism due to the fact that a person may win the race who received fewer votes than his running mate. Thanks to the individual model, it might happen that the political force acquire significant majority which favors for the President, however, due to the election cycle system there's a chance to articulate the intermittent changes in the public will. The members of the House of Representatives are elected for a two-year term, senators for a six years. One-third of senators run for election every two years, so do the members of the House of Representatives. The President might seem too powerful because of his executive powers or being unimpeachable and his veto power as well as the impact of the power of shaping the Supreme Court. However, sharing competencies between the Member States and the Federal State and the flourishing direct democracy in the Member States - considered as a whole – so far has not resulted any overconcentration of power.[36]

As a final thought after looking at the Constitution and those historical and sociohistorical developments that have occurred since then we can surely say that in such a developed country like the USA there can not be many alternatives: the government can lean either to the left or to the right but just a little bit. So there aren't so many fault lines in society, there is not much demand for numerous political parties, otherwise this form of government would raise several concerns. The two-party system, according to the correct interpretation of it and looking at it from the point of government and the electoral model's view it is not the result but the origin because it is quite unfavorable if the legal background artifically force the existence of the two-party system.

[33] Ellen ALDERMAN-Caroline KENNEDY: In Our Defense: The Bill of Rights in Action (A népnevében. Az amerikai alkotmány kétszáz éve, Hungarian edition). Közgazdasági és Jogi Könyvkiadó. Budapest, 1993. 331-332. p.

[34] MARTOS Dániel: Az Amerikai Egyesült Államok kialakulása a gyarmati időktől 1900-ig; notes p. 45.

[35] Képes György: A legtökéletesebb unió: az Amerikai Egyesült Államok Alkotmánya. Gondolat Kiadó. Budapest, 2003. 75-89. p.

[36] John LUKACS: Outgrowing Democracy: A History of the United States in the Twentieth century. (Hungarian edition) Gondolat Kiadó. Budapest, 1988. 88-100. p.; Charles SELLERS-Henry MAY-Neil R. Mc.MILLEN: A Synopsis of American History. (Hungarian edition) Maecenas Kiadó. Budapest, 1995.96-97. p.

Jus Sanguinis – The Basic Principle in Citizenship Law, Comparative Analysis of First Citizenship Law between Visegrad Four and China

Lu Da *

Abstract

Citizenship defines the relationship between the individuals and the government in the modern society. The citizenship law had a long history in the world, in central Europe, Hungary published its first citizenship law in 1879. After the independent, Czechoslovakia and Poland had their own citizenship in 1920 s. In China, Qing Dynasty also had its own nationality law in 1909. Although, these citizenship laws or nationality laws have some differences because of the different conditions in these countries, i.e. culture, economic condition. However, there are still have lots of similarity in these laws, the first and the most important principle similarity is jus sanguinis. Therefore, in this article the author will examine the first citizenship law in Hungary Kingdom, Czechoslovakia and Poland, the first nationality law in Qing Dynasty as well, and make comparison between these citizenship(nationality) law.

Key words: *Hungary; Czechoslovakia; Poland; China; citizenship law; nationality law; comparative analysis.*

Before we start this article, there is one question should be explained. As mentioned above, in Hungary, Czechoslovakia and Poland (the Visegrad Four Countries), the English name of the law on nationality is citizenship law.[1] However in China or Qing Dynasty, the name of the law on nationality is nationality law.[2] Although these laws' name are different, nevertheless, if we examine the content in the regulation, it will be easily find that all of the laws are related to acquire or lost some specific rights which may consider as the relationship between people and country, that is the citizenship or nationality right. What's more, we also should notice that the *jus sanguinis* principle played a very important role in the citizenship or nationality laws, no matter the laws were published in Central Europe or East Asia.[3]

1. The Similarities of Citizenship (or Nationality) Law Between Visegrad Four and China

It seems the Visegrad Four countries and Qing Dynasty, stood in the two different Continents, the citizenship law (or nationality law) should not have too much similarities. Nevertheless, when we examine the content of each of them, it will be easily find that although the distance of two countries is far away, there are many similarities between these laws. In this article, it will divide into the following three similarities: the resource of the citizenship law (or nationality law), the similarities of acquisition of citizenship law (or nationality law) between Visegrad Four countries and Chinese nationality law, the similarities

* Lu Da, Faculty of Law and Political Science, University of Szeged, Szeged, Hungary.

1 It seems a tradition that the law on the nationality will be called as citizenship law, however, this type of law or act is mainly deal with the nationality. In Mária M. Kovacs, and Judit Toth's abstract it mentioned: "Since 1879, Hungarian citizenship law has undergone four major reforms… The act on nationality has been an outstanding attribute to the state and national sovereignty…" KOVACS, Mária M., and TOTH, Judit, 'EUDO Citizenship Observatory: Country Report: Hungary', http://eudo-citizenship.eu/docs/CountryReports/Hungary.pdf, accessed 18 August 2016.

2 In China, the law on nationality will be called as nationality law, 国籍法 in Chinese. There are three types of nationality laws were published. The first is National Ordinance of Qing Dynasty which published in 1909, the second type of nationality law of China was published its first version in 1928 by Republic of China and four or six amendments. (The number of amendments depend upon the year of publication of the first version nationality law) The last type of nationality law of China was published in 1980 by People's Republic of China. 大清国籍条例[National Ordinance of Qing Dynasty], Chinese version see at http://ctext.org/wiki.pl?if=gb & chapter=176517, accessed 6 August 2016. As the second type of nationality law in China, in some Chinese legal history papers, the first version of nationality law of the Republic of China was published in 1912 (Min Guo Yuan Nian), the first year of the Republic of China. See ZHANG, Huiwen, and LU, Yinghui, '《中华人民共和国国籍法》浅论[On <Nationality law of People's Republic of China>]', *Chinese Journal of Law*, no. 6, 1980, P 48. However, in Legislative Yuan's website (Legislative Yuan is the legislative institute of Republic of China), the first version was published in 1929. See at http://lis.ly.gov.tw/lglawc/lawsingle?0^260C18C4811854060C18C0F21B03260C9AE4819823264C18, accessed 5 August 2016. The third type of nationality law, Nationality Law of People's Republic of China in Chinese version is available at the Ministry of Public Security of PRC's official website, http://www.mps.gov.cn/n16/n1282/n3493/n3763/n4168/428039.html, accessed on 5 August 2016.

3 In Hungary citizenship law (Act 50 of 1879), *jus sanguinis* principle was considered as the basic principle, only in the extraordinary cases the *jus soli* principle allowed to be asserted. VARGA, Norbert, 'The framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship', *Hungarian Studies*, vol. 18, no. 2, 2004, p 139-140. In China, the first nationality law, National Ordinance of Qing Dynasty also based on the *jus sanguinis* principle. Also, the Czechoslovakia and Poland, the first citizenship laws were based on the principles of *jus sanguinis.* See Polish Citizenship Act of 1920 in the website of yourpoland, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 20 August 2016. The first Czechoslovakia citizenship law also regulated the child at birth with the Czechoslovakia parents will get the citizenship of Czechoslovakia automatically. See Sbirka Zakonu a Narizeni Statu Ceskoslovenskeho. No. 46 of 1920. http://ftp.aspi.cz/opispdf/1920/046-1920.pdf, accessed 20 August 2016.

of loss of citizenship law (or nationality law) between Visegrad Four Countries and Chinese nationality law.

1.1 The Resource of the citizenship law (or nationality law)

The concept of citizenship or nationality is not an original concept in Visegrad Four and China.[4] In order to establish their own citizenship law (or nationality law), getting a strong influence which from other countries was a common phenomenon in these countries.

The first citizenship law in Hungary was published in 1879, after the upsurge of legislative acts on the nationality in Western Europe, during two decades, Hungary Kingdom witnessed the Germany Act of 1870, Switzerland Act of 1876, Italy Civil Code of 1865, Great Britain Act of 1870, etc.[5] In Nobert Varga's article, it mentioned that "…the German regulations of 1870, in harmony with which the bill of 1879 was drafted. The German citizenship law defined the legal titles of acquiring citizenship in a way that was identical with the Hungarian law."[6] It is not too difficult to find the influence by German citizenship law. In Poland, there was also had a strong influence by Germany, Austro-Hungarian Monarchy. After the first World War and the Treaty of Versailles, the Second Polish Republic was established.[7] However, it is not easy to settle the problem of citizenship in Poland, since this country was used to involved by the Germany, Austro-Hungarian Monarchy and Russia.[8] On 28 July 1919, the Polish Minorities Treaty was signed at Versailles, and the Polish Citizenship Act which was published in 1920 "was considered as the 'secondary' way to acquire Polish citizenship.[9] In Czechoslovakia, the similar situation was happened at the same time. After the First World War and long lasting uprising in Czechoslovakia, Czechoslovakia was established in 1918.[10] Before the country was established, most territory of Czechoslovakia was one part of Austro-Hungarian Monarchy, Czech part can be divide into two parts: Bohemia and Moravia,[11] and it was considered as one part of Sphere of influence of Austria, and Slovak was considered as the Upper Hungary.[12] Although, Czechoslovakia was established in 1918, it had to get some "help" from the big powers. Therefore, when the country published its first citizenship act, "The basic rule was modified by peace treaties and constitutional laws which regulated the issue of citizenship in order to protect ethno-national minorities and provided options to choose the citizenship of an ethnic kin state."[13]

While in China, the first nationality law was published in 1909 by Qing Dynasty, during the draft period, Qing Dynasty had collected lots of legal documents from Europe, America and Japan, since China and Japan share similar cultural background, which have a great influence to Chinese legislation.[14] However, if we trace the source of Japanese legislation, it was heavily influenced by German law.[15] Here, we could make a conclusion that as a great power in the world since the establishment of Germany, the German law heavily influence to other countries legislation activities. In Hungary Kingdom, the citizenship law which influenced by German Act of 1870, while in Qing Dynasty, the legislative body translated numerous laws which from Europe (included German act), USA and Japan, what's more, German law had a heavily influence to Japanese law, such as the principle of *jus sanguinis*, which were reflected in the National Ordinance of Qing Dynasty and Hungarian citizenship law of 1879.

1.2 The Similarities of Acquisition of citizenship (or Nationality) Between Visegrad Four and Chinese Nationality Law

As the Paper mentioned above, the *jus sanguinis* principle is very important in these countries citizenship law or nationality law. Therefore, all of the citizenship laws in these counties regulated how the descents of citizen or national acquire the citizenship or nationality automatically.

In the Hungarian citizenship law of 1879, it regulated four ways to acquire a Hungarian citizenship, descent (or lineage),

---

[4] Nationality, as a legal concept, it's started from French Revolution. See XIAO, Yongping, GUO, Minglei, 论国籍观念的演进与国籍法的变革 [On The Development of The Concept of Nationality And The Change of Nationality Law], *Law Review*, (2007) 6, p 66. The modern concept of citizenship was appeared after the Second World War, in 1963, T.H. Marshall described the evolution of three types of citizenship during the big debate in Britain. See WALLACE, Claire, *Citizenship and social policy in East-Central Europe*, Cracow: Academy of Economics; Warsaw: Friedrich Ebert Foundation, 1993, p 6.

[5] VARGA, Norbert, 'The framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship', *Hungarian Studies*, vol. 18, no. 2, 2004, p 130.

[6] Ibid, p 139.

[7] LUKOWSKI, J., and ZAWADZKI, H., *A Concise History of Poland*, Cambridge, Cambridge University Press, 2006, p 221-225.

[8] GORNY, Agata, and PUDZIANOWSKA, Dorota, *EUDO Citizenship Observatory, Country Report: Poland*, revised in May 2010, p 2, http://eudo-citizenship.eu/docs/CountryReports/Poland.pdf, Accessed 20 August 2016.

[9] Ibid.

[10] POLISENSKY, J. V., *History of Czechoslovakia in outline*, Praha, Bohemia International, 1991, p 104-110.

[11] THOMSON, S. H., *Czechoslovakia in European History*, Princeton, Princeton University Press, 1944. Foreword, p 1.

[12] BERGER, Tilman, *Slovaks in Czechia – Czechs in Slovakia*, p 1. https://homepages.uni-tuebingen.de//tilman.berger/Publikationen/CzechSlovak.pdf, Accessed 20 August 2016.

[13] BARSOVA, Andrea, *Citizenship Observatory, Country Report: Czech Republic*, revised and updated March 2013, p 2, http://eudo-citizenship.eu/docs/CountryReports/Czech%20Republic.pdf, Accessed 20 August 2016.

[14] Qing Dynasty translate a lot of laws or acts which from Europe, America and Japan. When Qing Dynasty begun to make the nationality law, the legislature bought each country's nationality regulations from America and Japan, then translated into Chinese. See LI, Yan, 《大清国籍条例》制定过程之考证 [The Research of Law-Making Process of National Ordinance of Qing Dynasty], *Historical Review*, no.2, 2013, p 101.

[15] After the Meiji Restoration, Japan established a western legal system and started its modernization movement, German as a great power in the world, had a great influence to Japan, such as Civil Code 1896 and 1998. Hosokawa Kiyoshi, 'Japanese Nationality in International Perspective', in KO, Swan Sik (ed.), *Nationality and International Law in Asian Perspective*, Dordrecht, Martinus Nijhoff Publishers, 1990, p 183.

legitimization, naturalization and marriage.[16] In Poland and Czechoslovakia, there were similar regulations of acquisition of citizenship since 1920 s.[17] Nevertheless, the first Chinese nationality law, National Ordinance of Qing Dynasty regulated the following ways to acquire Chinese citizenship, descent (or lineage), naturalization and marriage. Except the way of legitimization, the ways to acquire nationality between these countries are similar. However, it should be noticed that both in the polish citizenship act and Czechoslovakia citizenship regulation, it is only simply mentioned the acquisition of citizenship shall by birth, marriage, legitimization and naturalization.[18] In the following part, it will mainly introduce how acquire in Hungary and China in details.

In the case of descent, as mentioned previously, *jus sanguinis* principle is an important principle in these countries citizenship laws. Descent is the most popular reason to get the nationality in these countries. In the Hungarian citizenship law, it regulated that a person who should get the Hungarian citizenship, if the person was a legitimate child of a Hungarian Father or a Hungarian Mother, the person shall acquire his or her Hungarian citizenship, even if the child was born out of the Hungarian Kingdom.[19] However, in Polish citizenship act only implied that a person shall get his or her Polish citizenship by birth.[20] In Czechoslovakia, the acquisition of Czechoslovakia by birth also based on the *jus sanguinis*. There was also had some regulations of acquisition the Czechoslovakia citizenship. According to the introduction of the citizenship in Czechoslovakia from 1918-1949, the child shall get his or her Czechoslovakia citizenship by birth, when the child had a Czechoslovakia father or the father is unknown and the child had a Czechoslovakia mother.[21] In National Ordinance of Qing Dynasty, the similar regulation could found: Anyone shall have Chinese nationality when he or she was born with a Chinese national father or before he or she was born, his or her father died with a Chinese national shall have Chinese nationality. If there is no clue of the child's father or child's father is a stateless person, and the child has a Chinese national mother, the child shall have a Chinese nationality.[22] It should be noticed that both of the laws based on the principle of *jus sanguinis*, however, in the following cases these two laws shall employed the principle of *jus soli*. If the child who was born in the territory of China or Hungary, however there is no clue of his or her parents or the parents were statelessness, or the foundlings was found in the territory of China or Hungary and there is no clue of his or her parents, the child shall have the chance to get nationality (or citizenship).[23]

Naturalization is the most popular way for foreign nationals to acquire their Chinese and Visegread Four countries' nationality. What's more for the foreigners' who did a great achievement shall acquire a nationality or citizenship by a royal diploma. In National Ordinance of Qing Dynasty, chapter 2 regulated the case of naturalization. A foreign national want to acquire his or her Chinese nationality has to meet the following requirements:

"1. The person has to have lived in China for over ten years continuously;
2. The person has to have over 20 years old and with an unlimited capacity of action in accordance with the laws of his or her own country;
3. He or she behaves decently and honorably;
4. He or she has enough property or professional skills for his or her self-support or ensuring his or her living;
5. He or she dismissal his or her own nationality in accordance with the laws of his or her own country."

For stateless person, there is no need for meeting the subparagraph 5, since he or she don't have nationality. A married woman can not apply her Chinese nationality independently, her application should affiliate with her husband's application.

A foreign national or stateless person who made a special contribution to China, shall acquire his or her Chinese nationality by royal diploma which issued by emperor, even he or she

[16] 1879. évi L. törvénycikk: a magyar állampolgárság megszerzéséről és elvesztéséről [Act 50 of 1879: Acquisition and loss of Hungarian citizenship], http://www.1000ev.hu/index.php?a=3 & param=5880, accessed 18 August 2016. See VARGA, Norbert, 'The framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship', *Hungarian Studies*, vol. 18, no. 2, 2004, p 139. See TOTH, Pál Péter, 'Deprived of Citizenship', http://www.hhrf.org/kisebbsegkutatas/mr_03/cikk.php?id=1231, accessed 18 August 2016. See VARGA, Norbert, 'Short History of First Hungarian Citizenship Act', *Novi Sad Faculty of Law Collected Papers*, Novi Sad, Novi Sad Faculty of Law, 2009, P 464.

[17] In Poland, the Polish Citizenship Act of 1920 regulated the acquisition of citizenship, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 20 August 2016. After the publishing of the special constitutional law of the citizenship of Czechoslovakia in 1920, the Czechoslovakia also adopted these cases of acquisition of citizenship. See Sbirka Zakonu a Narizeni Statu Ceskoslovenskeho. No. 46 of 1920. http://ftp.aspi.cz/opispdf/1920/046-1920.pdf, accessed 20 August 2016.

[18] In my point of view, the Second Polish Republic and Czechoslovakia just independent from their big neighbors, it is important to establish a country which mainly with Poles or Czechs and Slovaks. And if we examine the citizenship regulations in these countries, it is easily to find the unfriendly of the rules to the minorities in these two countries. For instance, in Czechoslovakia, it is more difficult to a person who lives in the land however who did not consider as Czechs or Slovaks to acquire a Czechoslovakia citizenship. Melissa FEINBERG, *Elusive Equality: Gender, Citizenship, and the Limits of Democracy in Czechoslovakia, 1918-1950*, Pittsburgh, University of Pittsburgh Press, 2006, p 75-76.

[19] VARGA, Norbert, 'The framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship', *Hungarian Studies*, vol. 18, no. 2, 2004, p 140.

[20] Article 4, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 27 August 2016.

[21] The introduction of citizenship rules in Czechoslovakia, see at the website of Embassy of the Czech Republic in Tel Aviv. http://www.mzv.cz/telaviv/en/visa_and_consular_services/citizenship/who_is_citizen_guide_to_czech.mobi, accessed 27 August 2016.

[22] All in all, in the National Ordinance of Qing Dynasty, the nationality of a legitimate child will decide by the nationality of the father, if the father is a Chinese national, the legitimate child shall have a Chinese nationality. Article 1, 大清国籍条例[National Ordinance of Qing Dynasty], 1909. Chinese version see at http://ctext.org/wiki.pl?if=gb & chapter=176517, accessed 20 August 2016.

[23] This is the rule which regulated in both laws, Hungary resource Ibid 16, Chinese resource, Article 2, 大清国籍条例[National Ordinance of Qing Dynasty], 1909. http://ctext.org/wiki.pl?if=gb & chapter=176517, accessed 20 August 2016.

[24] Ibid

didn't meet the requirements which mentioned above.[24]

In following cases, a foreign national or stateless person shall have Chinese nationality by naturalization: 1. He or she has a Chinese national step-father and live together; 2. An out of wedlock child whose father is Chinese and his or her father recognized him or her; 3. An out of wedlock child whose mother is Chinese and his or her father does not recognize him or her. However, the child should be minor according to his own country's law and not married when the child is a girl.[25]

It is more complicated in Hungarian regulation, since there is such act of naturalization which issued in 1867, both of the rules were came into force. However, for the person who want to acquire a Hungary citizenship after 8 January 1880, he or she should follow the new rule. In the case of simple naturalization, the person who want to acquire his or her citizenship shall have a certain continues residence in Hungary, and finished some duties, e.g. pay their tax in Hungary. Like the law in China, naturalization person shall not have the right to take office until a certain period past.[26]

In Poland, the regulation was stated that,

Polish citizenship may be granted on request of a person who is willing to obtain it if the person proves that he/she:

1) has led an irreproachable life
2) has been a permanent citizen of the Polish State for at least 10 years
3) has means to provide for himself/herself and family
4) has command (or is fluent in) of the Polish language

In case of minors and others who are under a legal incapacity, a request concerning granting Polish citizenship is made by their legal guardians.[27]

Marriage was one option for foreigner woman who want to acquire nationality or citizenship. In National Ordinance of Qing Dynasty stated that "A woman shall have /her Chinese nationality in the case of marring a man with Chinese nationality.[28] In Hungary a foreigner woman who has a legally marriage with Hungarian man shall acquire her Hungarian citizenship, even if the woman was divorced or widowed.[29] In Poland and Czechoslovakia, a foreigner woman who want to get a citizenship of Polish or Czechoslovakia, marriage was also an option to them.[30]

1.3 The Similarities of Loss of citizenship (or Nationality) Between Visegrad Four and Chinese Nationality Law

In Hungarian citizenship law, there were five cases of loss of citizenship: dismissal, authority's decisions, absence, legitimization and marriage. Nevertheless, in Poland and Czechoslovakia, the mainly case to lose their citizenship is dismissal.[31] The Ordinance of Qing Dynasty existed the following cases: dismissal, legitimization and marriage.

Dismissal is the most important way to loss Chinese nationality. Since China does not recognize dual nationality, when a Chinese national acquire a foreign nationality, he or she should make a dismissal of his or her Chinese nationality.

In the Qing dynasty, a man who wants to acquire a foreign nationality should ask a dismissal of his Chinese nationality firstly. However, when he wants to ask for a dismissal, the following requirements should be meet:

"1. He or she has not an unclosed civil or criminal cases;
2. He has fulfilled his military service;
3. He or she has paid the tax;
4. He quit his office job and the qualification of attend the imperial examination."[32]

In order to dis dismissal his or her Chinese nationality, the person should meet the above requirements, it should notice that in that time, woman was usually considered as mere appendage to man.[33]

Just like the regulation in China, the citizenship act in Poland and Czechoslovakia also do not recognize the dual-citizenship at the beginning. If someone want to get another counties citizenship, they should consider that it almost means they are renounced their citizenship in Poland or Czechoslovakia.[34]

In Hungary, there is also such regulation, for the people who want to renounce his or her Hungarian citizenship, he or she should perform his or her obligation, such as fulfilled the military service and the tax should be paid.[35]

---

[25] Ibid Article 5.

[26] In Hungary, the period is ten years, however in China, the year from 10-20 years, 10 years for the person naturalized by a royal diploma, 20 years for the normal naturalized person. Hungary recourse: Ibid 19, p 141. Chinese Resource: Ibid 23, Article 8.

[27] Article 8, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 27 August 2016.

[28] Ibid 23, Article 5.

[29] Ibid 23.

[30] In Poland, Article 7, the Polish Citizenship Act of 1920 stated the marriage case to get the Polish citizenship, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 27 August 2016. In Czechoslovakia, the introduction of Czechoslovakia citizenship from 1918 to 1949, also provide this option to get Czechoslovakia citizenship, http://www.mzv.cz/telaviv/en/visa_and_consular_services/citizenship/who_is_citizen_guide_to_czech.mobi, accessed 27 August 2016.

[31] Dismissal, in this case, we can considered as the citizen in Poland or Czechoslovakia who get a foreigner citizenship, in this case, he or she will lost his or her Polish or Czechoslovakia citizenship.

[32] Article 12, 大清国籍条例[National Ordinance of Qing Dynasty], 1909. http://ctext.org/wiki.pl?if=gb & chapter=176517, accessed 20 August 2016.

[33] In Qing Dynasty, woman should follow the principle of three obediences and four virtues, three obediences ask a woman to obey: her father as her father as a daughter, her husband as a wife, her son in widowhood. 'San-ts'ung ssu-te', in TAYLOR, Rodney, L. and CHOY, Howard Y. F.(ed.), The Illustrated Encyclopedia of Confucianism, vol. 2, N-Z, New York, The Rosen Publishing Group, Inc., 2005.

[34] In the first version of citizenship act in Poland and Czechoslovakia, dual-citizenship were definitely forbidden, see http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, and BARSOVA, Andrea, *Citizenship Observatory, Country Report: Czech Republic*, revised and updated March 2013, p 2, http://eudo-citizenship.eu/docs/CountryReports/Czech%20Republic.pdf, Accessed 20 August 2016.

[35] VARGA, Norbert, 'Short History of First Hungarian Citizenship Act', *Novi Sad Faculty of Law Collected Papers*, Novi Sad, Novi Sad Faculty of Law, 2009, p 474-475.

There isn't a rule which called legitimization in National Ordinance of Qing Dynasty, however, in the regulation of dismissal there is a provision of the case of legitimization as Hungary law, a child who was born out of wedlock to a Chinese national mother and a foreigner national father, if the father admitted his child and as a result the child acquire a foreign nationality, the child shall loss his or her Chinese nationality.[36] When we examine Hungarian citizenship law, it is interested to know that there is a very similar rule.[37]

Marriage would be a reason for a Chinese woman or Visegrad Four countries' woman lost their nationality in the case of they married to a man who with a foreigner nationality. In National Ordinance of Qing Dynasty, "A woman married a foreign national" is one of the case to loss her Chinese nationality. For the sake of woman's interest, if according to her husband's own country's law, marriage does not change the woman's nationality, the Chinese woman shall keep her Chinese nationality. At the same time, an official marriage shall have official registration.[38] From the perspective of Hungary, the Hungarian citizenship law stipulated the case which woman lost her Hungarian citizenship because of marriage.[39] In Poland, the similar regulation stated that, "A Polish citizen who has lost her Polish citizenship by marrying a foreigner regains citizenship status if she submits an appropriate statement at an administrative office at the place of residence, after cessation of the marriage and settling in Poland."[40]

These regulations of marriage case in loss the citizenship implied that women seems considered as subjected to men in these countries.

2. The Differences of Two Citizenship (or Nationality) Law Between Visegrad Four and China

Although, we could find numerous similarities from these different citizenship or nationality laws, nonetheless, it is still have many differences between these different countries' laws, since the differences of culture, economic condition and so on. Basically it will be divided into the following parts: the historical background of the drafting period of the law, the differences of acquisition of nationality (or citizenship) between Visegrad Four countries' and Chinese citizenship or nationality law, the differences of loss of nationality (or citizenship) between Visegrad Four countries' and Chinese citizenship or nationality law.

2.1 The Historical Background of the Drafting Period of the Law

The producing from National Ordinance of Qing Dynasty was quite related with the overseas Chinese. There is a long time the Qing Dynasty did not admitted these overseas Chinese,[41] and the concept of nationality is not existed. In the ancient China, the system to calculate the population and distinguish the people's hometown is family register system.[42] According to the *jus sanguinis* principle, the descendants of Chinese will always Chinese, no matter he or she lives in China or not. However, with the weakness of Qing Dynasty and the development of capitalism in Europe, the capitalism countries came to all over the world to find market or colony. In such circumstance, the direct reason for Qing Dynasty introduced the nationality law had appeared. Since 1880 s, Netherland tried to govern the Chinese which lived in its colony, the territory in Indonesia nowadays. The overseas Chinese did not accepted it and ask the help, with the purpose of ruling the overseas Chinese and regulating the nationality problem in China,[43] the Qing Dynasty published the first nationality law.[44]

Nevertheless, when come back to examining the historical background, the requests from overseas Hungarian were definitely not the most important one. After the revolution of 1848, with the unification of Italy and Germany, national movement spread the Europe. As a result of the establishment of new states, the legislative activities happened. Hungary witnessed the upsurge of legislative activities and finally On 21 August, 1879, the Minister of the Interior received the drafted bill on acquisition and loss of citizenship law, then Ministerial Councilor, György Lukács, sent the bill to the Prime Minister. Sooner, after the permission of Royal Court in Vienna, this bill was discussed by the MPs in Hungary Parliament, and on 20 December 1879 the bill sanctioned by Emperor Franz Joseph.[45]

In Poland and Czechoslovakia cases, the background of drafting period is quite similar. After the First World War, the great powers in Europe signed the Treaty of Versailles, Because of the long lasting fighting for independence, Poland and Czechoslovakia got rid of the control of Austro-Hungarian Monarchy and other great powers in Europe, and started their own road of developing. However, not only in Poland, but also in Czechoslovakia, the biggest problem is there are too many minorities in their territory, and numerous Poles and Czechs or Slovaks live outside the country. In order to solve this problem, and based

[36] Ibid 23, Article 13.

[37] It is mentioned in Dr. Norbert Varga's paper, the child born out of wedlock would lost the Hungarian citizenship if his or her foreigner national father legitimated the child's status. Ibid 35.

[38] Ibid 23, Article 13, subparagraph 1.

[39] Ibid 35.

[40] Article 10, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 27 August 2016.

[41] It is said by the government that "人已出洋，已非我民，我亦不管" which means the Chinese who are in the overseas, are not Chinese already, the government shall not govern them and have responsibility to them. 清季外交史料[The Diplomatic Documents of the late of Qing Dynasty] vol. 166, cited in DING, Yuan, '《大清国籍条例》: 中国第一部国籍法的产生[National Ordinance of Qing Dynasty: the Producing of the First Nationality Law in China]', Overseas Chinese Journal of Bagui, vol. 16, no. 4, 1992, p 31.

[42] XIAO, Yongping, GUO, Minglei, 论国籍观念的演进与国籍法的变革[On The Development of The Concept of Nationality And The Change of Nationality Law], Law Review, no. 6, 2007, p 66.

[43] In the late of Qing Dynasty, it was common that Chinese which lived in the coastal areas changed their nationality in order to get some privileges. LI, Yan, 《大清国籍条例》制定过程之考证 [The Research of Law-Making Process of National Ordinance of Qing Dynasty], *Historical Review*, no.2, 2013, p 99.

[44] Ibid, see also Ibid 42 and 43.

[45] Ibid 5, p 128.

on the *jus sanguinis* principle, both citizenship acts regulated some rules in Poland and Czechoslovakia.[46]

2.2 The Differences of Acquisition of citizenship (or Nationality) Between Visegrad Four and Chinese Nationality Law

Since the citizenship acts between Visegrad Four countries and China are based on the *jus sanguinis* principle, there are lots of similarities in citizenship acts. However, each countries has its different condition and characteristics, it will have some differences in each citizenship act.

In the case of descent, as a result of the principle of *jus sanguinis* which were applied in all of these laws. It seems there aren't too much differences, the child born to have a pair of Chinese parents shall have Chinese nationality. The citizenship act in Visegrad Four countries had similar provisions in the same case. However, the provision of National Ordinance of Qing Dynasty stated that if before the child was born, the Chinese national father dead, no matter the mother's nationality, the child shall acquire Chinese nationality.[47]

When we speak of the case of marriage, it always means a foreigner woman married a man and got the man's nationality. All of these two laws also ask the valid of the marriage. However, the National Ordinance of Qing Dynasty didn't provide the resource to solve the dispute of invalidity of marriage. In Hungarian citizenship law it provides a method to solve this problem, the final judgment of the court.[48]

For foreign nationals the most common case of acquire a Chinese nationality or Visegrad Four countries' citizenship is naturalization, there are seems not to much regulation of naturalization in Polish and Czechoslovakia citizenship acts, in Czechoslovakia, the case of naturalization was considered as an "act of mercy by the state and renunciation of any previous citizenship upon naturalization was requested".[49] There are some regulations of naturalization in Chinese nationality law and Hungarian citizenship act. In National Ordinance of Qing Dynasty, one third of the provisions are related to naturalization. Because of the influence of Confucianism, some special provisions were regulated. A married woman shall not allow to acquiring Chinese nationality even she lived separated with her husband.[50] Hungarian citizenship law provided some exception in this case, if the woman not live with her husband, she may apply for Hungarian citizenship.[51] Re-naturalization were available in these two laws, however, there is a different condition to apply it. National Ordinance of Qing Dynasty regulated that a married woman could allowed to acquiring Chinese nationality when she was divorced or widowed. In other case, the originally Chinese want to get his Chinese nationality back, he should live in China three years continuously when he renounces his Chinese nationality.[52] In Hungary, the subject of re-naturalization should be originally Hungarian, excluding the person who lost their Hungarian citizenship by authority's decision.[53]

Legitimization is the last case in Hungarian citizenship law. An out of wedlock child shall acquire his or her Hungarian citizenship, in the case of his or her Hungarian father recognizes him or her.[54] In Czechoslovakia, the father shall declare his fatherhood, when the parents get married after the child was born, and during the declaration of fatherhood, two witnesses were requested.[55] However, in Poland, a child who is under 18 years old shall get his or her Polish citizenship by an entitlement, recognition and adoption.[56] In the National Ordinance of Qing Dynasty there isn't a concept of legitimization, however, in the Paragraph 3, Article 5, the naturalization section, this provision express the same meaning.[57]

However, since there were quite a lot of German, Hungarian and other minorities who live in Poland and Czechoslovakia,[58] the most differences of acquisition citizenship in Poland and Czechoslovakia is there are many regulation of case of option in Polish and Czechoslovakia citizenship act. In Polish act, it regulated that the Poles who live in other countries shall get the Polish citizenship if they renounced their citizenship of other countries.[59] For the people who live in the former Austro-Hungarian Monarchy, Prussian State and Russian Empire, which now are one part of Second Polish Republic shall get the Polish citizenship.[60] In Czechoslovakia, the citizenship act provide much more regulations of option, the people who live in the territory

---

[46] In order to solve the problem of the minorities in their territory, Poland and Czechoslovakia stipulated plenty rules of it in their citizenship acts. However, since the series of agreements which signed in Versailles and other places, the protection of minority should be considered in their drafting version of citizenship acts. See GORNY, Agata, and PUDZIANOWSKA, Dorota, *EUDO Citizenship Observatory, Country Report: Poland*, revised in May 2010, p 2, http://eudo-citizenship.eu/docs/CountryReports/Poland.pdf, Accessed 28 August 2016. BARSOVA, Andrea, *Citizenship Observatory, Country Report: Czech Republic*, revised and updated March 2013, p 2, http://eudo-citizenship.eu/docs/CountryReports/Czech%20Republic.pdf, Accessed 28 August 2016.

[47] Ibid 23, Article 1 Paragraph 2.

[48] Ibid 35, p. 466.

[49] BARSOVA, Andrea, *Citizenship Observatory, Country Report: Czech Republic*, revised and updated March 2013, p 2-3, http://eudo-citizenship.eu/docs/CountryReports/Czech%20Republic.pdf, Accessed 28 August 2016.

[50] Ibid 23, Article 7.

[51] Ibid 35, p. 468.

[52] Ibid 23, Article 21.

[53] Ibid 35, pp.471-472.

[54] Ibid.

[55] The introduction of citizenship rules in Czechoslovakia, see at the website of Embassy of the Czech Republic in Tel Aviv. http://www.mzv.cz/telaviv/en/visa_and_consular_services/citizenship/who_is_citizen_guide_to_czech.mobi, accessed 28 August 2016.

[56] Article 6, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 27 August 2016.

[57] Ibid 23, Article 5, paragraph 3.

[58] Before independent, the most territory of Poland and Czechoslovakia were part of Austro-Hungarian Monarchy and German Empire.

[59] Article 3, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 29 August 2016.

[60] Ibid, Article 2.

of Czechoslovakia had the right to opt their Czechoslovakia citizenship, no matter their original citizenship. The Czechs or Slovaks who know Czechoslovakia language and live in the territory of Italy, Poland, Austria, Romania, Serbia-Croatia- Slovenia State and Hungary now had the right to opt their Czechoslovakia citizenship and they must be older than18 years as well.[61] Also we should notice that since change of territory, there were numerous minorities in Poland and Czechoslovakia, in this case, the principle of *jus soli* also applied in the citizenship act.[62]

2.3 The Differences of Loss of citizenship (or Nationality) Between Visegrad Four and Chinese Nationality Law

As mentioned previously, the case of renouncement or acquisition other citizenship is the most popular reason to lose one's citizenship or nationality in these countries. Nevertheless, in different country, there is still has some differences. In Hungary, there are two cases of loss of nationality in Hungarian citizenship, the case of absence and authority's decision. A Hungarian citizen who lived in the overseas continuously for 10 years, he or she may lose his or her Hungarian citizenship. However, if the Hungarian citizen had visited to Hungarian during the period of ten years, this period shall be interrupted. Also the absence condition was a consequence of war, it shall not account in the period of ten years. What's more, people who lost their Hungarian citizenship want to acquire Hungarian citizenship again, they may choose re-naturalization. It was less procedure than naturalization's.[63] In the case of Lose one's Hungarian citizenship by authority's decision was regulated by Act 50 of 1879, in the case of a Hungarian citizen against his or her motherland-Hungary.[64]

In Poland, the Polish citizen may renounce his Polish citizenship in the case of acquiring of other country's citizenship, however, in such case he should fulfill his compulsory military service, if not, he will still consider as a Polish citizen.[65]

Before the publish of National Ordinance of Qing Dynasty, Qing Dynasty treat the overseas Chinese as a person who renounce his or her Chinese nationality, however, owing to the requesting of overseas Chinese, Qing Dynasty recognize the nationality of overseas Chinese.[66]

Even though Qing Dynasty (China) and Visegrad Four countries stand thousands miles apart, there are still some similarities in the nationality law, all of these countries were based on the principle of *jus sanguinis* in their citizenship act or nationality law. Nevertheless, the different cultural and Political economy condition made the law between these countries had some differences.

[61] Article 4 and 5, Sbirka Zakonu a Narizeni Statu Ceskoslovenskeho. No. 46 of 1920. http://ftp.aspi.cz/opispdf/1920/046-1920.pdf, accessed 29 August 2016.

[62] For instance, in the Polish citizenship act it regulated that "a person who was born in the territory of the Polish State and is not a citizen of another country." See Paragraph 2, Article 2, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 29 August 2016.

[63] Ibid 35, p 481-485.

[64] Ibid 35, p 487.

[65] Article 11, The Polish Citizenship Act of 1920, http://en.yourpoland.pl/userfiles/pdfs/polish-citizenship-act-1920.pdf, accessed 29 August 2016.

[66] MIU, Changwu, and LU, Yong, '《大清国籍条例》与近代"中国"观念的重塑[National Ordinance of Qing Dynasty and Rebuild of The Concept of Modern 'China']', *Nanjing Journal of Social Sciences*, no.2, 2012, p 153.

First Trademark Regulations in Bulgaria

Fanny Koleva *

Abstract

The aim of the paper is to disclose the specificity of trademark protection regime according to the first piece of legislation of Bulgaria as independent country (dated 1892) in comparison with the preceding regulations in the field, part of country's past in the frames of Ottoman Empire (dated 1870). The corner stones of this comparison are the conditions and procedure of protection, its scope and instruments of support, as well as the opportunities for geographical indications' protection available. The analysis is realized from the perspective of relevant and contemporary trends in trademark theory and practice. The study respectively reaches the conclusion that when similarities between the two acts are observed, they are mostly a result of the level of development of trademark regulations in the period than of an imitation of the norms of earlier regulation by the later one.

Key words: *trademarks; trademark history; Bulgaria; Ottoman Empire; ottoman; trademark legislation; trademark regulations; trademark protection; geographical indications.*

1. Introduction

Contemporary trademark regulations appear in developed countries in the second half of 19 century mostly. The first statute of Bulgaria in the field of intellectual property (IP), its Law on trademarks and industrial marks (1892), was not the first trademark act in the country, however. Being part of the Ottoman Empire until its Liberation (1878), Bulgaria followed imperial regulations - the Statute on the distinctive signs (marks), stamped on the factory industrial products and on the goods (1870).

The purpose of paper, therefore, is to reveal if the legislation of Bulgaria is based on Ottoman regulations. Following the introduction, the tasks of paper are to analyse:

a) the specificity of Ottoman trademark system from the perspective of registration procedure and scope of protection and in comparison with the relevant and contemporary trends
b) the specificity of Bulgarian trademark system from the same perspective and in comparison with the Ottoman system, before we conclude.

2. Legislative environment

France is the first country with modern trademark legislation (1857), establishing deposit system and unifying protection theories (on base of use and of examination, but not substantive). The laws of some other countries are introduced as follows: UK – 1862, USA – 1870 (federal law, preceded by state laws), Germany – 1874, Japan – 1884, etc (Casati and Buchan, 2002a, b; Shoen, 1999).

It's therefore impressive that Bulgarian trademark legislation appeared in 1892, especially having in mind the facts that many other regulations are introduced later (e.g. Commercial law - 1897) and that IP legislation is developed after the World War I mainly, according to country's obligations, connected with the Treaty of Neuilly (1919).

What is even more impressive from the perspective of time is that Bulgaria applied the relevant Ottoman regulations before its Liberation. Moreover, Ottoman statute is considered to be the second trademark regulation in continental Europe after the one of France and therefore - accordingly based on French legislation.[1]

3. Ottoman statute (1870)

3.1 Introductory part

Regulations start with definition of "distinctive sign", the more popular variant of "mark" at that time. It's based on the most important function of trademarks – distinctive ability: distinctive sign is every sign, which someone has taken to serve him for distinguishing his goods from the rest (article 1). This is the definition until today, the only difference being the lack of services, quite logical for the period. The definition doesn't require graphical presentation or visual perception as nowadays, but the rule nevertheless is present in further regulations.

Law gives examples, which is the approach today too. The regulation starts with them in fact while revealing the term on base of listing and summarizing it in the cited definition - every name, stamp and image, letter or numeral symbol, etc., which is stamped on the industrial products of some factory or on the goods, in order to note the place of their production or

* Fanny Koleva, PhD, University of National and World Economy, Sofia, Bulgaria.

1 For more information, see Assemblies of the member states of WIPO, General report, 2009.

the factory, from which they come, or the manufacturer, or the merchant, who sells them. Contemporary laws define the term usually and proceed with listing of examples, incl. not only the non-exhaustively indicated by the Statute, but also the newer for practice special marks (e.g. form of the good or its package, colour combination, sound, etc.).

Another regulation states that protection is given, only if the sign is registered according to Statute's regime. Registration is the most popular and broadly used approach for trademark protection today, which is not the case for commented period. The main alternative variant – use, has been more popular then, the reason for change being the insufficient legal security and trademark owners' preferences for registration, accordingly followed by legislators. Therefore even countries, which still recognize use, started treating it as an alternative, but not a leading approach as before. Article 3 elaborates further, stating that no one can claim against others, who imitate the sign, on base of his exclusive ownership, until he registers it according to Statute's requirements.

The term of registration is 15 years and it can be renewed following the same regime each 15 years (article 4). Nowadays it is 10 years usually and renewal is easier than initial registration. Even though, registration according to the Statute is not that heavy, explaining the difference.

The applicant pays a fee for registration and gets a proving document (article 5), exactly as today. Applicability is defined (article 6), also including the foreign persons, realizing commercial activity in the Empire under a trademark according to Statute's order. Moreover, judicial system regulates the arguments between foreign parties, if they fall within the scope of Statute. The act is quite liberal in this respect, especially having in mind the level of development of international commerce at that time, as far as nowadays it's more popular that laws are applicable to foreign parties, if they come from countries, parties of international agreements or on base of reciprocity.

3.2 Registration

It starts with sign depositing in the civil court according to applicant's residence - administration is not entrusted to a central specialized body as today, but realized, at least at first phase, by the judicial system at local level. This is fully explicable for its time, having in mind the opportunities for long distance traveling within the boundaries of Empire. Moreover, the Paris convention for the protection of industrial property (1883), laying the basic standards and the beginning of harmonization in the field, incl. regarding the creation of a specialized competent body, is not a fact yet.

As concerns to procedure (see figure 1), the requirement of graphic representation is part of depositing regulation namely (article 7), demanding two printed copies of the sign, if printing is possible, or two images fully identical to the initial, if not. The images are accompanied by explanation and signature or stamp of the applicant or his representative, as well as by all the documents, connected with depositing (e.g. letter for the representative, if one is used). The application today has similar contents – request for registration, trademark representation, name and address of the applicant, etc.

Procedure continues with filing of trademark into relevant registry, accompanied by unique number (the serial number according to the order of application submission), date of filing, name of the owner, his occupation and address and type of the industrial products or goods, on which the sign will be used. Those are the basic requisites of trademark filing today too. Moreover, although the goods are not mentioned in application contents, their later presence in registry clearly shows that the principle of specialized protection is at hand since the time of Ottoman Empire. The filing is stamped or signed by the chairman, the recorder and the applicant (article 8).

Process continues with issuing of temporary certificate about depositing, signed by the local governor, the chairman of court and the recorder against payment of a Turkish lira for the local city council (article 9). The main governor of area immediately sends documentation (the second trademark representation with the relevant registration requisites, also signed by the mentioned parties) in Constantinople (Istanbul) to the Ministry of justice (article 10). It itself makes the necessary filing in special centralized registry, saves the documents and sends back the real certificate to replace the temporary one no later than 1 month. Therefore although trademark is registered at local level, it has statute of application until confirmation by the Ministry of justice. The Statute doesn't prescribe for additional examination on the part of Ministry. Procedure therefore is similar to the later Madrid system for the international registration of marks (1891), guaranteeing registration from an earlier date and realizing technological savings.

To resume, Empire system includes a regime of registration, but not examination, as far as the Statute doesn't prescribe any other requirements, neither check-up for the suitability of sign to function as a trademark. The systems today are rarely registration ones (and even if so, they usually contain requirements, but do not examine them).

3.3 Protection

Claims can be civil and criminal and are shortly heard at local level (article 11). Today there are also administrative procedures usually and the bodies are very often specialized. Shortly, the system develops in direction of specialization, which is in favour of its beneficiaries. The opportunity for quick hearing in the Empire must be positively evaluated.

The Statute envisages, if defendant questions validity of rights, this claim to be added to the previous one and to be heard by the same court. Legal systems today have different approaches – some of them follow the same route and others prescribe that there would be two cases because if the infringer had any consideration about trademark validity, he should have raised them in advance, but not as a defense.

In case of infringement the trademark owner can claim seizure of relevant goods (article 12). The court takes into consideration the sign, used by the infringer, and the quantity of goods, on which it appears, as well as the document, certifying trademark depositing by plaintiff. It can also appoint experts in ones support. It can require from the plaintiff depositing of "certain amount of money" for guarantee before allowing goods seizure too. The owner of goods is informed in a written form

about seizure decision and receives a copy of the depositing document too. If any of the formalities is not observed, the guilty party must compensate the other one. In order to continue the procedure, the plaintiff must lodge infringement claim in term of 15 days from the date of seizure, and in case he "dwells far from the place", he receives additional term of number of days, corresponding to the distance between the two places. One day is considered to cover distance, which can be passed for 6 hours. If claim is not timely lodged, seizure is considered invalid, but does not affect the right of claiming damages (article 13).

Nowadays systems usually envisage provisional measures through seizure of the infringing goods, as well as appointment of experts. The Statute also impresses with the provided opportunity for compensation in case of illegal actions in the procedure, as well as with the prolonged term for claim lodging in case of plaintiff's remoteness from seizure place.

Penalties for claims of trademark infringement are envisaged both for parties, who directly use another's trademark on their goods, and for subjects, who imitate such signs in their commercial activity, incl. through deliberate selling or offering for sale infringing goods, which are not supplied with the consent of right holder (article 14). Even in that time the use of similar signs is considered infringement, as well as the informed trade with infringing goods (in fact they are even recognized being crimes), as today. Penalty provided is fine between 2 and 50 Turkish lire proportionately to the crime, or imprisonment between 1 and 6 months, or both.

Penalty is usually different today according to the followed approach - it can be fine or property sanction (most often for administrative proceedings), compensation, depending on the material and non-material damages suffered and benefits missed (for civil procedures) and imprisonment (and/or fine – for criminal routes). The regime of Empire is a combination between civil and criminal approaches. Besides fine, moreover, an opportunity for imprisonment is prescribed as possible sanction for trademark crimes, as well as proportionality of penalty to infringement, exactly as today.

If another's goods are marked with trademarks, which do not correspond to their real manufacturing origin, this is also considered infringement (article 15). Legislator takes measures against the opportunity parties, who are not manufacturers, but have the engagement to transfer the goods to the consumers, to "remake themselves the image of some sign with wily purpose" in order to confuse consumers about the real origin of goods and respectively – to realize sales on the back (and to the prejudice of interests) of the real trademark owner. Such text isn't usually present nowadays, as far as it's a part of the more common regulations forbidding trademark use by third parties. Even though, it is sometimes at hand in laws, showing high level of legislative care for the interests of trademark owners, as well as of consumers.

The norm considers infringement the situation when parties mark goods with other types of signs in order to "deceive the customer" or "knowingly sell or offer for sale goods, bearing such signs". This regulation probably considers geographical indications, as well as signs, the marking of goods with which is connected with government decisions (both categories being later regulated). Sanction respectively is fine between 2 and 30 lire, imprisonment between a week and 2 months, or both. Trademark laws today do not usually have such a broad concept for trademark as in the time of Empire - every sign is not considered trademark and is not regulated by relevant law.

If claim covers few infringements, defendant is sentenced according to the heavier crime (article 17), as is usually today too. The Statute provides opportunity for doubling of sanction in case of repeated crime (if infringement occurs in term of 5 years from the first verdict, article 18). Systems currently also provide for sanction increase in case of repeated infringement, while its size usually depends on the type of infringer and protection approach and can reach double size sometimes.

Seizure of infringing goods can be imposed not only as a provisional measure, but also after verdict announcement (article 19). The goods can be transferred to trademark owner or their value can be deducted from the compensation, if infringement is in the scope of articles 14 or 15. They can also be destroyed in the opposite case. Contemporary systems envisage such opportunities too, being in the same time more developed procedurally.

3.4 Geographical indication and other distinctive signs

Geographical indications' protection is connected with the opportunity to oppose to false indications for the geographical origin of goods, incl. in public (and consumers') interest safeguard against misleading. Statute provides sanction for such use both for the relevant producer, and for the sellers, who knowingly sell or offer for sale commented goods. According to the level of infringement it's size is between 2 and 50 Turkish lire, imprisonment between 1 and 6 months or both (article 21) and claims are heard under the same order as trademarks (article 22).

There is not a single conclusion regarding comparison with current situation as far as geographical indications are treated differently by countries. Some states recognize them as a separate type of IP and provide a sui generis regime of protection. Others protect them as collective or certification marks being closest to their nature (use by more parties and specific requirements for goods). Third legislations apply the instruments of unfair competition protection, more specifically for misleading, for infringements against geographical indications. Moreover, very often a certain combination of approaches is applied, while one of them is prevailing. The approach, which has first appeared, is the one of unfair competition and it is also applied by the Statute. Moreover, the first relevant international treaty – the Madrid agreement for repression of false or deceptive indications of source on goods (1891), is not a fact yet. Therefore Empire regulations are also relevant for their time.

Impressively, the goods can be detained upon import, if customs identify false indications of source on them (article 23). Afterwards they have to inform the local civil court, after which a process has to be initiated in the term, prescribed by article 13. The goods can also be seized as provided by article 19.

It seems, however, that regulations refer only to goods, produced in other parts of the Empire, as far as they repeatedly use the phrase "the name of another place in the Ottoman state,

and not the one, where they are produced". Whatever has been at hand, however, regulation is really modern for its time, especially if the fact is considered that custom measures are not necessarily explicitly provided for geographical indications even today.

What is particularly interesting from the perspective of current trademark trends is the regime, regulating the opportunity of government directing the use of distinctive signs on some types of goods. Article 2 specified that the use of trademarks was not obligatory by principle, but if it was ordered by government for certain type of goods, it became obligatory. If the producers or sellers do not observe this requirement, the sanction is fine between 1 and 10 lire, imprisonment from 24 hours to a week, or both (article 16). Moreover, they are obliged again to put the signs on goods, and if infringement is repeated in term of 5 years, the goods are seized (article 20).

As far as this is not a common regulation nowadays, additional research has been made[2]. It showed that certain countries had obligatory "marking" of cattle (e.g. Australia and Kenya) in order to prevent its theft or identify it easily, especially in border areas. Such norms are at hand not only in the time of Statute, but today as well - other countries (e.g. Russia) have a system for marking of jewelry in order to verify the fact that it corresponds to certain requirements/ standards. The two examples show that even if such regulations are at hand, they have more specific purposes and do not refer to the classic trademarks functioning, but basically to the facilitation of public authority agencies' activity or the management of certain standardization/ certification systems. The last issue is much more often regulated by the norms of certification marks today, than by regulations, similar to the commented. Nevertheless, as far as it's passed in 1870, when trademark laws regulate other types of signs as well, and having in mind that not only then, but today such texts are also at hand in some legislations, Statute's regime in the commented direction is not surprising.

4. First Bulgarian law (1892)

4.1 Introductory part

Differently from Ottoman statute, its text is shorter, envisaging creation of further regulations to elaborate on its application. For the purpose of comparison and facilitation of reader, the structure of Statute will be applied here as well and further specified according to the contents of law, where applicable.

4.1.1 Definition and grounds

Definition is connected with the distinctiveness of sign as before (article 1). This time "trademark" is the official name of term. The text is fully in the form of definitions nowadays: "The word mark is used to identify signs, put by merchants/ manufacturers on the articles, they offer for sale, in order to distinguish them from the similar articles, sold by other industrialists or merchants". Only services are lacking, the reasons being the same as for Statute, as far as the period of 20 years between two acts has obviously not been long enough for such a dramatic change in business relations to premise insertion of services in latter law.

Regulation continues with exemplary listing of possible signs – approach, present both in the Statute and in contemporary laws: "Such signs can be the trade name of the factory or the merchant, depicted on a specific form, the monogram of the manufacturer or seller, images of animals, buildings, allegory figures, etc." The law is closer to current approach as well – it starts with a definition and continues with exemplary listing, but not vice versa (as Statute). The special marks are not at hand, which is explicable with the epoch of regulations' introduction again. The requirement of graphic representation of sign is also missing from definition, but present in procedural regulation.

Following norm is more important from current perspective. It explicitly excludes as possible trademarks "the portraits of the Sovereign and of his family, the state armorial bearings, simple numbers and letters". Those are the only absolute grounds, prescribed by law. It, however, doesn't comment relevant examination. The text contains some of contemporary absolute grounds, namely that the sign must not by symbol of state sovereignty (incl. armorial bearings, flags, etc.) and that it must have distinctive character. Trademark theory and practice develop different requirements, connected with distinctiveness. One of them is that some signs are principally deprived of distinctiveness and not suitable for trademarks, except if they have not acquired distinctiveness through use. Single letters, figures and colours are among them, as well as simple geometrical figures. Commented text is obviously in synchrony with this point of view. This is impressive, especially having in mind the Statute, which doesn't have such a norm, and current laws, which have no such explicit requirement usually, although they demand distinctiveness.

It's even more interesting that the portraits of king and his family members are excluded, which is also not present in the Statute. The most probable explanation is that the same requirement is applied for the monarch as a symbol of state sovereignty, as for the other symbols of the kind (flags, armorial bearings, etc). The rule is present not only in contemporary laws, but since the Paris convention until today. On the other hand, it appears in the 1925 version of treaty. Therefore Bulgarian law is modern for its time in this respect.

On the other hand it's clear that the non-use of such symbols for commercial purposes is not the only aim achieved. In the case of monarch there is a specific reputation as a person as well. Nowadays the use of reputation of real and imaginary characters is object of attention on part of trademark theory and practice, incl. from the point of view that other parties can not register and/or use them as trademarks. As far as market relations at that stage have not been sufficiently developed in this respect, however, the mentioned portraits are probably protected only as symbols of state sovereignty.

[2] For more information see State will abolish compulsory branding requirement for local jewellery producers?, November, 2004, http://en.rian.ru/business/20041103/39772587.html?id=, Australia -livestock thefts, March, 2011, http://www.meattradenewsdaily.co.uk/news/040311/australia__livestock_thefts_.aspx и Kenia Gazette, August, 1907, http://books.google.bg/books?id=ENE33AV-5mQC&pg=PT21&lpg=PT21&dq=compulsory+branding&source=bl&ots=Jk9HFYJHWS&sig=XY8G-cQ1HuYVgwXAqRfSsMFb7Q8&hl=en&sa=X&ei=aKJVUcP_HoGatQb7zoH4BQ&ved=0CDsQ6AEwAg

The issue continues in another regulation (article 2) - the use of state armorial bearings as trademarks can be allowed. Current laws also envisage such opportunity in case of consent of relevant competent body, in synchrony with Paris convention. What is more interesting is that the norm specifies in what cases such an approval can be given – to producers, who have won first award at some exhibition. The regulation requires from the entrepreneur to use his own trademark as well in order to distinguish himself from other parties, who have also acquired this right. Current international treaties and laws do not usually prescribe the circumstances, under which such a use can be allowed and leave this to the competence of relevant body and the regulations of its activity. On the other hand, the restriction of opportunity for use of armorial bearings as trademarks only to the cases of winners of first awards is symbol of legislators' care for the protection of reputation of those signs. The same is at hand for the requirement for co-use of merchant's trademark. It must also be pointed out that state sovereignty symbol regulations refer only to native signs, but not to the ones of other countries (as current laws usually do in synchrony with Paris convention).

4.1.2 Connection of trademark with its owner

Regulations continue with this exactly, i.e. the destiny of sign follows the one of enterprise, owning it; the mark can not be used or assigned separately from it (article 3). This concept is a classic in trademark theory and practice. Their development needed a long time to reach the point that trademark can be independent asset, which doesn't necessarily follow the destiny of owner. The mentioned restriction is up-to-date not only for its time, but decades after. Even today some countries recognize trademark assignment only together with the relevant business goodwill and consider the deal invalid in the opposite case. Other legislations require from the new owner to guarantee that the quality of goods bearing the mark will remain the same.

Law envisages additional requirements in case of transfer of enterprise in order to validate trademark registration on the name of new owner. The last has to inform the competent body about transfer and ask for filing as new trademark owner in term of 3 months. Otherwise registration is terminated. This is only irrelevant for cases, when ownership goes to the heirs of trademark holder. Nowadays the same logic is applied – in order to have updated information about trademark ownership (incl. in favour of third interested parties) the competent body has to be informed about relevant changes. Differently from that time, the laws today are usually more liberal - there is not always a term for filing of the new circumstances, and if there is no filing, it's usually considered that the assignment can not be opposed to third parties.

Regulation continues that the termination of owner's activity terminates trademark's existence too. The same is usually prescribed by trademark laws today in case the owner is a judicial person without successors. What current legislations prescribe additionally is that termination can be requested by any interested third party usually.

Law continues with prohibition for trademark use by parties, different from the owner (article 4). This is a standard regulation for its time, and even today sometimes. Then and long years afterwards it's considered that trademark realizes its basic function – distinguishing, only if used by owner. If used by other parties, no matter if with his consent or not, even in a way fully identical to his, trademark already symbolizes another manufacturing/ commercial origin and leads consumers into confusion. Decades later it's recognized that if use is realized in the same way as by the owner and under his control, it's analogical to his use and therefore – permissible. Additional norms are respectively developed in laws to regulate licensing. Although rarely, licensing is still limited today in some countries because of the commented logic. In some laws the requirement for approval of licensing contract by the competent body is still at hand. The Statute doesn't have relevant requirements.

Article 5 is more interesting saying that trademark use is not obligatory besides in cases when laws impose such a duty. Although this regulation is curious from current perspective, it's common for its time, as showed the analysis of Statute. The last, however, binds the potential obligation not with the application of other laws, but with governmental decision. It contains additional regulations for cases, when the obligation is not observed, while the law doesn't, clearly leaving this issue to the "other laws". The lack of such regulations nowadays is fully explicable with the fact that trademark laws now regulate trademark issues, but not other signs usually.

4.2 Registration

"Whoever wants to reserve exclusive right on a trademark, he must present it for recording according to the following rules" (article 6). Such text is common for trademark laws, especially in countries with continental legal tradition. The more interesting question is if procedure is similar or different from the one of Statute and from current variants. It is realized in the relevant local administration office and starts with application, addressed to the local governor, accompanied by three representations of trademark on "special sheets" (article 7, see figure 2). The governor puts a date and hour to all the documents, his stamp and signature and transfers them to the financial clerk. Procedure is realized at local level initially, exactly as under the Statute. Here, however, not the court, but the local administration is competent and more specifically – its financial department, keeping the trademark registry. Or trademark registration is a responsibility of executive power, as is usually today too. At that time the Paris convention is already signed and it requires even a specialized agency. But as far as the country is not its member yet, it's fully explicable that the competent body is not specialized. Moreover, this is the period of first 15 years after the Liberation, i.e. the lack of specialized body can also be explained with the lack of administrative capacity. Together with this the requirement for "special sheets" can be interpreted in direction of existence of specific forms, used in the procedure, which is impressive for the time.

Process continues with attaching of one of representations to the registry, accompanied by applicant's name and address. The second exemplary is given to the applicant after writing in the blank space near the image the number of registry page, where the first copy is attached, and signing it. The third copy,

identical to the second, is sent to the Ministry of finance, keeping a uniform registry for the country. The three exemplars are stamped with marks of 4 leva (Bulgarian currency) for each one.

Procedure is very similar to the one, prescribed by the Statute, with the logical difference that documents are sent not to Constantinople, but to Sofia (the capital of independent country). After studying the regulations further (article 8), it becomes obvious that those are not the only differences. While Statute doesn't provide for substantive examination, the law requires from the financial clerk to check if the mark is not similar to any of the earlier recorded signs, intended for use on articles identical to the ones of new applicant, before recording the sign in registry. The law therefore provides for substantive examination of the relative grounds at local level. Although previous regulations do not comment the specialized character of protection, procedural texts unambiguously restrict it respectively. Protection extends not only to the use of identical signs by other parties, but also to similar signs, as today.

If the clerk finds conflicting previous rights, he doesn't register the mark and gives the applicant opportunity to correct it – option, existing today too. If application refers to "goods of different kind", there can be "no hindrance" for registration. It's interesting what is the meaning of "goods of different kind", i.e. if it refers only to non-similar goods as today, or also includes similar (but not identical) goods. It's assumed from current perspective that legislator missed to specify what "identical articles", respectively "goods of different kind" mean, than to state that protection doesn't cover the use of mark on confusingly similar goods.

Law explicitly prescribes that it's possible to have "disagreement on the identity of articles", in which case applicant asks the Ministry of finance for resolution. This also means that the system prescribes administrative opportunity for challenging of examination decisions, as is usually today.

After the local stage, the ministry makes verification in the central registry for existence of preliminary rights (article 9). Here the term used is "similar", being different from "identical" and once more confirming the view point for protection, covering use on similar goods. Regulation refers not only to the cases of arguments, but to the procedure generally. Therefore the document, issued at local level, has the character of temporary one until trademark registration by the ministry. Opportunity for corrections in case of problems is envisaged again as was at local level too.

Protection is practically granted after examination of earlier rights at national level. It's therefore interesting that such examination is done at local level too. A possible explanation is that the document of protection is first issued at local level, i.e. the purpose of examination there is not to issue such document, if there are problematic rights at local level and respectively - to ease the ministry. In case the trademark is registered at local level, however, the ministry has to make examination once more and it's obviously possible that it has a different outcome. The law doesn't specify what happens under such a scenario – if the ministry doesn't examine only the rights, acquired at the territories of other local administrations in order to avoid duplication of previous examination, as well as what happens with the document already issued. Logic says that it's considered invalid, except if procedure doesn't duplicate the one of Ottoman Empire and the Ministry always issues the final document of protection. Even though the law envisages issuing of further regulations, the lack of answer to those questions in it is definitely an omission on the part of legislator. Because of those and other disadvantages, commented further, only about 10 years later a new act has been introduced in the country.

Article 10 prescribes that in case of simultaneous application by few parties for "the same mark regarding the same products", the sign must be registered on the name of earlier applicant. Moreover, the hour is specifically marked in documentation. This is an opportunity very often regulated in the same way in IP laws (especially for trademarks) even today. Other frequent possible option is granting the exclusive right in co-ownership.

The system is practically one of examination, differently from the Statute. Procedure is certainly based on examination of relative grounds. It's not clear if the envisaged absolute grounds are examined, being disadvantage as well. Moreover, although the systems nowadays are really differing from the perspective of procedural variations, the regulations usually provide for examination on the absolute grounds and differ mainly in direction of examination of the relative grounds, its moment and influence on the procedure outcome.

The rights acquired have term of 10 years, and registration can be renewed unlimitedly, each time with the same term (article 11), exactly as is usually today too. Upon renewal the same procedure is followed and the same fee is paid. The regime of renewal, similarly to the Statute, repeats the registration one, and the term, differently from the 15 years under the older regulation, is shorter[3].

The law regulates the opportunity for foreign persons to "keep for themselves the right on the marks, which their products bear out of Bulgaria" for its territory too (article 12). Procedure is the same, as well as fees, which is definitely modern for the time. In this period the foreign persons have often been discriminated through higher fees or severe requirements as a result of protectionist policies of governments, which have also influenced IP. Moreover, our legislator provides this equal regime for the local and foreign persons although the country is not a member of the Paris convention yet (regulating the issue in the same way). The only difference between citizens and foreigners is that last should file their applications in the local administration office of Sofia. And yet, the legislator provides this opportunity for foreign persons, only if their countries recognize the same rights for Bulgarian merchants and manufacturers, i.e. it introduces the reciprocity principle in order to protect the interests of its own entrepreneurs[4]. To compare law with the Statute it must be mentioned that last doesn't require reciprocity, i.e. it's more liberal.

[3] 15 years is not extraordinary option for its time.

[4] The norm practically says that foreign persons can get a refusal, if reciprocity is lacking, i.e. from formal perspective the law is more liberal again, compared to the common contemporary regime.

Another issue is that the law envisages public access to the registries (local and central) for all interested parties (article 14), an opportunity also relevant today, but not under the Statute.

4.3 Protection

An opportunity for customs to prohibit import of goods in infringement of rights of Bulgarian entrepreneurs is envisaged (article 13). It's interesting if this is option only for Bulgarian mark holders, but not for foreign ones, especially having in mind the fact that foreigners are equalized to local citizens under the conditions of reciprocity. Statute envisages such measures regarding geographical indications, but not marks, which shows the law is more advanced in this respect. Contemporary regulations in the field provide both opportunities usually.

Deliberate infringements of trademark rights are punished with fine between 100 and 1000 leva, and in case of repeated infringement penalty is doubled (article 15). Regulations envisaging fines and opportunity for their raising up to twice in case of repetition, are practically at hand in the Statute (but there they are applied expressly under court order) and in contemporary laws too [5]. The law, of course, envisages the opportunity for trademark owner to sue the infringer for compensation.

Fines between 50 and 500 leva are envisaged for the sale of goods, bearing trademarks of persons, from whom the goods do not originate, in case the merchant knows about the infringement (article 16). Statute envisages equal responsibility for the merchants and manufacturers of such goods, while the law obviously considers that manufacturers must be punished in a stricter manner. Contemporary regulations usually envisage equivalent responsibility for the two categories as well. The law, moreover, envisages "ridding" of the merchant, if he succeeds to identify with the help of reliable documents the "author of infringement". Or if merchant helps for the identification of original infringer, the law becomes very favourable for him. Legislators nowadays do not usually act in this way. In case merchant knows about the infringement and even though sells the goods, he bears his responsibility exactly as any other infringer. Moreover, the regulations today also envisage an obligation for assistance to the competent authorities on part of the persons involved for the purpose of infringement proving (i.e. they are not that liberal as the law as well). The law also provides punishment for merchants in case of repeated infringement, exactly as for manufacturers.

Subject of punishment are also persons, who produce or offer goods with marks, different from the registered, but with such a little difference that "the customer can be deceived". The law therefore envisages protection against confusingly similar signs in the usual manner as well. The Statute doesn't explicitly prescribe this opportunity, i.e. the law is an improvement of protection in this respect [6].

Another interesting opportunity is that in trademark infringement lawsuits the court may order publishing of verdict in the "more important newspapers in the country and in the Official gazette more times and at the expense of the guilty" (article 18). The Statute has no regulations of the kind. As concerns to contemporary laws, they usually prescribe such opportunities. Therefore the approach of legislator is not that extravagant. Moreover, it shows serious care about the entrepreneurs, realizing their activity under trademarks.

The law also envisages opportunity for seizure of the counterfeit goods, a standard hypothesis, existing from the creation of trademark protection until today. But differently from the Statute, under the regime of which the goods can be given to the trademark owner, here they are surprisingly confiscated only in favour of treasury.

The law logically prescribes that pursuit of infringers can only be initiated by trademark holder (article 19). Contemporary regulations allow the same for the licensee usually, but as far as at that time licensing is a non-existing opportunity, the norm is not surprising. The court, after verifying the existence of exclusive right on the base of certificate, "starts immediately establishing the crime and commences a suit against the guilty" [7].

Differently from the Statute, the law doesn't contain norms for criminal responsibility of infringers, although it calls the infringement "crime" too. It doesn't include regulations about geographical indications as well. Its last norms refer to the status of marks, which are already present in public life at the moment of its introduction (article 20). The entrepreneurs, who have already taken a trademark for their goods, must register it in term of 6 months from the publication of law. Afterwards "their mark is considered destroyed", i.e. they can not claim rights on it. This is not the common approach in case of introduction of a new law, i.e. the already existing trademarks, if registered, usually continue their life until registration expiration, after which it's renewed under the new regime. In the same time, however, as far as it's the first relevant law after the Liberation and the desire of legislators to emancipate country's life from what happened in the time of existence in the frames of Ottoman Empire is logical, such a regulation is fully explicable. There is logically no text of the kind in the contents of Ottoman statute.

[5] The law doesn't clarify if the fines are also applied after court proceeding or executive power body is engaged with their imposition. The common spirit of law, however, is that only the court is engaged with the protection of rights, acquired according to its order.

[6] The Statute contains, in connection with the opportunities for infringement pursuits, terms as "imitate", "imitative signs", "remodeled sign" together with the direct use of distinctive signs, meaning again that protection is guaranteed not only for use of identical signs by third parties, but also of similar ones.

[7] Article 19 is the only one, using "certificate". This most probably means that the Ministry, as previously supposed, after realizing examination of the sign, issues the final document of protection – certificate, or at least confirms as a final document the one, given to the applicant by the local administration office.

5. Conclusions

Ottoman statute doesn't envisage requirements to marks (in spite it calls them distinctive signs, i.e. it's implicitly introducing the requirement of distinctiveness), while the law contains both absolute (more specifically – connected with state sovereignty and explicitly with distinctiveness, although in a simplified form), and relative grounds for the signs. The system, functioning under the Statute is a registration one while the system, prescribed by the law, envisages substantive examination (for preliminary rights). The norms of latter regulation prescribe opportunities for corrections in application and challenge of local examination decisions before the Ministry. The law prescribes limited opportunities for actions with trademarks (e.g. assignments), as well as public access to trademark registries, which are fully lacking from the Statute.

Only Statute, on the other hand, provides opportunity for protection of geographical indications. It's more concrete and detailed as concerns to registration procedure and rights protection (criminal responsibility is at hand as well). But the law on its part has an opportunity for verdict publication and differentiates the burden of punishment according to the level of infringement (there is a special approach for merchants). Moreover, it provides customs protection for trademarks. There is also a difference in the protection term in favour of the Statute.

The latter act is better from the previous one in most of its regulations. Therefore the lack of norms about geographical indications, as well as the regime of protection in case of infringements, which is not well developed, are not explicable (although the further regulations expected could take care of the deficiencies).

As concerns to the question if the two acts are up-to-date with their time, it's a fact. Moreover, regarding the existence of specialized trademark registry, the country is even ahead of it, having such requirements in both regulations.

And last, but not least, the two regulations put each for its time and in full compliance with it, a very good basis for trademark protection at the territory of the country. And although they do not necessarily include regulations of a contemporary type, as far as business practice is different at that time, the distinctions between them show that legislation is considerably developing in the right direction. Moreover, this happens in a very limited term of 20 years. This is impressing, especially having in mind that the country has passed through its liberation movement during this period and has started building its institutions as a modern state. Probably the fact that Bulgaria starts quickly its modern market development after the Liberation, is due to some extent to the existence of going trademark regulations at that time.

References

Arnaudov, H. (1871) "Statute on the distinctive signs (marks), stamped on the factory industrial products and on the goods", in *"Full collection of the state laws, statutes, instructions and high ordinances of the Ottoman empire, with application of the treaties and protocols with foreign countries, of the issued emperor's firmans for the vassal principalities, of the necessary explanations and of alphabetic index",* Arnaudov, Tsarigrad, pp. 363-370.

Assemblies of the member states of WIPO. (2009) *"General report".*

Australia-livestock thefts, March, 2011, http://www.meattradenewsdaily.co.uk/news/040311/australia__livestock_thefts_.aspx (Accessed 29 January 2015).

Brestnichka, R. (2004) *"Brand management",* University publishing house "Stopanstvo", Sofia, pp. 67–72, 79-83.

Casati, A. and Buchan, I. (2002a) "Early trademark legislation around the world", *INTA Bulletin,* No. 17, pp. 1, 9.

Casati, A. and Buchan, I. (2002 b) "Early trademark legislation around the world", *INTA Bulletin,* No. 18, pp. 1, 9.

Kenia Gazette, August, 1907, http://books.google.bg/books?id=ENE33AV-5mQC&pg=PT21&lpg=PT21&dq=compulsory+branding&source=bl&ots=Jk9HFYJHWS&sig=XY8G-cQ1HuYVgwXAqRfSsMFb7Q8&hl=en&sa=X&ei=aKJVUcP_HoGatQb7zoH4BQ&ved=0CDsQ6AEwAg (Accessed 29 January 2015).

Kitsikis, D. (2000) *"The Ottoman empire",* Kama, Sofia.

Law on the trade and industrial marks (1892)

Madrid Agreement Concerning the International Registration of Marks (1891)

Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891)

Nenova, A. (2008) *"Short history of the industrial property in Bulgaria – 60 years Patent office",* Sofia.

Panayotov, N. (1995) *"The legal proceedings in the decay of the Ottoman empire",* Varna free university, Varna.

Paris Convention for the Protection of Industrial Property (1883)

Shoen, O. (1999) "The history and development of trademark law". In: *Overview of Japanese trademark law.* www.iip.or.jp/translation/ono/ch2.pdf. (Accessed 29 January 2015).

"State will abolish compulsory branding requirement for local jewellery producers?". November, 2004, http://en.rian.ru/business/20041103/39772587.html?id= (Accessed 29 January 2015).

Tokushev, D. (2008) *"History of the new Bulgarian state and law 1878 – 1944",* Sibi, Sofia.

Figure 1 Trademark registration procedure in the Ottoman Empire

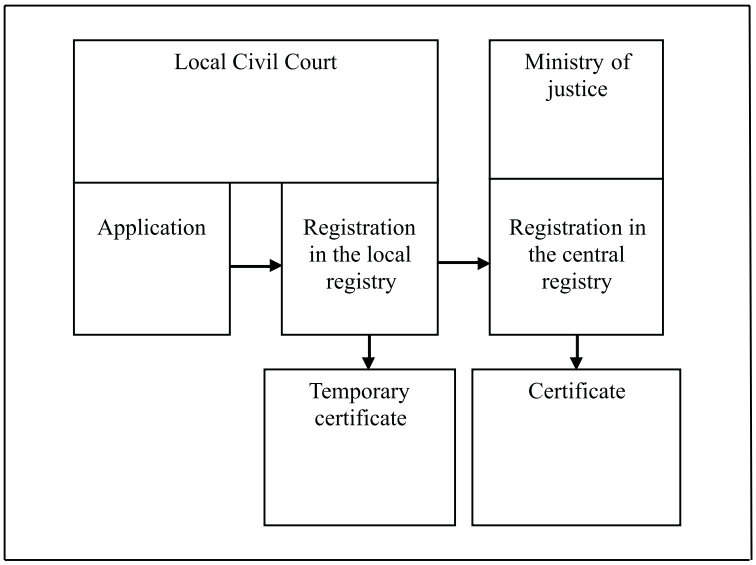
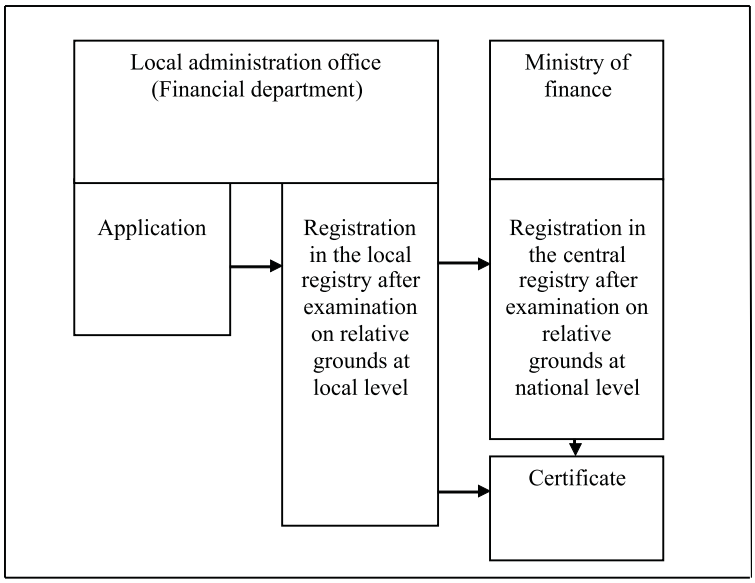


Figure 2 Trademark registration procedure in Bulgaria



Historical – Legal View of the Freedom of Religion in Republic of Albania

Engjëll Likmeta [*], *Enton Dimni* [**]

Abstract

The legal mechanism that provided for the protection of freedom of conscience and religion were envisaged by the first contemporary Albanian state. The first law for religious statutes of Albanian state was the legal statute of religious communities. According to this law, the freedom of conscience and faith was guaranteed. In order to guarantee the freedom of religion, despite constitutional provisions and Criminal Code, other mechanisms are ratified by law by the Albanian parliament including also the Universal Declaration of Human Rights, The Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief, and the Convention for the protection of children.

This paper aims to give a general overview of all the legal mechanisms in Albania that guaranteed freedom of faith during different periods and all the current mechanisms that still do guarantee it and are in force, including a short description of the punishments provided by criminal law in cases of criminal offenses against the freedom of religion. This general overview is aiming to show the importance of freedom of religion and faith, its development, as it is considered as interdependent and associated with other human rights.

Key words: *Freedom; Religion; Canon; Constitution; Criminal Code.*

1. Introduction

Freedom of religion in the Republic of Albania has been integral part of his life and existence [1]. In Albania, the religious feeling inherited a huge dose of beliefs and traditional pagan rites accompanying important aspects of life as: birth, marriage, death etc [2].

Apart from pagan cults, monotheism has always been evident in Albania's social organization. It's enough to remember the expression, sanctioned at any canon rate of the Albanian canon law [3], that: "The house of the Albanian belongs to God and to the guest" [4].

The Albanian canon law showed particular attention in regulating the church's position in Albanian's social life. The canon's provisions sanction independence of the church. For instance it is clearly stated in the Lekë Dukagjini Canon: "The church foundations are located under the rule of the religion, and not under the law of the Canon" [5]. This meant that this religious organization depended on the Pope of Rome of that period [6] and not on the Canon laws [7].

The church as a divine institution enjoyed a high freedom level and it could be considered as untouchable [8]. The church as a legal entity could possess, buy, and sell goods and services [9]. In this sense, the provisions of the Albanian canon law predicted sense, the rights, property and assets of the church. At the same time the Albanian canons included sanctions against all criminal actions that occurred in the properties and territories of the church regardless of whether they were directed against the clergy or citizens. These actions included but were not limited to murder, violation or damage and destruction of the church's property, damage to the cult's buildings, etc.[10]. In this aspect, the provisions of the Albanian canon law which provided protection to the church were not very different from the provisions of state laws that punished common crimes [11].

[*] Engjëll Likmeta, Associate Professor, Department of Criminal Law, Faculty of Law, University of Tirana, Albania.
[**] Enton Dimni, Result Oriented Monitoring (ROM) Expert of EU-funded projects in Western Balkans at Particip GmbH, Brussels Area, Belgium.

1 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 338.
2 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 338.
3 GROUP OF AUTHORS, *History of the state and of the right in Albania,* part II, Press House "Luarasi", Tirana, 1997, p. 12.
4 ILIA, FRANO, *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. 52.
5 GJEÇOVI, SHTJEFËN, *Canon of Lekë Dukagjini,* Press House "Kuvendi", Printing Office "Geer", Tirana, 1999, p. 1.
6 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 202.
7 VILARI, SALVATORE, *Legal canon rates of Albania, Canon of Lekë Dukagjini,* Press House Ombra GVG, Tirana, 2012, p. 210.
8 GJEÇOVI, SHTJEFËN, *Canon of Lekë Dukagjini,* Press House "Kuvendi", Printing Office "Geer", Tirana, 1999, pg. 1-3.
9 VILARI, SALVATORE, *Legal canon rates of Albania, Canon of Lekë Dukagjini,* Press House "Ombra - GVG", Tirana, 2012, p. 211.
10 GJEÇOVI, SHTJEFËN, *Canon of Lekë Dukagjini,* Press House "Kuvendi", Printing Office "Geer", Tirana, 1999, p. 1-3.
11 VILARI, SALVATORE, *Legal canon rates of Albania, Canon of Lekë Dukagjini,* Press House Ombra GVG, Tirana, 2012, p. 211.

The Albanian canon law envisaged the following structure the church's organism and management organs of it as: Bishop and Parson[12].

The Christian religion started to gain terrain in Albania since the early stages of Christianity[13] as propagated by the sermons of Jesus Christ apostles[14]. According to Dom Frano Ilia, Apostle Saint Paul in its letter to the Romans wrote that he has spread the Christianity to Illyria[15]. Also, the author of the sixth century, Kosmas included Illyrian-Albanians in the group of the people who had embraced Christianity in his period[16]. Names of several cities and settlements across Albania indicate the early connection of Albanians with Christianity. Settlements were named after the first martyrs of Christianity such as: Shën Gjergj - Saint George, Saint Basilius - Shën Vlash, Shubak-Saint Baku, Shijak - Saint Giacobe etc[17]. The city of Durres was the most important center of Christianity at the time[18]. With political changes in the country the church's organization also went through significant changes. Thus, according to historical and archive sources at the time of the Bulgarian domination, the metropolitanate centre of Nikopoja was moved to the south of Naupaktit, the Dardania metropolitanate moved from Skopje to Ohrid, and the Prevali metropolitanate moved from Shkodra to Tivari[19]. Furthermore the church maintained the same organizational structure even after the separation of the West Church with its center in Rome from the East one located in Constantinople.

It should be noted the church's official division (1054) found Albanian lands divided between two major centers of the Christian world[20]. Consequently, in most part of Albania the church's organization was influenced by the Constantinople Patriarch. However, Rome' Pope authority was still evident in the northwestern Albania, as a catholic enclave represented by bishoprics of the cities of Shkodra, Tivari, Drishti etc. was established in this area[21].

The church law was implemented in the Albanian principalities of the XII-XV centuries by the priests who in addition to clerical responsibilities had several legal competencies[22]. During the period of Arbri principality, (XII-XIII centuries), the Albanian church directly depended from the Holy See in Rome. The Rome Pope directly appointed the head of the Albanian church. Even, appointment and ordination of its head was made only by the Rome Pope[23].

In the Albanian state led by national hero of Albania, George Kastrioti Scanderbeg, known as "athlete and protector of Christianity", the legal framework included the catholic and orthodox canons in addition to other laws governing the state[24].

This is a clear indication that the freedom of religion during this period in Albania was known, guaranteed, and implemented in practice by the state itself. According to the researcher Irakli Koçollari the statutes of Shkodra (XIV century circa) were a real legal act which reflected the way how the administration of a society with civic European feature of that period was carried out[25]. Although they did not directly regulated religious freedom the Statutes of Shkodra foresaw in their provisions the feast of the holy of Shkodra city– Saint Stefan. The Statutes guaranteed the protection of foreign citizens on this occasion. The Statues clearly mentioned that: "With God's will and that of our defender Saint Stefan we order that for a period six days, three days before and after feast, foreigners who come in our country especially for this holiday, will be not affected and violated"[26]. For this case, the culprit was punished with a financial fine of 50 hyperperë- monetary units of time[27].

The Statutes of Shkodra dedicated concrete succession provision for the clergy properties[28]. The Statutes included the proper procedure for cases where the disputing parties were clergymen[29]. Those regulated the position and the institution of bishop[30]. The Statutes of Shkodra clearly made the difference between the church's rights and citizen's secular rights[31].

---

12 ILIA, FRANO, *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. 216.
13 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 200-201.
14 ILIA, FRANO, *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. 214.
15 ILIA, FRANO, *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. 214.
16 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 200-201.
17 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 200-201.
18 ILIA, FRANO, *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. Ilia,F., *Canon of Scanderbeg,* Press House "Editrice La Rosa", Milot, 1993, p. 214.
19 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 203.
20 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 245.
21 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 245.
22 GROUP OF AUTHORS, *History of the state and of the right in Albania,* part I, Press House "Luarasi", Tirana, 1997, p. 125.
23 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 245.
24 GROUP OF AUTHORS, *History of the state and of the right in Albania,* part II, Press House "Luarasi", Tirana, 1997, p. 221-222.
25 KOÇOLLARI, IRAKLI, *History of Right's philosophy,* Press "Dudaj", Tirana, 2008, p. 133.
26 NADIN, LUCIA, *Statutes of Shkodra,* Press House "Onufri", SecondEdition, University "Wisdom", Tirana, 2010, p. 300.
27 NADIN, LUCIA, *Statutes of Shkodra,* Press House "Onufri", SecondEdition, University "Wisdom", Tirana 2010, p. 300.
28 NADIN, LUCIA, *Statutes of Shkodra,* Press House "Onufri", SecondEdition, University "Wisdom", Tirana 2010, p. 343.
29 NADIN, LUCIA, *Statutes of Shkodra,* Press House "Onufri", SecondEdition, University "Wisdom", Tirana 2010, p. 343.
30 NADIN, LUCIA, *Statutes of Shkodra,* Press House "Onufri", SecondEdition, University "Wisdom", Tirana 2010, p. 343.
31 KOÇOLLARI, IRAKLI, *History of Right's philosophy,* Press "Dudaj", Tirana, 2008, p. 150.

Depending on the object of the conflict between parties, when a clergyman was in conflict with an ordinary citizen he had to appear in the civil court before claiming the case to the religious hierarchy i.e. the Bishop. When the dispute had religious character or the judgment's object were items owned by religious community or violated by the latter, the issue was resolved only through the Christian Church law and the civil court were prohibited to take review cases[32].

In addition to Christianity the picture of the religious communities included other religious identities such as: the Muslim, Hebrew and Protestant[33]. As emphasizes by the researcher Nathalie Clayer, religious beliefs among Muslim believers varied depending on several factors such as family, provincial, social or why not political. The Hebrew and Protestant communities has a stretch limited in the territory of Albania respectively in Vlora and Korça[34].

Religious differences were a reality in Albanians, and as it is also valid nowadays, they failed to feed or to demonstrate intolerance and religious bigotry[35].

2. Meaning and the importance of freedom of religion

We shouldn't forget the simple truth that no one can understand the humanity without understanding the beliefs, which can be manifested in the naive ora spiritually elevated form, through harshness, through hatred or love throughout history. Respect for human rights has its roots in faith human dignity. So, human rights are based on moral values[36]. When it comes to freedom of religion we should keep in mind two important principles[37]:

- Everyone enjoys the right to exercise the freedom of religion. This freedom includes theist beliefs, atheist, not theist, whether traditional or new. We should avoid any tight treatment, or discrimination.
- Freedom of religion and faith is interdependent and it associates with other human rights.

Human rights do not imply favoring some rights and limiting others. More than competitive, the various rights are mutually reinforced.

In the sense of the law theory, the rights of religion freedom and conscience means the rights of each individual to believe in God, change his belief, to feature it in private and public, or to not believe at all, the right to think freely and without any restriction on everything that surrounds[38]. The freedom of religion is part of the sphere of a person's internal experiences[39]. The freedom of religion is not simply a religious tolerance, so a simple tolerance of embracing a religion or a secular belief[40]. The freedom of religion being matter of individual conscience, means, inter alia, the freedom to manifest such religious beliefs, both privately or in the community with others in public, and in the circle of those with whom they share the same faith[41]. From here it stems the manifestation of freedom of religion[42].

The main forms of the manifestation of religion or belief are: prayer, learning, practice[43] or ritual actions[44] and respect[45]. The freedom of religion should include the freedom[46]:

- For integrity of the places of worship, the exercise of religion;
- The regime of facilities that charitable institutions and humanitarian operate the activity appropriately;
- The freedom for publication and distribution of religious literature;
- The freedom for research and making financial aid voluntary

The freedom of conscience and religion is presented with its two main features[47]. Seen in this sense, it means that everyone is free not only to choose but also to exercise the freedom of cult[48]. In exercising such freedom, the person must have in mind his specific social and professional position[49].

Under a government where human dignity is the higher value and where self-determination of each individual is recognized, religious freedom guarantees to anyone the space in

[32] KOÇOLLARI, IRAKLI, *History of Right's philosophy,* Press "Dudaj", Tirana, 2008, p. 150.
[33] CLAYER, NATHALIE, *In the beginning of the Albanian nationalism,* Second Edition, Press "Përpjekja", Tirana, 2012, p. 39 - 52.
[34] CLAYER, NATHALIE, *In the beginning of the Albanian nationalism,* Second Edition, Press "Përpjekja", Tirana, 2012, p. 52.
[35] ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* first volume, Press "Toena", Tirana, 2002, p. 251.
[36] SINANI, GJERGJ, The freedom of religion in the context of the European model of relationships between state and religion, *Scientific and Cultural Journal "Zani i Naltë",* Tirana, 2013, p. 1.
[37] SINANI, GJERGJ, The freedom of religion in the context of the European model of relationships between state and religion, *Scientific and Cultural Journal "Zani i Naltë",* Tirana, 2013, p. 1.
[38] ÇUKAJ, LIRIME, *The freedom of religion and conscience,* Master Degree Micro thesis, Department of Public Law, Faculty of Justice, Tirana, 2008, p. 2.
[39] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 277.
[40] SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 183.
[41] CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO, Pristina, on 30 September 2011, No.ref.: RK137/11.
[42] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 277.
[43] CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO, Pristina, on 30 September 2011, No. ref.: RK137/11.
[44] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 282.
[45] CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO, Pristina, on 30 September 2011, No. ref.: RK137/11.
[46] ÇUKAJ, LIRIME, *The freedom of religion and conscience,* Master Degree Micro thesis, Department of Public Law, Faculty of Justice, Tirana, 2008, p. 9.
[47] ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies",*No.1, Year 2004, Faculty of Justice, University of Tirana, p. 15.
[48] ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies",*No.1, Year 2004, Faculty of Justice, University of Tirana, p. 15.
[49] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 283.

which he can live accordingly to his beliefs, free from state interventions [50].

Here it is also included the right of everyone to orient personal behaviors and attitudes according to his/her faith and to act in compliance with his internal religious views [51].

3. National legal mechanism and international of freedom of religion

3.1 Constitution

The legal mechanism that provided for the protection of freedom of conscience and religion were envisaged by the first contemporary Albanian state. The first law for religious statutes of Albanian state was the legal statute of religious communities. According to this law, the freedom of conscience and faith was guaranteed [52]. The Ministry of Justice was responsible for implementing this law [53].

The Organic Statute of Albania envisaged the freedom of religion and the principle of secularism of the Albanian state [54]. The Extended Statute of Lushnja of the Republic of Albania sanctioned the freedom of religion and faith [55]. The Albanian state declared that there was no official religion [56].

In the period before and after World War One, Albania had three main religions: Muslim, Orthodox, and Catholic [57]. The Catholic Community had directly link with the Saint Holy of Vatican, while the two other religious communities were self-organized in independent institutions such as: The Temporary High National Council for the Orthodox Community which acted till the creation of the Holy Synod on 1929, and the High Council of Shariat, whose chairman was the representative of the Muslim Community, called Mufti [58]. According to the 1930 census, the dominant religion was Muslim with 69.4% of the population, the orthodox religion accounted for 20%, and the catholic religion 10.5% of population [59]. There were not a huge number of Jews believers, or other religions [60]. Protestant community although was small in number, established an Evangelic Fraternity in the south-east town of Korça [61]. The level of faith and religious practice was not always associated with affirming the community's identity based on religious affiliation, is one thing else [62]. King Zog of Albania took serious efforts to develop the legal framework in the spirit of western countries as well and as the one of Mustafa Kemal's Turkey [63]. In this regard, the Constitution of the Albanian Monarchy regulated the position of religious communities on the principles of secular power [64]. While the Albanian state had no official religion, it was established that: *"all religions and beliefs are honored and the freedom of exercise and their external practice is provided"* [65]. According to the Monarchy Statute the state was separated from the religions. This did not imply that the state had no right to control religious institutions in order to prevent any activity aimed against the country interests or religious communities.

In any case, the religious freedom could not create juridical obstacles or be used for political purposes [66]. In this context, the quality of the Member of Parliament was incompatible with any active religious service. The Member of Parliament couldn't attend parliament meetings with religious clothes [67]. Also, according to constitutional rules of the Kingdom Albanian religious communities could open religious schools in accordance with applicable laws and after such permission was provided from the responsible ministry. In late 1920 s and early 1930 s, the Albanian state took measures to regulate the religions role in the society while guaranteeing simultaneously the secular principle and there religious freedoms [68].

During the same time, several legal acts for religious communities were approved in accordance with the Albanian Kingdom constitution such as: The establishment of the Holy Synod of the Albanian Autocephalous Orthodox Church 1929, the Statute of the Muslim Community, the Bektashi Regulation etc [69]. Religious canons such as the ones of the catholic and orthodox churches had their legal impact on Albanian society up till April11929, the period in which the Albanian civil law came into force [70].

During 1920-1939, the politic of Albanian state aimed at setting stronger national principles for the activity of religious institutions, as well as a general state control over the religious communities. This policy aimed at enhancing cohabitation and

50 SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 183.
51 SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 183.
52 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 172.
53 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 172.
54 ÇUKAJ, LIRIME, *The freedom of religion and conscience,* Master Degree Micro thesis, Department of Public Law, Faculty of Justice, Tirana, 2008, p. 20.
55 ÇUKAJ, LIRIME, *The freedom of religion and conscience,* Master Degree Micro thesis, Department of Public Law, Faculty of Justice, Tirana, 2008, p. 20.
56 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 174.
57 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 169.
58 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 169.
59 ACADEMY OF THE SCIENCES OF ALBANIA, *History of the Albanian people,* third volume, Press "Toena", Tirana, 2007, p. 299-300.
60 ACADEMY OF THE SCIENCES OF ALBANIA, *History of the Albanian people,* third volume, Press "Toena", Tirana, 2007, p. 299-300.
61 CLAYER, NATHALIE, *In the beginning of the Albanian nationalism,* Second Edition, Press "Përpjekja", Tirana, 2012, p. 52.
62 CLAYER, NATHALIE, *In the beginning of the Albanian nationalism,* Second Edition, Press "Përpjekja", Tirana, 2012, p. 40.
63 KARČIĆ, FIKRET, *Studies for the sharia law and institutions,* press house "Logos-A", Skopje, 2015, p. 140.
64 KARČIĆ, FIKRET, *Studies for the sharia law and institutions,* press house "Logos-A", Skopje, 2015, p. 140.
65 *BASIC STATUTE OF ALBANIAN KINGDOM.* Furthermore:*http://www.oborrimbreterorshqiptar.al/pages/constitution* access online date 10. 07. 2016.
66 *BASIC STATUTE OF ALBANIAN KINGDOM.* Furthermore:*http://www.oborrimbreterorshqiptar.al/pages/constitution* access online date 10. 07. 2016.
67 *BASIC STATUTE OF ALBANIAN KINGDOM.* Furthermore:*http://www.oborrimbreterorshqiptar.al/pages/constitution* access online date 10. 07. 2016.
68 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 302.
69 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 302 - 307.
70 KARČIĆ, FIKRET, *Studies for the sharia law and institutions,* press house "Logos-A", Skopje, 2015, p. 140.

mutual understanding among religious communities in Albania. Furthermore such policy aimed at strengthening the unity of Albanian nation in order to avoid religious conflicts which could put the country territorial integrity at risk[71].

During the Second World War the Italian authorities recognized the religious reality in Albania and were careful to allow the activities of religious institutions in accordance with their goals. They attributed greater financial attention to the religious communities[72].

The history of conscience's freedom and religious faith during the communist state was a prohibition history[73]. Once the communist regime was established, in order to gain support the communists relied to Albanian traditional values quoting in few cases the words of the Albanian poet of XIX century, Pashko Vasë Shkodrani: "The Albanian's religion is albanianism"[74]. Hence the Constitution of 1946 guaranteed the freedom of conscience and faith for all citizens[75]. It highlighted the separation of Church from the state and the independence and freedom of religious communities in their matters of faith and the exercising of such beliefs. However, as the regime was enforcing its ruling it established new relationships with religious communities which were forced to act on the basis of the new political line set by the Labor Party in line with its relationships with the Soviet Union[76]. The Church and the Religion were stopped to be subject to political purposes. The paragraph four of the article 16 of the new Constitution served as basis for repressing religions and for persecuting several clergymen who were accused "of political organization aiming at overthrowing the communist regime"[77].

Religious based political organizations were banned[78]. Although, the Albanian state was constitutionally obliged to help religious communities[79], pursuant to the Marxist Leninist ideology and under pressure of the Chinese impacts, a process began to ban citizens from exercising religious freedom which led to the closing and destruction of all buildings and religious institutions[80]. Consequently Albania became the first atheist country in the world[81]. This brought the closure of all religious institutions and arrests of clergymen. Throughout this period of a single party rule, a so called "war for revolutionizing life in the country" affected all religious institutions. In this regard, the most basic formulas of freedom of religion were fully removed from the 1976's Constitution of the Popular Socialist Republic of Albania[82]. According to the communist doctrine, the Constitution of 1976destroyed the basics of religious obscurantism, and the human moral of the working class, its consciousness and its point of views would be formed by the proletarian ideology as ruling ideology in the country[83].

The socialist order impacted all rights and fundamental freedoms, and no form of religion was recognized. The regime supported and developed atheist propaganda to enforce the materialistic scientific perspective on the people[84]. The provision 55 of the 1976 constitution clearly expressed the regime's position by categorically banning the establishment of any religious institution[85].

3.1.1 Constitution of 1998

In the Republic of Albania, the freedom of religion is one of the most important victories of the political pluralism[86]. According to the pluralist legal framework, the freedom of religion consists of the right of every citizen to freely choose his/her religion and to display those beliefs individually or collectivity while practicing the religious beliefs[87]. The freedom of religion includes also the right of citizens to not belong to a specific religion[88].

The post-dictatorial first constitution of 1998, established the relationship between state and religion, in such a way to balance the interests of the state with the interest of the individual, with a soft leaning to the individual interest[89].

The current Constitution of the Republic of Albania guarantees the independence of religious communities from the

---

71 ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies"*,No.1, Year 2004, Faculty of Law, University of Tirana, p. 11.

72 ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, *History of the Albanian people,* fourth volume, Press "TOENA", Tirana, 2008, p. 31.

73 ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies"*,No.1, Year 2004, Faculty of Law, University of Tirana, p. 11.

74 GLENNY, MISHA, *The Balkans, 1804-1999, Nationalism, war and the great powers*, Press "Toena", Tirana, 2007, p. 560.

75 CONSTITUTIONAL ASSEMBLY, *Statute of the Popular Republic of Albania,* Edit. "Bashkimi", Tirana, 1946, art. 16, p. 4.

76 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 302.

77 ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies"*,No.1, Year 2004, Faculty of Law, University of Tirana, p. 12.

78 CONSTITUTIONAL ASSEMBLY, *Statute of the Popular Republic of Albania,* Edit. "Bashkimi", Tirana, 1946, art. 16, p. 4.

79 CONSTITUTIONAL ASSEMBLY, *Statute of the Popular Republic of Albania,* Edit. "Bashkimi", Tirana, 1946, art. 16, p. 4.

80 GLENNY, MISHA, *The Balkans, 1804-1999, Nationalism, war and the great powers*, Press "Toena", Tirana, 2007, p. 566.

81 DERVISHI, KASTRIOT, *The history of the Albanian state 1912-2005,* Publishing House "55", Tirana, 2006, p. 704.

82 ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", *legal scientific journal "Legal Studies"*,No.1, Year 2004, Faculty of Law, University of Tirana, p. 12.

83 LAW no.5506, date 28. 12. 1976, *Constitution of the Popular Socialist Republic of Albania.*

84 LAW no.5506, date 28. 12. 1976, *Constitution of the Popular Socialist Republic of Albania.*

85 LAW no.5506, date 28. 12. 1976, *Constitution of the Popular Socialist Republic of Albania.*

86 ELEZI, ISMET, *Criminal Law – specific part,* Press "Erik", Tirana, 2009, p. 197.

87 ANASTASI, AURELA, *Constitutional Law,* press house "Pegi", Tirana, 2001, p. 63.

88 ANASTASI, AURELA, *Constitutional Law,* press house "Pegi", Tirana, 2001, p. 64.

89 ANASTASI, AURELA, *Constitutional Law,* press house "Pegi", Tirana, 2001, p. 64.

state[90]. Thus the article 10 of the Constitution[91] provides that: *"The state is neutral in matters of faith and conscience, and it guarantees the freedom of their expression in public life"*[92]. Furthermore the Constitutional Court of the Republic of Albania in its practice states that: *"the Albanian state in the fulfillment of the legal framework on the relationships of the state with religion, in maintaining and developing interfaith harmony in the country, besides agreements with other communities, as concerns the Muslim Community in Albania it ratified the law no. 10056, date 22. 01. 2009 "For the ratification of mutual relationships between the Council of Ministers of the Republic of Albania and the Muslim Community of Albania". Article 11 this agreement which regulates the organization of Muslim Community of Albania states that: "in relations with bodies, institutions and other organizations secular and religious, at home and abroad, the believers of Muslim Albanian Community are represented by the authorities, officers and directors appointed or selected in accordance with the statute. The officials, and management bodies of the Community have full freedom of exercising their religious, organizational and administrative activities, in accordance with the acts of this community, as far as these activities do not contradict the constitutional and legal provisions and"*[93].

A series of legal acts clearly provide for prohibiting any form of religious beliefs-based discrimination. Article 18 of the Constitution stipulates that: *"all citizens are equal in front of law and the discrimination for any reason including religious convictions is prohibited"*[94]. In this context, the law no. 1022/2010 "For the protection against discrimination" holds the same position, related to the exercise of the freedom of conscience and religion, as in its article 10 it states that: *"Discrimination related to the exercise of freedom of conscience and religion, especially when it is about expressing it individually or collectivity, in public or private life, through cult organization, education, practices or performing rites, is prohibited… introducing discrimination due to exercise the freedom of conscience and religion can be allowed only by law"*[95].

The commissioner for the protection against discrimination in one of the cases reviewed by him noted that: *"It resulted proven that there is a difference in the treatment of student XX, who differently to other students who have or not different beliefs or the same religion with the said student, has been denied the right to pursue learning equally with others, due to her head cover, and this limitation is not based on the law, but it is rather based on the vague and controversial acts"*[96].

The Freedom of religion is guaranteed by the Constitution. In its article 24 he Constitution states that: *"freedom of conscience and religion is guaranteed. Anyone is free to pick or to change the religion or belief, as well as to feature them individually or collectively, in public or private life, through cult, education, practices or performing rites. No one can be forced or prohibited to attend a religious community or its practices, and to make public his beliefs or his believe"*[97].

The principle of freedom of religion is not reduced nor is it minimized as it boundaries are defined by the Constitution itself, i.e. in accordance with the constitutional system of values and, taking into account the unity of this basic system of values[98].

The close link of freedom of religion with human dignity, as a higher value in the system of fundamental rights, excludes that any activity or different ways of behavior, which may arise from a specific faith, can be subject to sanctions from the state, regardless of the motivation[99]. It is common for a state which declares the human dignity as its highest constitutional value, and which guarantees the freedom of religion and conscience to allow to the other groups or communities, the unimpeded practicing of their personality in accordance with their subjective beliefs of trust, as far as they do not contradict with other constitutional positions on values as long as their behaviors will not cause sensitive damages to the community or to the fundamental rights of other citizens[100].

The jurisprudence of the European Court of Human Rights states that: *"in a democratic society, in which some religions coexist within the same population, it may be necessary to restrict this freedom for reconciliation of different group interests and to ensure the compliance with the beliefs of all"*[101,102].

3.2 Criminal Code

Since its independence in 1912 Albania had four criminal laws. These coincide with several historical periods which the Republic of Albania went through. So, we have the Criminal Code of the Albanian Monarchy, the Criminal Code of 1952 and 1977, and the Criminal Code of 1995. Among these, the darkness period is the one after the Second World War. This period has originated with setting of the cruelty red communist in the country. The criminal laws of this time, respectively those of 1952 and 1977, did not provide a special protection for religion. The Criminal Code of 1952 in difference with the one

[90] CONSTITUTIONAL COURT OF REPUBLIC OF ALBANIA, Decision no.45, date 29. 06. 2015.
[91] LAW, No.8417, Date act: 21. 10. 1998, Date Approval 21. 10. 1998, Official Public. no.28, Page: 1073. Constitution of Republic of Albania. Furthermore: https://www.parlament.al/wp-content/uploads/sites/4/2015/11/kushtetuta-perditesuar.pdf access online date 12. 07. 2016.
[92] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29. 01. 2015.
[93] CONSTITUTIONAL COURT OF REPUBLIC OF ALBANIA, Decision no.45, date 29. 06. 2015.
[94] LAW, No.8417, Date act: 21. 10. 1998, Date Approval 21. 10. 1998, Official Public. no.28, Page: 1073. Constitution of Republic of Albania. Furthermore: https://www.parlament.al/wp-content/uploads/sites/4/2015/11/kushtetuta-perditesuar.pdf access online date 12. 07. 2016.
[95] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29. 01. 2015.
[96] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29. 01. 2015.
[97] LAW, No.8417, Date act: 21. 10. 1998, Date Approval 21. 10. 1998, Official Public. no.28, Page: 1073. Constitution of Republic of Albania. Furthermore: https://www.parlament.al/wp-content/uploads/sites/4/2015/11/kushtetuta-perditesuar.pdf access online date 12. 07. 2016.
[98] SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 189.
[99] SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 189.
[100] SCHWABE, JÜRGEN, *Selected decisions of Constitutional Federal Court of Germany,* Press "Vincent – Grafika", Skopje, Macedonia, 2010, p. 189.
[101] THE EUROPEAN COURT OF HUMAN RIGHTS, *Case Kokkinakis vs. Greece,* (Application no. 14307/88) Strasbourg, France, 25 May 1993.
[102] THE EUROPEAN COURT OF HUMAN RIGHTS, *Case Leyla Şahin vs. Turkey, (*Application no. 44774/98) Strasbourg, France, 10 November 2005.

of 1977, in the quality of the figure of criminal offense against state provided the prohibition of hate or disputes between religions [103]. The Criminal Code of 1977 did not foresee legal protection to the person's religious beliefs [104]. This is explained by the fact that during this period Albania was an atheist country.

3.2.1 Criminal Code of Albanian Kingdom

The Criminal Code of Monarchy of Albania constituted the basic source of criminal law of this historical period. It included 561 articles divided into three main parts: errors and penalties, crimes and criminal offence [105]. The provisions protecting freedom of religion were an important part of the criminal legislation in the Albanian monarchy [106].

The Criminal Code of Monarchy offered a legal protection for freedom of religion. In its second chapter the code envisaged sanctions for crimes against the freedom of religion [107]. In its article 155, the Code sanctioned the protection of freedom of religion as group's object and the ceremony and religious activity as a specific subject. In view of objective side, the delict requires performing such actions that stop or trouble / bother the exercise of the functions or religious ceremonies. Active subject of the concerned crime was punished by imprisonment up to 3 months and fine heavy from 50-500 gold francs [108]. As when performing the crime, in view of objective side, accompanied with the use of violence, blackmail, intimidation or actions violated dignity and morals, culprit was punished by imprisonment of 3-30 months and fine heavy from 100-1500 gold francs [109]. The legislator had predicted a harsher punishment when this offence carried out publicly. In such a case for the active subject was predicted a sentence imprisonment up to 3 months and fine by 100-3000 gold francs [110]. In view of the subjective side, the delict was carried out more with the special purpose to prejudice the dignity of the religion protected especially from the legal rates [111].

The criminal rate of the Albanian Kingdom provided a legal-criminal protection for three main religions in the country. Seen in this regard, came criminalized in the quality of the figure of the criminal offense any action which intended the humiliation of religions through destruction, breaking or other ways of things that were intended for the exercise of religion [112]. The author of the criminal offense was punished by imprisonment 10 days up to 2 months as well as a fine heavy up to 300 gold francs [113]. Being in front this offense, important was the place of its commission. In view of objective side was required that dishonoring or violation of profane items which were used for the exercise of cult in the public area [114].

In the second paragraph, article 157 of Criminal Code, took in the protection from criminal actions also the authority and religious representatives during the exercise of duty or due to his function. The violence against religious authority was punished by criminal Albanian rate from 1 to 6 months and fine heavy of 100 to 1000 gold francs [115]. At the same time, the Criminal Code take in special protection the place for the exercise of the religion [116]. The code take care specifically that every action intended decay, desecration or destruction of exercise's countries of cult, as: pictures, statues were punished [117].

Interestingly is the fact that, criminal rate of this period, protect in criminal aspect not only the countries of exercise of cult but also the cemetery – permanent site rest of people. This not unintentionally, but for the fact that in them, Albanian cemetery was characteristic of this period, which religious services become even in such countries, where at least there was also a cult object for every religious community. In such a case, the author of the criminal offense in question, was punished by imprisonment of 1 month to 1 year fine heavy as well as to 500 gold francs [118]. We think, that in criminal terms, The Code of the Albanian Monarchy provided protection to the freedom of religion and atheism. In such a case, the offense started with the request of the injured accuser, when the latter was violated publicly. The culprit was punished by imprisonment up to 3 months, or by a heavy fine until 1000 thousand gold francs [119].

3.2.2 Criminal Code of year 1995

The Criminal Code of 1995 is cared to include in his field also the protection of freedom of religion. The legal Albanian doctrine with offenses against the freedom of religion means acts

[103] MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, *Criminal Code of the Popular Socialist Republic,* Tirana, 1952, p. 42-102.
[104] MINISTRY OF JUSTICE OF THE POPULAR SOCIALIST REPUBLIC OF ALBANIA, *Criminal Code of the Popular Socialist Republic,* press house "8 November", Tirana, 1977, p. 52-53.
[105] GROUP OF AUTHORS, *History of the state and of the right in Albania,* part II, Press House "Luarasi", Tirana, 1997, p. 209-210.
[106] GROUP OF AUTHORS, *History of the state and of the right in Albania,* part II, Press House "Luarasi", Tirana, 1997, p. 209.
[107] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 155-160, p. 84-86.
[108] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 155, p. 84.
[109] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 155, p. 84.
[110] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 156, p. 84.
[111] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 155, p. 84.
[112] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 157, p. 85.
[113] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 157, p. 85.
[114] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 157, p. 85.
[115] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 157, p. 85.
[116] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 158, p. 85.
[117] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 158, p. 85.
[118] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 158, p. 85.
[119] MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, *The Albanian Criminal Code 1927,* Printing-house "Sun" Tirana, 1929, article 160, p. 86.

or unlawful omissions, which prohibit or inhibit the exercise of actions of religious organizations or persons to participate in religious ceremonies and those that destroy or damage cult's facilities [120]. More specifically, in his ten section, the criminal law provides three criminal offenses against the freedom of religion. They are divided in crimes and criminal offenses. In crimes are included the obstruction of activities of religious organizations and destruction or damage to the cult's buildings. While, the inhibition of religious ceremonies is a criminal offense provided by the criminal rule. Criminal sanction for crimes and criminal offenses against the freedom of religion is punishment with fine or imprisonment.

Object of the criminal offense provided under article 131 of the Criminal Code is the activity of religious organizations. In view of objective side this criminal offense is consumed by active actions taken to stop the exercise or activities of religious organizations and also the creation of barriers for this purpose. According to the criminal Albanian law, subject to crime, is any person who has reached age for criminal liability and is responsible. The age for criminal liability is 14 years old for crimes and 16 years old for offenses. The criminal sanctions provided to the person who is found guilty by the court for committing such a crime, are: penalty with fine or imprisonment up to three years [121].

The criminal legislation provides protection to the cult's facilities from destruction and full injuries or partial. In such case, it is anticipated that: "The destruction or damage of cult's objects, when they caused the fully loss or partially of their values, is fined or imprisonment up to three years" [122].

In the Republic of Albania is hard to be found an exact clue connected to the total number of cult's facilities that exist in the country. This is because the number of religious buildings has changed so much at the last years, due to the new constructions. Currently, Albania counts approximately 1668 religious cults of five religious communities, already recognized by the Albanian state, of which 873 mosques and 794 church's as well as a synagogue of the Jewish religion located in Tirana [123].

The criminal offense "Obstruction of religious ceremonies" provided in the article 133 of the criminal law provides sanction against actions aimed at stopping the expression of religious convictions. It's done through actions such as: stopping or creating obstacles – that were done to the persons who participate in religious ceremonies. In this case, the culprit of fined or imprisonment up in a year [124].

The criminal offenses against freedom of religion represent an irrelevant position in the general volume of crimes and criminal offenses carried out in Albania for the period 2004-2014. During 2004-2014 out of 31099 criminal offenses only 33 of them belonged to criminal offenses against freedom of religion. In percentage, the criminal offense of obstructing religious ceremonies provided by the article 133 of Criminal Code is only about 0.1% of general volume of offenses occurred during 2004-2014. 37 individuals were punished for the criminal offense of obstruction of religious ceremonies during 2004-2014.

The measure of punishment given to the culprits who committed the criminal offense of obstruction of religious ceremonies, during 2004-2014, has been with fine for three individuals and with imprisonment up to 2 years for 34 other persons [125].

If we analyze the annual statistics of Ministry of Justice for 2004-2014, we will note that the total number of crimes against freedom of religion occurred in Albania for this period represents only a small number when compared to the total number of all crime convictions. In this regard, for the crime of "Obstruction of activities of religious organizations" provided by the article 131 of Criminal Code we have in total two cases and the same number of convicted persons. While, for the criminal offense "Destruction or damage to the cult's buildings" provided by the article 132 of the Criminal Code we have four cases occurred and just as convicted. So, in total for the period 2004-2014 have 6 criminal offenses and the same number of convicted persons. Expressed in percentage, they occupy about 0.01% of total volume of crimes committed in the country. Out of the total 51183 of crimes occurred in Albania during 2004-2014, only six of them belong to crimes against freedom of religion [126]. While the conducted persons with final decision for crimes against freedom of religion occupy an even smaller volume in relation with the numbers of prisoners in the country. Thus, out of 60113 of convicted for years 2004-2014 only six of them belong to those who have committed crimes against the freedom of religion. Said this in percentage, they represent only 0.001% of the total number of convicted.

The measure of punishment given to the culprits who have completed the crimes provided respectively by the articles 131 and 132 of the Albanian Criminal Code was punishment with imprisonment up in a year in five cases and only in a case penalty with fine. The latter is provided for criminal offense provided under article 132 of the Code [127].

[120] ELEZI, ISMET, *Criminal Law – specific part,* Press "Erik", Tirana, 2009, p. 197-198.
[121] LAW, no.7895, Date act: 27. 01. 1995, Date Approval: 27. 01. 1995, Official Public. no.2, Page: 23, article 131.
[122] LAW, no.7895, Date act: 27. 01. 1995, Date Approval: 27. 01. 1995, Official Public. no.2, Page: 23, article 132.
[123] ÇAUSHI, JEARTA, & ZITO, ERALDA, Newspaper "Tirana Observer". Furthermore: https://www.shqiperia.com/Shqiperia-ka-1668-kulte-fetare.13097/ access online date 15. 07. 2016.
[124] LAW, no.7895, Date act: 27. 01. 1995, Date Approval: 27. 01. 1995, Official Public. no.2, Page: 23, article 131.
[125] MINISTRY OF JUSTICE OF REPUBLIC OF ALBANIA, *Annual Statistics 2004-2014,* Tirana. Furthermore: http://www.drejtesia.gov.al/al/dokumente/statistika access online date 20. 06. 2016.
[126] MINISTRY OF JUSTICE OF REPUBLIC OF ALBANIA, *Annual Statistics 2004-2014,* Tirana. Furthermore: http://www.drejtesia.gov.al/al/dokumente/statistika access online date 20. 06. 2016.
[127] MINISTRY OF JUSTICE OF REPUBLIC OF ALBANIA, *Annual Statistics 2004-2014,* Tirana. Furthermore: http://www.drejtesia.gov.al/al/dokumente/statistika access online date 20. 06. 2016.

Figure 1 Criminal Acts 2004-2014 Cases Albania

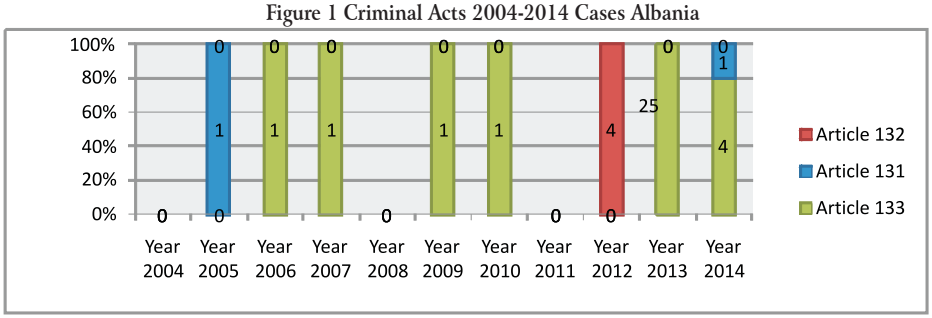
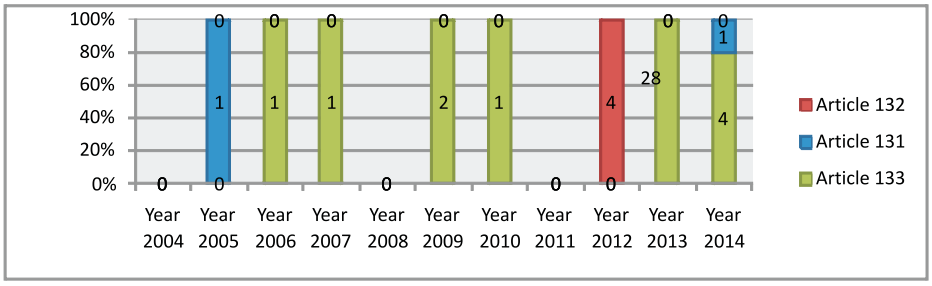


Figure 2 Contraventions 2004-2014 Convicts Albania



3.3 European Convention of Human Rights [128]

Freedom of thought, consciousness and religion represents one of the foundations of a "Democratic society" under the meaning of the European Convention of Human Rights (ECHR) [129]. The European Court of Human Rights has sanctioned the freedom of thought, conscience and religion in its article 9, where is said that: *"Everyone has the right to freedom of thought, conscience and religion; this right means the freedom to change the religion or belief, either individually or collectively, publicly or privately through cult, teaching, practices and performance of rites. The freedom of occurrence of his/her religion or someone's beliefs cannot be subject to other limitations, in addition to those provided by the law and that make up necessary measures in a democratic society in the interest of the public security, for the protection of public order, health or moral or for the protection of others rights and freedoms"* [130]. Article 9, parag.1 provides for freedom in the spiritual field. This freedom cannot be subject to any limitation [131]. While, parag.2 of article 9, determines the conditions, when the state intervention may occur under specific circumstances [132].

According to the meaning of the Convention, the freedom of thought, conscience and confidence is essential for the preservation of identity and point of views of the believers [133]. In order to guarantee the freedom of religion, other mechanisms ratified with law by the Albanian parliament include also the Universal Declaration of Human Rights, The Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief, and the Convention for the protection of children.

4. Conclusions

Five main religions coexist in Albania: Catholic religion, Jewish, Muslim, Orthodox, and Protestant. The activities of these religious institutions are independent and distant from those of the political organizations and law enforcement agencies [134]. Albania applies the same principles Alexis de Tocqueville mentions in his book "Democracy in America" [135].

Religious coexistence is an added value for the Albanian society [136]. It should be maintained and fed as a good model to build reports between religious communities through tolerance and respect for the rights of each individual, despite individual qualities or belonging to a particular group that distinguishes us from the other part of the society [137], taking into account as the laws of nature as well as the laws which are made to administer human life [138].

[128] LAW, No.8137, Date Act: 31. 07. 1996, Date Approval: 02. 08. 1996, Official Publish. No.20, Page: 724. European Convention of Human Rights.
[129] CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA, Decision no. 45, date 29. 06. 2015.
[130] COUNCIL OF EUROPE, *European Convention of Human Rights,* Strasbourg, France. Furthermore: http://www.echr.coe.int/ access online 12. 07. 2016
[131] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 276.
[132] NOWICKI, MAREK ANTONI, *About European Convention,* Press "Morava", Tirana, 2003, p. 276.
[133] NOWICKI, MAREK ANTONI, *Stones guides, Jurisprudence of the European Court of Human Rights,* Re-publishment of the Albanian Center for the Human Rights, Tirana, 1999, p. 384.
[134] DE TOCQUEVILLE, ALEXIS, *Democracy in America,* press house "Kristalina-KH", Tirana, 2002, p. 125.
[135] DE TOCQUEVILLE, ALEXIS, *Democracy in America,* press house "Kristalina-KH", Tirana, 2002, p. 23.
[136] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29. 01. 2015.
[137] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29. 01. 2015.
[138] GYLEN, M. FETHULLAH., *Towards of a world's civilization with love and tolerance,* press house "Prizmi", Tirana, 2012, p. 33.

Also, we Albanians need to be attentive and careful in the treatment of individuals especially to the children's in connection with the right for education, based on the principle of equality and non-discrimination because of religious beliefs.[139]

The principal punishments given to those who commit criminal offenses against the freedom of religion are imprisonment and fine. More specifically, the measure of punishment given to the culprits who have committed criminal offenses against the freedom of religion, for the period 2004-2014, has been mostly punishment by imprisonment up to two years for crimes (in five cases) and punishment with fine (in one case); for criminal offenses fine was given in three cases and punishment by imprisonment up in a year in 34 cases. In no case the court, convicted the culprits of committing crimes against the freedom of religion with the maximum provided by law.

The religious tolerance is one of the specific component elements of the system of culture's traditional values that distinguish it significantly from the cultures of other European countries[140].

Bibliography

ACADEMY OF THE SCIENCES OF ALBANIA, Institute of History, History of the Albanian people, first volume, Press "Toena", Tirana, 2002.
ACADEMY OF THE SCIENCES OF ALBANIA, History of the Albanian people, third volume, Press "Toena", Tirana, 2007.
ANASTASI, AURELA, Constitutional Law, press house "Pegi", Tirana, 2001.
ANASTASI, AURELA, "The relationship between the state and religion in the cases of freedom of religion", legal scientific journal "Legal Studies", No.1, Year 2004, Faculty of Law, University of Tirana.
CONSTITUTIONAL ASSEMBLY, Statute of the Popular Republic of Albania, Publish. "Bashkimi", Tirana, 1946.
CLAYER, NATHALIE, In the beginning of the Albanian nationalism, Second Edition, Press "Përpjekja", Tirana, 2012.
CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO, Pristina, on 30 september 2011, No.ref.: RK137/11.
CONSTITUTIONAL COURT OF REPUBLIC OF ALBANIA, Decision no.45, date 29. 06. 2015.
COMMISSIONER FOR THE PROTECTION AGAINST DISCRIMINATION, REPUBLIC OF ALBANIA Decision no.14, date 29. 01. 2015.
ÇUKAJ, LIRIME, The freedom of religion and conscience, Master Degree Micro thesis, Department of Public Law, Faculty of Justice, Tirana, 2008.
DERVISHI, KASTRIOT, History of the Albanian state 1912-2005, Press House "55",Tirana, 2006.
DERVISHI, ZYHDI, Crossed looks at the sea, Culture's Sociology 1, Five Edition, Press House "Emal", Tirana, 2009.
DE TOCQUEVILLE, ALEXIS, Democracy in America, press house "Kristalina-KH", Tirana, 2002.
ELEZI, ISMET, Criminal law- special part, Press "Erik", Tirana, 2009.
EUROPEAN COURT OF HUMAN RIGHTS, Case Kokkinakis vs. Greece, (Application no.14307/88), Strasbourg, France, 25 May 1993.
EUROPEAN COURT OF HUMAN RIGHTS, Case Leyla Şahin vs. Turkey, (Application no.44774/98), Strasbourg, France, 10 November 2005.
GLENNY, MISHA, The Balkans, 1804-1999, Nationalism, war and the great powers, Press "Toena", Tirana, 2007.
GROUP OF AUTHORS, History of the state and law in Albania, part II, press house "Luarasi", Tirana, 1997.
GYLEN, M. FETHULLAH, Forward a world's civilization with love and tolerance, press house "Prizmi", Tirana, 2012.
GJEÇOVI, SHTJEFËN, Canon of Lekë Dukagjini, Press House "Kuvendi", Printing Office "Geer", Tirana, 1999.
ILIA, FRANO, Canon of Scanderbeg, Press House "Editrice La Rosa", Milot, 1993.
KARČIĆ, FIKRET, Studies for the shariat law and institutions, press house Logos-A, Skopje, 2015.
KOÇOLLARI, IRAKLI, History of philosophy of law, Press "Dudaj", Tirana, 2008.
LAW, no.5506, date 28. 12. 1976, Constitution of Popular Socialist Republic of Albania.
LAW, no.8417, Dt.Act:21. 10. 1998, Date Approval: 21. 10. 1998, Official Publish. No.28, Page:1073.
LAW, no.7895, Dt.Act:27. 01. 1995, Date Approval: 27. 01. 1995, Official Publish. No.2, Page:23.
LAW, no.8137, Dt.Act:31. 07. 1996, Date Approval: 02. 08. 1996, Official Publish. No.20, Page:724.
MINISTRY OF JUSTICE OF ALBANIAN KINGDOM, The AlbanianCriminal Code 1927, Printing-house "Sun" Tirana, 1929.
MINISTRY OF JUSTICE OF POPULAR REPUBLIC OF ALBANIA, Criminal Code of Popular Republic of Albania, Tirana, 1952.
MINISTRY OF JUSTICE OF POPULAR SOCIALIST REPUBLIC OF ALBANIA, Criminal Code of Popular Socialist Republic of Albania, press house "8 November", Tirana, 1977.
MINISTRY OF JUSTICE OF REPUBLIC OF ALBANIA, Annual Statistics 2004-2014, Tirana.
NADIN, LUCIA, Statutesof Shkodra, presshouse "Onufri", second Edition, Universitety "Wisdom", Tirana 2010.
NOWICKI, MAREK ANTONI, About European Convention, Press "Morava", Tirana, 2003.

[139] THE COMMISSIONER OF PROTECTION FROM DISCRIMINATION, REPUBLIC OF ALBANIA, Decision no.14, date 29.01.2015.
[140] DERVISHI, ZYHDI, *Crossed looks at the sea,* Culture's Sociology 1, Five Edition, Press House "Emal", Tirana, 2009, p. 31.

NOWICKI, MAREK ANTONI, Stones guides, Jurisprudence of the European Court of Human Rights, Re-publishment of the Albanian Center for the Human Rights, Tirana, 1999.
SCHWABE, JÜRGEN, Selected decisions of Constitutional Federal Court of Germany, Press "Vincent – Grafika", Skopje, Macedonia, 2010.
SINANI, GJERGJ, The freedom of religion in the context of the European model of relationships between state and religion, scientific and cultural journal "Zani iNaltë", Tirana, 2013.
VILARI, SALVATORE, Legal canon rates of Albania, Canon of Lekë Dukagjini, Press House "Ombra GVG", Tirana, 2012.
http://www.oborrimbreterorshqiptar.al/pages/constitution
https://www.parlament.al/wp-content/uploads/sites/4/2015/11/kushtetuta-perditesuar.pdf
http://www.drejtesia.gov.al/al/dokumente/statistika
http://www.echr.coe.int/
www.ligjet.org
www.qpz.gov.al
https://www.shqiperia.com/Shqiperia-ka-1668-kulte-fetare.13097/

Der Rücktritt gemäß Art. 50 EUV unter Rechtshistorischen Aspekten. Der Fall des sog. ‚Brexit'

("Withdrawal in Accordance with Art.50 TEU under Legal-Historical Aspects. The Case of the So-called ‚Brexit'")

Carmine Galloro *

Abstract

The Case of the so called ‚Brexit' puts light on several important aspects of European Law. The issue firstly leads a historical analysis about the process of withdrawing from the EU under Article 50 of the Treaty on European Union. In particular, it is to see if there are precedent cases or similar legal figures in other jurisdictions, which can represent an important inspiration in this regard. It will allow to analyze in detail the specific provisions of art. 50 and then to understand the nature of the Brexit. The argument gives at the same time the opportunity to consider a range of matters connected with the future of the EU as institution.

Key words: *European Union; Art. 50 TEU; Withdrawal; Secession; Brexit.*

Voraussetzung

Die Römischen Verträge von 1957, ursprünglich von sechs Staaten Belgien, Luxemburg, Niederlande, Italien, Frankreich und Deutschland unterzeichnet, waren ein Modell von wirtschaftlicher Kooperation, das man niemals zuvor in der Welt gesehen hatte. In den folgenden 50 Jahren hat diese *sui generis* Gemeinschaft einen untrennbaren Entwicklungsprozess gekannt, bzw. die Inklusion von zahlreichen Ländern innerhalb der damaligen EG. Neben solchem Prozess, wurde gleichzeitig auch die Vertiefung des Integrationsraumes vorgesehen, aus dem die Harmonisierung und Zentralisierung vieler Politikbereiche unternommen wurden. Inwieweit der beschriebene Mechanismus funktioniert hat, ist die Frage und die Zielsetzung dieser Untersuchung [1].

Einige sind der Ansicht, dass das Binom Erweiterungs- Integrationsprozess immer wieder neue Herausforderungen, bzw. Konflikte gestellt hat. Der Widerspruch besteht darin, dass einer pleonastischen rechtlichen Produktion – insbesondere, rein technischer Normen - keine kulturelle Vereinigung Europas gefolgt hat [2].

Anderen Autoren zufolge, bleibt die EU unter einem beträchtlichen demokratischen Defizit, da ihre Einrichtungen für die Unionsbürger verbindlich bestimmen, obwohl solcher Prozess im Prinzip gegen das demokratische Elementargrundsatz *‚one man onevote'* anstoßt. Insbesondere, fehle es an ein einheitliches Staatsvolk, welches denselben Einrichtungen eine echte demokratische Legitimation verleihen könnte. Die Vielfalt der nationalen Interessen erschwert außerdem jeden gesamteuropäischen politisch-öffentlichen Diskurs: Kurz gesagt, es gibt keinen Raum für eine gemeinsame Identität, die einem europaweiten Konzept von Bevölkerung entspricht [3].

Eine andere Auffassung hat die Idee bevorzugt, die EU als *intergouvernement* darzustellen. Der Begriff zeigt die Tendenz der politischen europäischen Organe, die Erfindungsprozesse auf eine zwischenstaatliche Zusammenarbeit zu beschränken und wenig signifikanten Prärogativen den exekutiven Einrichtungen – bzw. Europäische Kommission und Europäisches Parlament, zu übertragen [4].

---

* Carmine Galloro, Rechtsanwalt in Stuttgart und wissenschaftlicher Mitarbeiter an der Universität Siena, Italien.

1 Der Vortrag ruht selbstverständlich die zitierten fundamentalen Themen nur summarisch an, um die Prämisse der folgenden Betrachtungen aufs Beste darzustellen.

2 Mit Bezug auf das Thema der Erweiterung s. ALBER, MERKEL (Hrsg.), *Europas Osterweiterung: Das Ende der Vertiefung?*, Berlin, 2005, SS. 183-358; BEICHELT, *Die Europäische Union nach der Osterweiterung*, Baden-Baden, 2004; KLEGER, KAROLEWSKI, MUNKE, *Europäische Verfassung: zum Stand der europäischen Demokratie im Zuge der Osterweiterung*, Münster, 2004.

3 Vgl. dazu BIN, CARETTI, PITRUZZELLA, *Profili costituzionali dell'Unione europea*, Bologna, 2015, S. 352 ff.; TER. RUSSO, *Deficit e anti-deficit democratico nell'ordinamento dell'Unione Europea*, Salerno, 2011; WOLF, *Ein Vorschlag zur Beseitigung von Repräsentations- und Legitimationsdefiziten in Rat und Europäischem Parlament. Überlegungen zur Debatte über die institutionelle Reform der EU*, in: PVS, 2000, 41, 730-741

4 Über das Thema s. die Umfassungen des sog. ‚Maastricht-Urteils' (BVerfGE vom 12. Oktober 1993, 2 BvR 2134, 2159/92). Mit solcher Entscheidung bestätigte das deutsche Bundesverfassungsgericht die Vereinbarkeit des EU-Vertrags von Maastricht mit dem deutschen Grundgesetz. Das Gericht bestätigte überdies, dass die im Grundgesetz garantierten Grundrechtsstandards auch für das EU-Gemeinschaftsrecht gelten und deshalb ist es Aufgabe des BVerfG (wie der anderen nationalen Einrichtungen) das Letztentscheidungsrecht innerhalb des Staatsgebiets auszuüben. Dem Bundesverfassungsgericht nach, hätte die Union nur zwischenstaatlichen Charakter, da sie auf einer europäischen Bürgerschaft basiert, während die Mitgliedstaaten Herren der Verträge bleiben. Das demokratische Defizit wurde auch im Urteil zum Lissabon-Vertrag (BVerfGE vom 30. Juni 2009 - 2 BvE 2/08 - Rn. 1-421) bestätigt, in diesem wurden die Unterschiede zwischen den nationalen Parlamenten und dem Europäischen Parlament bekräftigt. Das letzte stellt nicht effektiv die Bürger, bzw. nicht alle Völker der Mitgliedstaaten in der gleichen Art und Weise dar, gegeben dass, es ein Organ an den Europäischen Rat untergeordnet bleibt. Die Entscheidungen werden dabei von den Vertretern der Regierungen – zumeist einstimmig, getroffen.

Unter weiteren Aspekte, hat die Heterogenität der Interessen dabei weit reichende Folgen mit sich gebracht, bzw. erschwerte Entscheidungsfindungsprozesse durch divergierende Haltungen und die Unmöglichkeit, gemeinsame Ziele, die für die Weiterentwicklung der Europäischen Union notwendig erschienen sind, zu erreichen.

Mit Sicherheit war es Sorge des EU-Gesetzgebers, jeden unordentlichen Haushalt abzuschaffen: Der Reformvertrag von Lissabon unternimmt deshalb eine ganze Reihe von Änderungen, um die Europäischen Union effektiver, transparenter und - in gewissem Sinne - auch demokratischer zu gestalten.

Das hatte jedoch zu einem Blockieren auf nationaler Ebene ausgeführt, wo sich verschiedene Stimmen gegen eine gezwungene oder unvollständige Integration erhoben hatten [5]. So weit dass, es vorgeschlagen wurde, diejenigen Länder, die einer weiteren Integration unter den bestimmten Umständen nicht respektieren können, zum Wohle der verbleibenden Staaten austreten hätten soll. Inwiefern diese Meinung ‚revolutionär' war, sieht man aus dem Fakt, dass seither noch kein Mitgliedstaat die Union verlassen hat [6], während die gleiche Union als dauerhaft bestehende Struktur weiterhin besteht. Überdies ist es ebenso zu beobachten, dass eine Vertragsabstimmung allein nicht dezidierend sein könnte, da auch neu eingetretene Umstände - wie bspw. eine akute Wirtschafts-und Finanzkrise, als grundlegende Änderung der Umstände hätten gelten können.

Die vorangegangenen Überlegungen in groben Zügen erweisen, dass der Austritt als mögliche Option Relevanz von damals erhalten hat. Durch den Vertrag von Lissabon kommt nun auch die rechtliche Legitimation, damit wird zum ersten Mal in ein europäisches Vertragswerk die ausdrückliche rechtliche Verfügung eingesetzt, bzw. es wird einem Mitgliedsland erlaubt, die Union einseitig und ohne Angabe von Gründen zu verlassen.

Infolgedessen folgen die Frage: Wenn ein EU-Staat von der Austrittsoption Gebrauch machen sollte, ist dies als eine Art von Bedrohung gegen dasselbe Konzept der europäischen Integration zu betrachten? Ist daher die Glaubwürdigkeit der EU auf den Prüfstand zu stellen?

1. Aufbau der Arbeit

Der Fokus dieses Aufsatzes ist, ein kurzes rechtshistorisches *excursus* über den Austrittsrecht durchzuführen. In diesem Sinn wird zunächst in Par. 2 dieses Recht historisch ausführlich analysiert, um eine Grundbasis für die weitere Betrachtung zu schaffen. Insbesondere, wird unter Par. 3 ermittelt, welche rechtliche Normen – die einen Austritt in irgendeiner Weise ermöglichen, bereits im derzeitigen Vertragswerk vorhanden sind. Daraufhin wird im Anschluss unterstrichen, wie die EU etwaige auftauchenden Risiken und Chancen darüber geschätzt hat, als dieselben ein vertraglich garantiertes Austrittsrecht vorgesehen haben.

Eine genaue Einordnung der Austrittsmöglichkeit für die EU-Mitgliedsländer impliziert die Diskussion, unter welchen Umständen ein Mitgliedsland den Austritt anstreben und das entsprechende Verfahren einleiten kann.

Deshalb ist vor allem zu betrachten, auf welche rechtshistorische Grundlage in den Vertrag der Europäischen Union das betreffende Recht letztendlich eingesetzt wurde [7]. Dazu scheint der entsprechende Gesetzestext doch nicht detailliert, da die praktische Umsetzung eines Austritts kaum hervorgehoben wurde. Und dies legt nahe, dass sich etwaiges Austrittsverfahren mit der Union von Fall zu Fall ausgehandelt wird. Aus dem können wiederum mögliche Folgen entspringen, wie das Vorliegen von verschiedenen kontroversen Meinungen erweisen.

Unter Par. 4 wird dann ein Vergleich ausgearbeitet, mit Bezug auf den Unterschied zwischen Rücktritt und Sezession. Es handelt sich um Einrichtungen, die föderale Ordnungen interessieren und wichtige Elemente zugunsten dieser Diskussion darstellen.

Zuletzt - unter Par. 5 - wird eine umfassende Analyse des Austrittsartikels durchgeführt, mit Bezug auf die sog. *‚Brexit'* und deren rechtliche, bzw. welche Gründe das Volk und die Regierung derartige Entscheidung zu finden, berechtigen.

2. Historisches *excursus*

Die vorliegende Diskussion nimmt von dem Römischen Vertrag 1957 Ausgang, als die Gründung der Europäischen Wirtschaftsgemeinschaft auf die Bestimmung der ursprünglichen Mitglieder bestand.

In dieser Gelegenheit wurde das Vorsehen eines Rücktrittsrechts aber nicht in Diskussion gestellt, da die Gründer aus der anbrechenden Organisation den Ausgang (selbstverständlich) nicht ermöglichen, bzw. solche Möglichkeit nicht ausdrücken wollen.

Anlässlich der Vorarbeiten des sog. ‚Spinelli-Entwurf', wurde jedoch die Einsetzung einer derartigen Klausel erstmals skizziert. Diese war die Anregung einer gewissen Fraktion, welche vom Däne Jens-Peter Bond dargestellt aber von Spinellis Befürworter widergesetzt wurde.

Zu erinnern ist ebenso der sog. ‚Hermann Bericht' von 1994 [8], der die Union in einer föderalistischen Weise (ähnlich

---

[5] Der Anziehungskraftsverlust seitens der EU ist vom Island-Fall in irgendeiner Weise bewiesen. Nach dem Eintrittsantrag im Jahr 2009, hatte das Land im darauffolgenden Jahr offiziell den *status* von Kandidat bekommen und deshalb erhebliche Fortschritte zur Anerkennung im Sinne des *acquis communautaire* realisiert. Dennoch hat es die Verhandlungen unterbrochen und den Beitrittsantrag zurückgezogen, bzw. den Verzicht auf die EU-Mitgliedschaft definitiv ausgedrückt. Ein Präzedenzfall könnte hierzu der Norweger-Fall sein, als dieses Land den Beitrittsantrag dreimal präsentierte, und den entsprechenden Vertrag zweimal – 1972 und 1994 – unterzeichnete. Aufgrund der Nichtratifikation, bzw. der entsprechenden negativen Ergebnisse der Volksabstimmungen, ist Norwegen außerhalb der EU geblieben (CARAVITA, *La grande sfida dell'Unione europea tra prospettive di rilancio e ombre di declino*, in: *Federalismi*, 1/2012, 2 ff.; DIRRI, *Unione europea – L'Islanda rinuncia alla membership europea*, in: News dalmondo, 18 marzo 2015).

[6] Der Grönland-Fall bildet daher eine Ausnahme (s. auch *infra*Fn. 15).

[7] Für eine allgemeine gesamte Analyse s. BRUHA, NOWAK, *Recht auf Austritt aus der Europäischen Union? Anmerkungen zu Artikel 1-59 des Entwurfs eines Vertrages über eine Verfassung für Europa*, in: AVR, 2004, 42, 1, 1-25; BUSCH, *Das Vereinigte Königreich vor dem Austritt aus der Europäischen Union?*, IW policypaper, 9/2014; VILLANI, *Istituzioni di Dirittodell'Unioneeuropea*, Bari, 2013, S. 65 ff.

[8] Dazu s. PISTONE, *A trent'annidalProgettoSpinelli: un'iniziativaparlamentare a favore di unacostituzionefederaleeuropea*, in: *Il Federalista*, 2014, LVI, 1-2; PONZANO, *Il trattato „Spinelli" del febbraio 1984: l'avvio del processo di costituzionalizzazionedell'Unioneeuropea*, in: LEHMANN (Hrsg.), *AltieroSpinelli – federalistaeuropeo*, Bruxelles, 2009, SS. 41-47

wie der Spinelli-Entwurf) vorstellte, aber eigentlich zur vollständigen Restrukturierung der Verträge, bzw. eines einzigartigen Code Gründung, orientiert war[9]. Dieser Code hätte also die gemeinschaftlichen Ziele und das *acquis communautaire* definitiv fokussieren sollen. Art. 44 des Berichtes sah für di Europäische Union bspw. die Fähigkeit vor, Verträge im Allgemeinen zu schließen: Insbesondere, können die Verträge gem. Abs. 7 womöglich gekündigt werden, nach Verfahren ähnlich denen, die für den Abschluss vorausgesetzt waren.

In diesem Sinne war irgendwie stärker die sog. ‚Penelope-Studie', welche im Jahr 2002 unter Prodi-Präsidentschaft von François Lamoureux bearbeitet wurde[10]. Es handelte sich um einen Entwurf für den zukünftigen EU-Verfassungsvertrag, worin die Rücktrittsmöglichkeit ausdrücklich festlegt (Art. 103) wurde. Das betreffende Recht könnte nur von diesen Mitgliedstaaten ausgeübt werden, die nicht imstande gewesen wären, nachträgliche Revisionsverfahren des Verfassungsvertrags auszuführen. Besser gesagt, die Vorschrift einiger Mitglieder das Rücktrittsrecht und gleichzeitig die Möglichkeit, mit der EU assoziiert zu bleiben, wurde anerkannt, aber nur im Falle von nicht nachvollziehbaren Verfassungsänderungen.

Ein erheblicher Fortschritt war der Entwurf für einen europäischen Verfassungsvertrag von 2004 – später ‚Vertrag über eine Verfassung für Europa' (VVE), in dem die Rücktrittsklausel in Betracht gezogen wurde, aufgrund von rein politischen Motivationen. Damals hatte man die EU-Osterweiterung, wo die neue Mitgliedstaaten für eine derartige Klausel genau drängten. Der Punkt war, dass diese Staaten aus der Erfahrung des Warschau-Pakts kamen, worin kein Rücktrittsrecht entweder *de iure*, auch noch *de facto* vorgesehen war.

Dieser Vorschlag löste in Wirklichkeit eine lebhafte Debatte aus, da die Idee, die EU verlassen zu können, im Gegensatz zum gleichen europäischen Geist in irgendeiner Weise schien und deshalb schlecht aufgenommen wurde. Des ungeachtet, blieb eine bestimmte Divergenz zwischen den Beteiligten, erst über die Bedingungen einer zukünftigen Rücktrittsklausel.

Überdies, hatte Art. 46 des genannten Entwurfs sich auf die entsprechenden Regeln des WÜRV ausdrücklich bezogen, nichtdestotrotz gingen die betreffenden Stellungnahmen während der Vorarbeiten auch herb gegeneinander zu. Manche waren bspw. der Meinung, das einseitige Rücktrittsrecht zu vermeiden, bzw. den Ausgang einer Vereinigung zwischen EU und dem betreffenden Staat, obligatorisch zu verbinden. In dieser Richtung setzte sich die Begrenzung des Rücktrittsrechts nur an die Fälle, in denen eine Verfassungsrevision nicht möglich gewesen wäre, ähnlich wie im Hermann-Bericht vorgeschrieben. Unter anderem Aspekt wurde angeregt, einen Zeitraum von 5 bis 20 Jahre ab dem Einschluss des Ausgangsverfahrens festzulegen und erst danach würde dem Staat ein neuer Beitrittsantrag möglich gewesen[11].

Eine Kompromisslösung war, die Möglichkeit für den betreffenden Staat, welcher auf das *ordinary membership* verzichtet hätte, den *status* von Assoziierter Mitglieder anzuerkennen. Dieses Argument wurde auch lebhaft debattiert, als es die Spaltung zwischen den Befürworter eines föderalen Europas und diese, die das zwischenstaatliche Konzept bevorzugten, verursachte. Zuletzt wurde die Option gewählt, welche in Art. I-60, insb. Abs 2, danach eingeschlossen wurde: *„Ein Mitgliedstaat, der auszutreten beschließt, teilt dem Europäischen Rat seine Absicht mit. Auf der Grundlage der Leitlinien des Europäischen Rates handelt die Union mit diesem Staat ein Abkommen über die Einzelheiten des Austritts aus und schließt es ab, wobei der Rahmen für die künftigen Beziehungen dieses Staates zur Union berücksichtigt wird* […] *Das Abkommen wird nach Artikel III-325 Absatz 3 ausgehandelt. Es wird vom Rat im Namen der Union geschlossen; der Rat beschließt mit qualifizierter Mehrheit nach Zustimmung des Europäischen Parlaments"*[12].

Es kam wiederum in den folgenden Jahrzehnten zu zahlreichen Erweiterungen, aber es wurde nie im Laufe der Geschichte europäischer Staatenverbindungen ein - weder freiwilliger noch erzwungener –Austritt betrachtet. Man hatte jedoch von ‚Verkleinerung' des Territoriums gesprochen, als drei Fälle sinnbildlich eintraten[13]: *a)* In Folge der Unabhängigkeitserklärung von 1962, war Algerien nicht mehr Teil von Frankreich und wurde deshalb aus dem EG-Bereich entzogen[14]; *b)* Nach dem Referendum im Jahre 1985 ergab sich der Austritt Grönlands aus der Europäischen Gemeinschaft[15]; und im Falle *c)* Saint-Barthélemy in der Karibik, welches auf eigenen Wunsch trotz Abhängigkeit von Frankreich aus der Union ausschied, als assoziiertes überseeisches Gebiet[16]

[9] FREY, EICHENBERGER, *FOCJ: Competitive Governments for Europe*, in: Int. Rev. Law Econ., 1996, 16, 315-327.

[10] MATTERA (Hrsg.), *Pénélope, Projet de Constitution de l'Union Européenne*, Paris, 2003.

[11] S. Vermerk des Präsidiums für den Konvent, CONV 648/03, Anl. II, S. 9.

[12] Hier wird der Begriff ‚Qualifizierte Mehrheit' als 72% der Ratsmitgliedern oder 65% der Bevölkerung verstanden. Über das Thema s. BUSIA, *Ammissione di nuovi Stati, recesso dall'Unione e revisione del Trattato costituzionale*, in: BASSANINI, TIBERI (Hrsg.), *La Costituzione europea. Un primo commento*, Bologna, 2004, SS. 256-258.

[13] Es gibt eine grundlegende Regierungsveränderung, wenn innerhalb eines Staats eine neue unterschiedliche Regierung auf extra-legalem Weg gegründet wird, ohne dass das Staatsgebiet damit verbreitet oder verkleinert wird. In diesen Fällen gilt nach dem Gewohnheitsrecht die *rebus sic stantibus* Regel, in deren Sinne die Verträge beenden, wenn zum Zeitpunkt des Abschlusses des gleichen Vertrages die ursprünglichen Voraussetzungen und Tatbestände geändert sind (vgl. Wiener Übereinkommen über das Recht der Verträge, Art. 62).

[14] Über das Thema s. *ex multis*, BANTIGNY, *Genčses de l'Europe, jeunessesd'Europe. Entre enchantement et détachement*, Paris, 2010.

[15] Die Bevölkerung des autonomen Staates, welcher jedoch zu Dänemark gehört, fürchtete in Wahrheit die Überfischung seiner Gewässer durch europäische Unternehmen. Grönland verließ also die EG im Jahr 1985, auch wenn keine rechtliche Unabhängigkeitserklärung dazu folgte. Um solchen Austritt zu formalisieren, gelangt man erst zu einer Vertragsänderung, bzw. zum sog. Grönland-Vertrag 1984. Durch diesen wurde die Anwendung der EG-Verträgen für das Grönlandgebiet aufgehoben und ein besonderes Beziehungssystem – nach dem Modell der französischen Überseegebiete, erstellt (s. ETZOLD, OPITZ, STEINICKE, *Drinnen, draußen, und dazwischen – die Entwicklung des Integrationsmodells EU-Grönland*, in: STRATENSCHULTE (Hrsg.), *Heilsame Vielfalt?*, Baden-Baden, 2014.

[16] Es gehört sich, die genannten Fälle hierbei aufzustellen, auch wenn keiner von ihnen eigentlich einen Präzedenzfall von Rücktritt darstellt. Der Punkt ist, dass es in solchen Tatbestände eine Hypothese nie auffindbar ist, wo ein Unterzeichnerstaat des EG-Vertrags, bzw. des Beitrittsvertrags, den Rücktritt aus der EU vorangekündigt hat.

Seither war eine Suspendierung in irgendeiner Weise aus der Gemeinschaft auch nicht vorgesehen. Es sind jedoch umfangreiche Klagebefugnisse der Kommission und der Mitgliedstaaten gegen andere Mitglieder vor dem Europäischen Gerichtshof hängig, welche dazu dienen, etwaige Ausschlüsse nur erschweren. Dies aufgrund des Primats der besonderen gemeinschaftsrechtlichen Vertragsverletzungs- und Aufsichtsverfahren[17].

Unter anderem Aspekt ist zu bemerken, dass ein Recht zum freiwilligen Austritt aus der Europäischen Union in dem Entwurf der sog. Europäischen Verfassung bereits verfügbar war (Art. I-60), wie später im Lissabon-Vertrag wesentlich eingesetzt wurde[18].

Grundsätzlich sind die Mitgliedstaaten die Schöpfer des Primärrechts der EU geblieben, bzw. die „Herren der Verträge", denn nur sie können das Primärrecht ändern. Infolgedessen hätte ein Austritt im gegenseitigem Einvernehmen der Mitglieder möglich sein können[19].

Wie bekannt, obwohl der Verfassungsvertrag nicht bewilligt wurde, ist die Rücktritts-Klausel im Lissabon Vertrag, d.h. im heutigen EU-Recht, trotzdem endlich eingegangen[20].

Vor dem Vertrag von Lissabon war aber ein Teil der Rechtslehre der Meinung, dass es kein Raum für den Rücktritt aus den Verträgen sein könnte, im Gegensatz zu denen, die sich auf die Normen des allgemeinen Völkerrechts bezogen. Des Weiteren wurden die wichtigsten Verträge konzipiert, als hätten sie unbegrenzte Dauer, wie übrigens Art. 53 des EU-Vertrags und Art. 356 AEU Vertrags hierüber erweisen.

Diese Bestimmungen, mit der zugunsten von EU-Rechtsordnung Souveränitätseinschränkung der Staaten kombiniert, drücken also die Unumkehrbarkeit des Integrationsprozesses, bzw. die Unmöglichkeit seitens eines Mitgliedstaats das Ausgangsrechts auszuüben. Dafür spricht, dass dieses Recht in den Vorbereitungsverhandlungen des Vertrages von Rom im Jahr 1957 nicht erwähnt wurde, weshalb das Thema sich noch in Diskussion befand[21].

An dieser Stelle hat der Diskurs auf das dualistische Konzept ausgewichen, welches die Normen des Völkerrechts auf einer Stufe mit dem innerstaatlichen Recht in Betracht zieht. In diesem Sinne, scheint die Verankerung einer Austrittsmöglichkeit im Vertrag von Lissabon als eine politische Reaktion auf die bestrittenen Erweiterungen der vorangegangenen Jahrzehnte[22].

In dem sog. Lissabon-Urteil vom 30. 06. 2009, hat seinerseits das deutsche Bundesverfassungsgericht einige Prinzipien erklärt, bzw. das Bestehen für jedes Mitgliedslandes gewisser Souveränitätsrechte, abgesehen von der zunehmenden Europäisierung und der Erweiterung der Unionszuständigkeiten[23]. Dies hat die Durchführung, durch den Vertrag von Lissabon, des bestimmten Austrittsrechts *ex* Art. 50 EUV ohne Zweifel beeinflusst.

Infolgedessen muss bspw. ein Mitgliedstaat, der sich entscheidet auszutreten, dem Europäischen Rat seine Absicht ohnehin mitteilen. Nach dem Beschluss dieses Organs, haben die zuständigen Komitees mit diesem Staat zu verhandeln, die einzelnen Bedingungen des Austritts festzulegen und das entsprechende zu beschließen, indem die künftigen Beziehungen dieses Staates zur Union reglementiert werden (Art. 50 Abs. 1-3 EUV)[24].

Der erste Absatz des betreffenden Artikels sieht im Allgemeinen ein Austrittsrecht auf freiwilliger Basis vor. Dies würde nahelegen, dass ein erzwungener Ausgang aus der Europäischen

---

[17] Vgl. dazu KOENIG, HARATSCH, BONINI, *Diritto Europeo*, Milano, 2000, SS. 386 ff.

[18] Die Europäische Gemeinschaft für Kohle und Stahl, auch *‚Montanunion'* genannt, wurde in dem ursprünglichen Vertrag für die Dauer von 50 Jahren geschlossen (Art. 97). Diese Frist lief 2002 ab. Im Maastricht-Vertrag 1992 wurde jedoch eine Europäische Union *„auf unbegrenzte Zeit"* (Art. 51) vorgesehen, die *„auf drei Pfeilern beruht: die Europäischen Gemeinschaften, die Gemeinsame Außen- und Sicherheitspolitik (GASP) und die Zusammenarbeit in den Bereichen Justiz und Inneres"*.

[19] (Eichholz, 2011, S. 26.) In Deutschland wurde diese Unklarheit durch ein Grundsatzurteil des Bundesverfassungsgerichts beseitigt. In dem *supra* zitiertes Maastricht-Urteil von 1993 hat das Karlsruher Gericht erklärt, dass die Bundesrepublik trotz der Ewigkeitsklausel im, ein Jahr zuvor, abgeschlossenen Unionsvertrag, über eine Austrittsmöglichkeit verfügt. Insbesondere ist *„Deutschland […] einer der ‚Herren der Verträge', die ihre Gebundenheit an den ‚auf unbegrenzte Zeit' geschlossenen Unions-Vertrag (Art. Q EUV) mit dem Willen zur langfristigen Mitgliedschaft begründet haben, diese Zugehörigkeit aber letztlich durch einen gegenläufigen Akt auch wieder aufheben könnten. Geltung und Anwendung von Europarecht in Deutschland hängen von dem Rechtsanwendungsbefehl des Zustimmungsgesetzes ab. Deutschland wahrt damit die Qualität eines souveränen Staates aus eigenem Recht und den Status der souveränen Gleichheit mit anderen Staaten* […]» (s. BVerfGE 111). Für weitere Überlegungen, s. oben Fn. 4.

[20] Vgl.: ID., *Revisione del Trattato, ammissione di nuovi Stati e recesso dall'Unione*, in: BASSANINI, TIBERI (Hrsg.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Bologna, 2010, SS. 412-414.

[21] Die Herrschaft auf die Verträge und das Letztentscheidungsrecht zugunsten der deutschen Rechtsordnung stehen aber theoretisch in Widerspruch zur Konzeption von europäischer Mitgliedschaft, wie vom Grundgesetz vorgesehen. Insbesondere spricht die gleiche Präambel offen von einem deutschen Volk in einem vereinten Europa. Aus dem sollte es schwierig anzunehmen sein, dass Deutschland auf das EU-Recht im Einklang mit ihren eigenen Verfassungsregeln eigenes überlappt, ohne den Geist des Grundgesetzes zu brechen. Im Übrigen hatte das Bundesverfassungsgericht bereits mit dem sog. *‚Solange II'* Beschluss (vom 22. 10. 1986, 32 BvR 197/83, 339, 131) bestätigt, dass die vom Grundgesetz verbürgten Grundrechte im Gefüge der Verfassung als einer normativen Sinneinheit stehen. Der Bezug auf das vereinigte Europa ist also nicht nur eine reine Formulierung, sondern eine in jeder Hinsicht verfassungsartige Vorschrift. Die offenen Fragen bleiben deshalb: Gibt es keinen Widerspruch, wenn sich eine Rechtsordnung gleichzeitig Herr von supranationalen Verträge und Teil des vereinigten Europas nennt? Kann ein staatliches Bundessverfassungsgericht – und deshalb eine gleiche staatliche Rechtsordnung, die ganze Union beherrschen? Über das Thema s. *ex multis* CASSESE S., *L'Unione Europea e il guinzaglio tedesco*, in: Giorn. Dir. Amm., 2009, 9, 71 ff. Da die Diskussion rein politischen Charakter hat, gibt man hierbei auf die spezifischen Texten Verweis.

[22] Weniger als zuvor ist die Union eine ewige Gemeinschaft. Es wurde hierzu gesagt, dass niemand zur Fortführung der europäischen Integration gezwungen werden soll (BECKER, in: SCHWARZE, BECKER, HATJE, SCHOO (Hrsg.), *EU-Kommentar*, Baden-Baden, 2012, S. 390).

[23] BVerfGE vom 30. Juni 2009 - 2 BvE 2/08 - Rn. 1-421. S. auch *supra* Fn. 4.

[24] Das Abkommen wird nach Artikel 218 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union aushandeln. Es wird vom Rat im Namen der Union geschlossen; der Rat beschließt mit qualifizierter Mehrheit nach Zustimmung des Europäischen Parlaments. Die Verträge finden auf den betroffenen Staat ab dem Tag des Inkrafttretens des Austrittsabkommens oder andernfalls zwei Jahre nach der in Absatz 2 genannten Mitteilung keine Anwendung mehr, es sei denn, der Europäische Rat beschließt im Einvernehmen mit dem betroffenen Mitgliedstaat einstimmig, diese Frist zu verlängern.

Union rechtlich unmöglich sei. Jedenfalls gilt jeweilige nationale Verfassung als Rechtsgrundlage, an die der Staat sich halten muss, wenn der Austritt auf eine extra-nationale Norm bspw. bezogen ist. Es ist der Fall der Ausgestaltung von Volksabstimmungen oder Referenden. Gem. Absatz 2 muss in erster Instanz der Europäische Rat, welcher aus den 28 Staats- und Regierungschefs der Mitgliedsländer besteht, informiert werden.

Ein derartiges Abkommen benötigt die Entscheidung des Europäischen Rats mit qualifizierter Mehrheit, nachdem das Europäische Parlament als repräsentatives Organ der Union zugestimmt hat[25].

An dieser Stelle ist zu erinnern, dass der Vertreter der austretenden Nation im Europäischen Rat und im Rat gem. Art. 50 Abs. 4 EUV nicht an Beratungen und Beschlussfassungen teilnehmen darf. Hierbei ist ebenso zu bemerken, dass die Verträge der Europäischen Union zwei Jahre nach Inkrafttreten des Abkommens für den ausgliedernden Staat nichtig sind, es sei denn der Europäische Rat setz eine andere Frist (Abs. 3).

Rein bestritten ist jedoch der Fall, wenn der Europäischen Rat keine qualifizierte Mehrheit erreicht, da es nicht geregelt ist, wie sich das Austrittsverfahren in diesen Tatbestände durchführen lässt. Manche sind der Ansicht, dass sich der betreffende Staat der Auslegung des Europäischen Gerichtshofs wenden müsste. Zu dieser Gelegenheit hat das deutsche Bundesverfassungsgericht im Urteil zum Lissabon-Vertrag nochmals seine Meinung geäußert: *„Die Entscheidung, auszutreten, muss nicht zwingend durch ein Austrittsabkommen zwischen der Europäischen Union und dem betreffenden Mitgliedstaat umgesetzt werden. Für den Fall, dass ein Abkommen nicht zustande kommt, wird der Austritt zwei Jahre nach Mitteilung der Austrittsentscheidung wirksam* […]"[26].

Die Aktivität des Europäischen Rats ist in diesem Bereich orientiert, damit etwaige Verhandlungsverfahren über einen Austritt aus der Europäischen Union, die Verfahren über die Aushandlung eines Beitritts soweit möglich folgen. In beiden Fällen trägt dieses Organ die Befugnis den Verhandlungsführer beim Austrittsprozess zu bestimmen[27].

Überdies bleiben im Fall von Austrittsverfahren wichtige Fragen noch unbeantwortet. Zunächst ist zu schätzen, welche Gültigkeit einige Unionsrechte (gem. Art. 50 Abs. 3 EUV) zukünftig haben können. Hierbei handelt es sich um die vier Grundfreiheiten der Union, bzw. freies Verkehr von Waren, Personen, Dienstleistungen und Kapital. Diese Rechte stellen den Kern des ganzen EU-Systems dar, deshalb ist es kaum vorstellbar, sie innerhalb einer kurzen Frist aufheben zu können[28].

Insbesondere, gibt es mit Bezug auf die Personenfreiheit Rechte, die sich mit einem Austritt des jeweiligen Landes nicht einfach löschen lassen: Eines für alle, das Recht auf Familiennachzug. Diese Argumente legen nahe, dass Übergangsregelungen mit dem austretenden Land unbedingt zu vereinbaren sind. Jedenfalls liegen die Normen des Unionsrechts nicht alle unter der Kraft des dritten Absatzes des Artikels 50 EUV. Man erinnert bspw. an die Möglichkeit, die Beziehungen mit der Europäischen Union in anderer Weise zu führen. Außer dem Fall, nachdem ein ausgeschiedener Staat einen Antrag auf erneute Aufnahme in die EU gem. Art. 49 EUV weiterleiten kann (Abs. 5 des Art. 50), bleibt für den Staat selber immer noch die Möglichkeit, ein bilaterales Abkommen mit der Kommission zu vereinbaren.

Dieser Ansatz wurde aber von einigen nationalen Verfassungsgerichten kritisiert, da das Konzept von „Übertragung von Teilsouveränität" statt dieses von „Souveränitätsverzicht" bevorzugt wurde, und damit die Austrittsmöglichkeit - gem. den gleichen nationalen Prinzipien von Souveränität, in irgendeiner Weise legitimiert hatten.

Manche waren gegen der Meinung, dass aufgrund ausdrücklicher Bestimmungsmangel, die Rechtfertigung eines Rücktritts von einem Mitgliedstaat, in den Normen des allgemeinen Völkerrechts zu finden seien. Hier kommt somit das Wiener Übereinkommen über das Recht der Verträge vom 23. Mai 1969 (WÜRV) in Betracht, wobei sich Teil V insbesondere um die Ungültigkeit, Beendigung und Aussetzung der internationalen Verträge kümmert.

Es ist allerdings zu bemerken, dass, im Rahmen der europäischen Verträge, die traditionellen Regeln des Gewohnheitsrechts - bzw. *contraria consuetudo*, *desuetudo*, *etc.*, nie in Betracht gezogen worden sind, wobei die gleichen Verträge ihrerseits auch keine endgültigen Bedingungen oder (im eigentlichen und uneigentlichen Sinne) zufällige Resolutivbedingungen vorgesehen hatten.

Mit Bezug auf das Rücktrittsrecht, differenziert das Wiener Übereinkommen zwei Tatbestände: *i)* Die für eine Partei ausdrückliche Möglichkeit, eigenes Kündigungs- oder Rücktrittsrecht auszuüben; *ii)* Der Fall, worin keine Vereinbarung solches Rechts reglementiert.

Über das Thema sind also einigen Normen zu analysieren. Vor allem scheint Art. 54 WÜRV relevant, dort wo es heisst; *„Die Beendigung eines Vertrags oder der Rücktritt einer Vertragspartei vom Vertrag können erfolgen: a) nach Massgabe der Vertragsbestimmungen*

[25] Ab dem 1. November 2014 wird gemäß dem Vertrag über die Europäische Union eine Mehrheit als qualifizierte Mehrheit angesehen, die *„von mindestens 55 % der Mitglieder des Rates, gebildet aus 15 Mitgliedern, sofern die von diesen vertretenen Mitgliedstaaten zusammen mindestens 65 % der Bevölkerung der Union ausmachen"* (Art. 16 Abs. 4) gebildet wird. Die Ausweitung der Mehrheitsentscheidungen im EU-Ministerrat steht seit der Einheitlichen Europäischen Akte (1987) immer wieder auf der Agenda bei Vertragsrevisionen. Es bleibt jedoch abzuwarten, ob nicht die Bedingungen der qualifizierten Mehrheit die Entscheidungsfindung erschweren werden. Die komplizierte Struktur der doppelten Mehrheit für die 55% der Mitgliedstaaten (mindestens 15 Länder) und 65% der Bevölkerung notwendig sind (und einer Sperrminorität von mindestens 4 Mitgliedstaaten) kann hier eventuell hemmend wirken (vgl. dazu HOFMANN, WESSELS: *Der Vertrag von Lissabon. Eine tragfähige und abschließende Antwort aus konstitutionelle Grundfragen?*, in: *Vierteljahreszeitschrift des Instituts für Europäische Politik in Zusammenarbeit mit dem Arbeitskreis Europäische Integration*, Baden-Baden, 2008, 1, 15 ff.).

[26] (BVerfG. v. 30. 06. 2009, BVerfGE 330).

[27] Wenn die Verhandlungen über alle Kapitel abgeschlossen sind, kann der Beitritt mit dem Abschluss des entsprechenden Vertrags zwischen den Mitgliedstaaten und dem Kandidatenland eingeleitet werden.

[28] Dies ist mit der heutigen Diskussion verbunden, mit Bezug auf die Hinfälligkeit der erworbenen Rechte der europäischen Bürger, die nach dem *Brexit* in dem Vereinigten Königreich ansässig sind (s. den letzten Teil dieses Aufsatzes).

oder b) jederzeit durch Einvernehmen zwischen allen Vertragsparteien nach Konsultierung der anderen Vertragsstaaten". Die Bestimmung unter Buchstabe *a)* bezieht sich auf den Gültigkeitsbereich der ausdrücklichen Klauseln der Verträge und ist nach Inkrafttreten des Vertrags von Lissabon genau anwendbar; die Bestimmung unter Buchstabe *b)* sieht die Anwesenheit der Vereinbarung zwischen Partei vor, bzw. die Möglichkeit der konsensuellen Aufhebung der Verträge[29].

Art. 56 sieht die Fälle vor, wo keine Bestimmung über Beendigung, Kündigung oder Rücktritt liegen. Insbesondere, findet man schon im ersten Absatz die allgemeine Norm gegen die einseitige Kündigung[30]. Infolgedessen kann eine Vereinbarung ohne ausdrückliche Klauseln, einer nie eine Voraussetzung einer Kündigung darstellen. Indes geschieht das aber nur ausnahmenweise in zwei Fälle: *a)* Die Vertragsparteien beabsichtigen die Möglichkeit einer Kündigung oder eines Rücktritts zuzulassen; *b)* Ein Kündigungs- oder Rücktrittsrecht lässt sich nicht aus der Natur des Vertrags herleiten.

Abs. 2 des genannten Art. 56 diszipliniert die Vertragslaufzeit, wo festgelegt ist, dass eine Vertragspartei ihre Absicht, nach Absatz 1 einen Vertrag zu kündigen oder von einem Vertrag zurückzutreten, mindestens zwölf Monate im Voraus zu verlautbaren hat.

Was die Vertragsbeendigung anbelangt, sieht das Völkerrecht dazu wohl sechs Tatbestände vor: 1) Aufhebung, wenn alle Vertragsparteien später einen sich auf denselben Gegenstand beziehenden Vertrag schliessen und im Gegensatz zum ursprünglichen Vertrag neue Regeln festlegen (Art. 59 WÜRV); 2) Vertragsverletzung, als Grund für die Beendigung des Vertrags oder für seine gänzliche oder teilweise Suspendierung geltend zu machen (Art. 60); 3) Nachträgliche Unmöglichkeit der Erfüllung, wenn sich die Unmöglichkeit aus dem endgültigen Verschwinden oder der Vernichtung eines zur Ausführung des Vertrags unerlässlichen Gegenstandes ergibt (Art. 61); 4) Grundlegende Änderung der Umstände (Art. 62); 5) Verzicht, wenn eine Vertragspartei – im Falle von Einvernehmen, die für die gleiche Partei nur günstige Situationen erstellte und keine Verpflichtungen mitbrachte, auf einige subjektive Rechte verzichtet[31]; 6) Entstehung einer neuen völkerrechtlichen Norm von *ius cogens*, somit wird *ex nunc* jeder zu dieser Norm im Widerspruch stehende Vertrag nichtig und erlischt (Art. 64).

Aus allem diesem taucht die Option, die mehr als andere mit dem EU-Recht kompatibel zu sein scheint. Es handelt sich um die grundlegende Änderung der Umstände *ex* Art. 62 WÜRV, als *‚rebus sic stantibus'* Klausel bekannt[32]. Die Vorschrift ist detailliert, insbesondere Abs. 1 lautet: *„Eine grundlegende Änderung der beim Vertragsabschluss gegebenen Umstände, die von den Vertragsparteien nicht vorausgesehen wurde, kann nicht als Grund für die Beendigung des Vertrags oder den Rücktritt von ihm geltend gemacht werden, es sei denn a) das Vorhandensein jener Umstände bildete eine wesentliche Grundlage für die Zustimmung der Vertragsparteien, durch den Vertrag gebunden zu sein, und b) die Änderung der Umstände würde das Ausmass der auf Grund des Vertrags noch zu erfüllenden Verpflichtungen tiefgreifend umgestalten"*.

Es ist weiterhin hervorzuheben, dass die gleiche Klausel – universell anerkannt aufgrund ihres Wertes von *ius cogens*, und ebenso vom EuGH bestätigt wurde[33]. Folglich konnte ein EU-Mitgliedstaat – vor dem Inkrafttreten des Vertrags von Lissabon – nur nach Zustimmung aller Mitgliedern den einseitigen Rücktritt einbringen, bzw. aufgrund einer unvorstellbar grundsätzlichen Änderung der Tatbestände, die erhebliche Unfähigkeit die erfüllenden Verpflichtungen zu schaffen, verursacht hätte.

Um eine Parallele zum Wirkungsbereich des UN-Rechts zu ziehen, sieht die Charta keine ausdrückliche Möglichkeit der Kündigung vor und bisher werden etwaige Vorfälle allerdings auch nicht registriert. Dazu hielt die völkerrechtliche Rechtsprechung, dass durch die Ausnutzung des allgemeinen Völkerrechts der Rücktritt aus der UN-Mitgliedschaft ausgeübt werden kann, bzw. durch die *rebus sic stantibus* Klausel. Es ist der Fall, wo ein Mitgliedstaat nicht mehr imstande ist, die aus der Charta kommenden Verpflichtungen, wie bspw. die Beteiligung an die UN-Versammlung, zu erfüllen.

3. Rechtliche Folgen des Rücktritts

Mit Bezug auf die rechtlichen Folgen eines möglichen Austritts, ist hervorzuheben, dass Art. 50 EUV die entsprechenden Rücktrittsverhandlungen nicht nur beschreibt sondern dieselben - im Rahmen der zukünftigen Beziehungen zwischen dem Staat und der EU, besonders reglementiert. Infolgedessen findet man in diesem Bereich die Einsetzung aller anwendbar europäischen Normen, bzw. aller Vorschriften der Verordnungen, die in die nationale Rechtsordnung nicht umgesetzt werden sollen und deshalb keine Wirkung mehr gegen das austretende Land haben. Als Ergebnis, wurde das letzte bspw. aus dem betreffenden Umsetzungspflicht befreit, mit dem Risiko jedoch, in verschiedenen Felder Rechtsmängeln davonzutragen[34].

Unter anderem Aspekt bringt der Rücktritt *ex* Art. 50 die Beendigung der Geltung der vier Freiheiten mit, wo natürliche und juristische Personen keinen unmittelbaren Zugang zum EU-Markt – bzw. die Möglichkeit den freien Verkehr von Waren, Personen, Dienstleistungen und Kapital auszuüben, verlieren

---

[29] RIEDER, *The withdrawal clause of the Lisbon Treaty in the light of EU Citizenship: Between Disintegration and Integration*, in: Fordham Intl LJ, 2013, 37, 149-153

[30] CHRISTAKIS, *Article 56, 1969 Vienna Convention*, in: CORTEN, KLEIN (Hrsg.), *The Vienna Convention on the Law of the Treaties: A Commentary*, Oxford, 2011, S. 1257 ff.

[31] S. bspw.:*I.L.C. report on the work of its fifty-third session*, in *Yearbook of the International Law Commission*, II, Art. 45, S. 121

[32] BULLINGTON, *International Treaties and the clause „rebus sic stantibus"*, in: UPaLRev, 1927, 153-177.

[33] *„Die Regeln des Völkergewohnheitsrechts über die Beendigung und die Suspendierung vertraglicher Beziehungen wegen einer grundlegenden Änderung der Umstände* [binden] *die Gemeinschaftsorgane und sind Bestandteil der Rechtsordnung der Gemeinschaft"*, s. *Racke GmbH & Co. v Hauptzollamt Mainz*, Urteil vom 16. Juni 1998, Slg. 1998 I-03655, par. 48.

[34] Vgl. Dazu HERBST, *Observations on the Right to Withdraw from the European Union. Who are the „Masters of Treaties"?*, in: GLJ, 2005, 11, 1755-1760; LAZOWSKI, CEPS, *Commentary*, in: ELR, 2012, 5, 523-540.

würden. In diesen Fällen folgt der ehemalige Handelsverkehr die WTO Normen, mit Bezug auf das sog. Meistbegünstigungsprinzip[35].

Es besteht somit das Problem, die vom EU-Recht abstammenden nationalen Vorschriften zu reglementieren, da jede Rechtsordnung der Mitgliedstaaten in der einen oder anderen Weise von den europäischen Normen beeinflusst ist. Es können *selfexecuting* Verordnungen oder Richtlinien - welche ihre Umsetzung in das nationale Recht sowie ihre Anwendbarkeit innerhalb der einzelnen Staaten erfolgen müssen, sein. Das ausgetretene Mitgliedsland ist doch nicht verpflichtet, diese europäischen Normen zu löschen oder in eigener Rechtsordnung zu lassen. Ihm bleibt aber die Verantwortung, diese Normen dem neuen Kontext anzupassen.

Der ausgetretene Staat kann die *self executing* Verordnungen und die Umsetzung gewisser Richtlinien *pro futuro* nicht mehr verwenden, sofern er für die Erfüllung der betreffenden Rechtslücke auf nationalem Niveau sorgt. Dies beansprucht erhebliches Engagement seitens des Staats selbst, um in der kürzesten möglichen Zeit die beste Rechtsproduktion zu schaffen und eigene Rechtsordnung nicht ungeschützt zu lassen.

Denkt man bspw. an die Beendigung der Gemeinsamen Politik, mit der die Union Einzelnen und Unternehmern von verschiedenen Sektoren unterstützt. Ohne solchen Beistand muss der Staat allein die Ressourcen und die Modalität bereitstellen, um die gleiche Unterstützung wahrzunehmen. Dies impliziert die Notwendigkeit, neue Institutionen – wie unabhängige Behörden, staatliche Agentur, *ad hoc* einzurichten.

Ein weiteres Problem steht in Bezug auf die Auslegung des EU-Rechts. Nach dem Austritt, ist der Staat den Entscheidungen des EuGH nicht mehr unterworfen, dessen ungeachtet können etwaige Kontrasten zwischen diese Subjekte auftauchen. Dieses Gericht könnte über Auslegungsfragen entscheiden, welche in nationalen Rechtstexten gefestigt europäischen Vorschriften interessieren. In diesem Fall bleibt die staatliche Norm vom ursprünglichen Hintergrund nicht isoliert, weshalb eine Art von rechtlichem Paradox aus dem herkommen könnte, wo die Urteile des EuGH gegen den ehemaligen EU-Mitgliedstaat Kraft haben, bzw. außer dem Bereich eigener Zuständigkeit[36].

Was die Rechtsgeschäfte zwischen dem ausgetretenen Staat und einem anderen EU-Mitgliedstaat anbelangt, sollten die unter der Ägide der EU-Normenreihe geschlossenen Geschäfte den normalen Kurs folgen. Die nach dem Austritt entstandenen Verpflichtungen – abgesehen vom Zeitpunkt des Abschlusses, berühren jedoch in der Regel auf die nationalen Normen, mit der Konsequenz, dass das verträgliche Gleichgewicht zugunsten einer oder anderer Partei mitunter verschoben werden könnte. Einige Positionen können Vorteile bekommen, in Abhängigkeit von den zeitlichen rechtlichen Rahmenbedingungen[37].

All dies beweist, dass das Rücktrittsrecht nicht nur Probleme von internationaler Verantwortung oder rein ökonomische-fi-

[35] Das Prinzip impliziert die Garantie, dass der Anbieter mit keinem anderen Kunden günstigere Vertragsbedingungen vereinbart hat, bzw. dass die Gleichberechtigung allen Vertragspartnern gewährt wird. Dieses Prinzip verhindert die Benachteiligung einzelner Länder im Welthandel, ist Grundbestandteil des GATT und anderer Handelsabkommen. Im Allgemeinen, ist das die wichtigste Grundlage aller Vertragswerke der WTO, wo das Allgemeine Zoll- und Handelsabkommen, das Dienstleistungsabkommen sowie das Abkommen zum Schutz geistigen Eigentums, eingeschlossen werden. Im Einklang mit der Reziprozitätsklausel, stellt die Meistbegünstigungsklausel das Grundprinzip des WTO-Rechts dar. Das Gegenseitigkeitsprinzip bezieht sich aber nicht auf die Anwendung der Meistbegünstigungsklausel, sondern lediglich auf bilaterale Verhandlungsprozesse. Für einen Überblick s. HORN, MAVROIDIS, *Economicand Legal Aspectsofthe Most-Favored-Nation Clause*, in: EJPE, 2001, 17, 2, 233-279; KRAJEWSKI, *Wirtschaftsvölkerrecht*, Heidelberg, 2012, S. 84 ff.; SCHMAHL, *„Enabling Clause" versus Meistbegünstigungsprinzip*, in: AVR, 2004, 42, 4, 389-410.

[36] Den jüngsten Ergebnisse der Rechtslehre zufolge, handelte es sich dabei, um einen nur virtuellen Paradox. Heutzutage sind die Verknüpfungen zwischen verschiedenen Rechtsordnungen so eng, dass die Begrenzung zwischen nationalen und extra-nationalen doch verschwommen scheinen. Und dies dank auch dem sog. Dialog zwischen Hochgerichte, welche durch ihre Entscheidungen das Weitergeben der universalen Grundprinzipien über die Rechtsordnungen vereinfacht haben. Sodass die meisten mitgliedstaatlichen Höchstgerichte einen Vorrang kraft verfassungsrechtlicher Ermächtigung, und damit die Kollisionsnorm im jeweiligen nationalen Rechtssystem angenommen haben. Nach der in dem Text angerufenen Hypothese, spielen die europäischen Normen als einseitige Ausführungsnormen, die sich nicht auf das Unionsrecht vorsätzlich orientieren, aber vielmehr ein Art von Anwendung des europäischen Rechts darstellen. Die nationalen Vorbehalte könnte man deshalb auf diesem Weg betrachten, als sie in bestimmten Situationen trotz des prinzipiellen Vorrangs des Unionsrechts, als eine Art von *ordre-public* angewendet werden sollen. Die Qualifikation von diesem Recht als‚globales' statt ‚internationales' kommt wiederum aus der Tatsache, dass die Entwicklungsprozesse der Weltordnungspolitik – welche diesen Bereich interessieren, eigentlich eine Vielzahl von Akteuren und Einrichtungen betreffen. Dieser Reichtum der Elemente erlaubt also nicht eine Klassifikation nach dem klassischen völkerrechtlichen Schema. Es handelt sich um Subjekte, bzw. Beamten mit begrenzten von ihren Regierungen gegebenen Mächte, Vertreter der internationalen Bürokratie oder anderen privaten Institutionen, die sich aus dem Völkerrecht kaum betrachten lassen. Manche Beobachter argumentieren dafür, dass fortschreitende Systematisierung einheitlicher Verwaltungsvorschriften zu einer bestimmten Konfiguration des Rechtsbereiches in der Welt geführt hat, was als neue Version von *ius gentium* definiert wurde. Dies sei mehr aus den zahlreichen unterschiedlichen Beziehungen zwischen sog. globalen Aktoren und Einrichtungen ähnlich entstanden, als von diesem Recht, welches auf zwischenstaatlichen Übereinkommen – sog. *ius inter gentes* – beruht. Dazuvgl. S. CASSESE, *Administrative Law without the State? The Challenge of Global Regulation*, in: NYU J. Int'L L. & Pol., 2005, 37, 663 ff.; COHEN, SABEL, *Global Democracy?,ivi*, 790-794; MOELLERS, *Transnational Governance without a Public Law?*, in: JOERGES(Hrsg.), *Transnational Governance and Constitutionalism*, Oxford, 2004, S. 327 ff.

[37] Selbstverständlich wird hiermit das Problem nur kurz beschrieben, da es die Dialektik zwischen IPR und nationales Privatrecht insbesondere impliziert. Einem laufenden Gedanke zufolge, stehe kein Einklang zwischen staatlichen intertemporalen und internationalen Kollisionsnormen zu. Als mögliche Lösung, ersetzt man bei einzelnen Normen des IPR die örtliche durch eine zeitbezogene Verbindung. Die Regel ‚*locus regit actum*' lasse sich nicht durch die Regel ‚*tempus regit actum*' also substituieren. Anders als im IPR, wo das Kriterium auf einen *favornegotii* abstellt (wie in Deutschland Art. 11 EGBGB bspw. daher wirkt), sei im nationalen Privatrecht nur eine starre Anknüpfung an den Augenblick der Vornahme des Rechtsgeschäfts vorstellbar. Im Prinzip werden etwaige Vertragsprobleme durch die traditionellen Rechtseinrichtungen - wie selbständige oder unselbständige Anknüpfung, Qualifikation, Gesamtverweisung, *ordre public*, fallweise geprüft. Dazu s. HESS, *Intertemporales Privatrecht*, Tübingen, 1998, S. 325 ff.; LAGHI, *Il diritto internazionale privato nei suoi rapporti colle leggi territoriali*, Bologna, 1888, S. 39 ff.; TORRENTE, SCHLESINGER, *Manuale di Diritto Privato*, Milano, 2015, S. 62 ff.

nanzielle Affäre impliziert. Nun wird jede staatliche Rechtsordnung von der EU-Rechtsordnung dermaßen beeinflusst, dass ein *detachment* gerade mit einer Vertragskündigung nicht mehr möglich ist. Die entsprechenden Beziehungen sind so verknüpft, dass etwaige Rücktrittsverhandlungen lediglich eine Sektor für Sektor Folgenabschätzung beanspruchen. Denkt man bspw. an die Folgen, dass der Rückzug auf die europäische Staatsbürgerschaft haben würde und auf die Rechte im Allgemeinen der Bürger des ausscheidenden Staats[38]. Ähnliche Fragen kommen mit Bezug auf die Allmendegüter sowie auf das Problem- Management im Bereich von Umwelt, Energie, Menschenrechte, Droge- und Waffenhandel, Terrorismus, *etc*.[39]

Die Rechtsordnung des ausgetretenen Staats würde also die rechtlichen Verbindungen mit der EU aufrechterhalten, da es kaum vorstellbar ist, die europäischen regulatorischen Entwicklungsprozesse – welche das nationale Gesetz vor dem Austritt gekennzeichnet haben, *ex abrupto* zu löschen.

Unter anderen Aspekt ist, die Möglichkeit des Rücktritts aus dem EWU-System ohne die EU zu verlassen, zu erwähnen. Mit anderen Worten, der austretende Staat könnte ohne Mitgliedschaftsverlust, von bestimmten in den Verträgen festgelegt Verpflichtungen, zurückziehen. In Wahrheit sehen die Verträge keinen freiwilligen Austritt oder Ausschluss vor, deshalb hat auch die jüngste Rechtslehre die Frage des Verzichts auf den Euro als realistisches Problem betrachtet.

Aus rechtlicher Sicht, scheint nur ein einseitiger Rückzug aus der EWU infolge des Rücktritts *ex* art. 50 EUV zulässig. Außerdem sei eine Vertragsänderung darüber erforderlich, aber jedenfalls bleibt für dieses Zweck eine Vereinbarung zwischen allen EU-Mitgliedstaaten notwendig, gegeben dass, einige wichtige Interessen noch auf dem Spiel stehen würden. Denkt man bspw. an den Rückkehr der Kapitalanteile der EZB und der angebrachtem Währungsreserven, an die Umbenennung in Landeswährung der ehemaligen öffentlichen Kreditaufnahme und die zwischenstaatlichen Vertragsbeziehungen in Euro.

Um diese rechtlichen und technischen Fragen zu beachten, ist daher eine gewisse Verhandlungszeit einzukalkulieren. Die stellt höchstwahrscheinlich der entscheidende Aspekt des ganzen Themas dar.

4. Rücktritt oder Sezession?

Die Umsetzung des Rücktrittsrechts im Art. 50 vom Lissabon Vertrag ist in Wahrheit ein Versuch, in die EU-Rechtsordnung ein richtiges Rücktrittsverfahren festzulegen, infolgedessen sollte die Sache nicht auf einem völkerrechtlichen Niveau sondern auf diesem des EU-Verfassungsrechts betrachtet werden[40]. Der Punkt ist, dass die Union eigenartige Gefüge besitzt, deshalb kann man einen Vorfall – mit dem eine neue verfassungsrechtliche Figur vergleicht, nur mit Schwierigkeit herausfinden.

Etliche Beobachter sind der Meinung, dass die EU eine *sui generis* Föderation darstellt. Nachdem eine Auslegung von Art. 50 bezogen werden kann, die das betreffende Rücktrittsrecht als Sezessionsrecht zu analysieren erlaubt.

Es ist daran zu erinnern, dass die Union an sich ursprünglich auf der Basis der nationalen und internationalen Grundprinzipien – als von Rechtsprechung und Literatur bearbeitet – beruht. Solche Verknüpfung hat sich in letzter Zeit vielmehr verstärkt, so dass einige heute die EU-Einrichtungen als Teil der internationalen Rechtsordnung halten[41]. In diesem Sinne, kann man also den Vergleich zwischen den Figuren von Sezession und Rücktritt rechtfertigen.

Vorausgesetzt dass, ein einseitiges Sezessionsrecht in einer föderalen Rechtordnung noch nicht existiert[42], ist es weiterhin hervorzuheben, dass Art. 50 selbst von dem berühmten Quebec- Urteil 1997 erheblich beeinflusst wurde[43]. In dieser Hinsicht, gelten die nationalen Verfassungsnormen als Orien-

---

[38] Über das Thema des *detachment* im Völkerrecht s. BRÖLMANN, *Deterritorializing International Law: Moving Away from the Divide between National and International Law*, in: NOLLKAEMPER, NIJMAN (Hrsg.), *New Perspectives on the Divide between National and International Law*, Oxford, 2007, S. 84 ff.; 109; KAHN, *Territory and Boundaries*, in: FASSBENDER, PETERS (Hrsg.), *The Oxford Handbook of the History of International Law*, Oxford, 2012, S. 225 ff.; TEUBNER, KORTH, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in: YOUNG (Hrsg.), *Regime Interaction in International Law: Facing Fragmentation*, Oxford, 2010, S. 23 ff.

[39] Es handelt sich um Themen, die nur auf trans-nationalem Niveau geschaffen werden können. Und dies aufgrund eigenes Sachwertes sowohl der Interessen, welche die nationale Grenzen doch überschreiten. Für weitere Betrachtungen dazu, s. *supra*Fn. 36.

[40] In diesem Sinn zeigt der Begriff ‚europäisches Verfassungsrecht' diese Disziplin, welche auf den spezifischen Vertrag, sowie auf das *soft law* und das Gewohnheitsrecht beruht. Die entsprechenden Normen, Regeln und Prinzipien haben nicht unbedingt Vorrang vor traditionellem Völkerrecht. Vielmehr gilt dieses Verfassungsrecht als ein Komplex von extra-nationalen Regeln und Prinzipien, die so wichtig sind, so lange sie ‚konstitutionell' oder verfassungsartig gehalten werden. Über das Thema s. ARNOLD, *Konstitutionalisierung im europäischen Recht*, in: *Festschrift für Günter H. Roth zum 70. Geburtstag*, München, 2011, SS. 13-22: KNAUFF, *Konstitutionalisierung im inner- und überstaatlichen Recht – Konvergenz oder Divergenz?*, in: ZaöRV, 2008, 68, 453-490; PETERS, *Grundlage europäischer Konstitutionalisierung: Die Entkopplung von Verfassung und Staat*, in: LIEBERT, FALKE, MAURER, (Hrsg.), *Postnational Constitutionalisation in the New Europe*, Baden-Baden, 2006, SS. 35-64.

[41] S. dazu die sog. *‚Kadi'* Urteile, bzw. das II des EuGH vom 3. 9. 2008 (C-402/05 P; C-415/05 P, in: Slg. 2008, I-6351) und das IV vom 18. 7. 2013 (C-584/10 P, C-593/10 P und C-595/10 P, in Slg. 2013, I-518). Das erste erklärte, dass es eine *„grundsätzlich umfassende"* Grundrechtskontrolle aller EU-Rechtsakte gewährleisten müsse, und zwar *„auch in Bezug auf diejenigen Handlungen […], [die] der Umsetzung von Resolutionen des Sicherheitsrats nach Kapitel VII der UN-Charta dienen sollen"* (vgl. Punkt 326). Der zweiten Entscheidung nach, müssen die Unionsgerichte durch die Befugnissen, die ihnen aufgrund des Vertrags zustehen, eine grundsätzlich umfassende Kontrolle der Rechtmäßigkeit sämtlicher Handlungen der Union – mit Bezug auf die Grundrechte als Bestandteil der Unionsrechtsordnung – gewährleisten (vgl. Punkt 23). Dazu s. auch BESSON, *European Legal Pluralism after Kadi*, in: ECLR, 2009, 5, 237 ff.; DERS, *Zur Rechtsmittelentscheidung des EuGH (Große Kammer) vom 3. September 2008*, in: EuGZR, 2008, 673 ff.; WEIß, *Praktische Konsequenzen der Kadi-Rechtsprechung*, EuR, 2014, 231. Eine kritische aber interessante Position wird dagegen von LENAERTS vorgestellt, s. *Dass der EuGH als internationales Gericht angesehen wird, ist ein großes Missverständnis*, in: Völkerrechtsblog vom 10. 12. 2014, verfügbar auf: http://voelkerrechtsblog.org/dass-der-eugh-als-internationales-gericht-angesehen-wird-ist-ein-groses-missverstandnis/.

[42] CARAVITA, *Lineamenti di diritto costituzionale federale e regionale*, Torino, 2006 S. 54.

[43] *Libman v. Quebec*, 9. Oktober 1997, Nr. 24960, in: CanLII, 1997, 326 (SCC).

tierungspunkt, auf dessen Basis die Rücktrittszustimmung verankert. Insbesondere, beruft sich das Rücktrittsverfahren auf die Folgen vom *referendum*, Verhandlung und Zustimmung, wie vom nationalen Gericht festgelegt [44].

Die gerichtliche Entscheidung bezog sich grundsätzlich auf das Prinzip, wonach das Selbstbestimmungsrecht den Völkern – die entweder ein Teil des Kolonialreichs, oder unter Fremdherrschaft waren, anerkannt werden konnte. Im Quebec-Fall, hatte die Bevölkerung jedoch die Möglichkeit, eigene fundamentale demokratische Rechte auszuüben, deshalb war das Selbstbestimmungsprinzip selbstverständlich unanwendbar. Das Gericht bestätigte allerdings die Legitimität des *referendum* als Einrichtung, betonte aber, dass etwaiges Ergebnis zu Gunsten der Sezession, nur den Anfang von Verhandlungen zwischen der betreffenden separatistischen Provinz und die zentrale Regierung mitgebracht hätten können. Das Selbstbestimmungsrecht war dann mit anderen Verfassungsprinzipien zu vergleichen, welche Verfassungsstrenge oder Rechtssicherheit.

Allerdings ist die Option des beiderseitigen Einverständnisses sowohl von den völkerrechtlichen Normen wie auch von der nationalen Rechtsprechung bestätigt: Das Wiener Übereinkommen hat insbesondere die Zustimmung zwischen den Parteien vorgeschrieben, während das nationale Gericht den Weg durch die Verhandlungen bevorzugt hat. Außerdem findet man verschiedene Berührungsstelle zwischen dem Quebec-Urteil und dem Art. 50 EUV, dort wo die Willenserklärung jedenfalls nur den Beginn der Verhandlungen darstellt. Solchem Urteil zufolge, muss die Sezession nach Vereinbarung mit den anderen Provinzen und nicht nur mit der zentralen Regierung folgen, etwa wie im EU-Recht, wobei der betreffende Unterhändler (nicht für nichts) der Rat ist, der aus allen Staats- und Regierungschefs der EU-Mitgliedsstaaten besteht. Genau genommen, scheint der Wert des beschriebenen Vergleichs aber in dem zu sein, dass er die Übersetzung aus dem Niveau der materialen Tatsache auf dieses des Verfahrensrechts demonstriert hat. Der Ausgangspunkt ist eigentlich der Versuch, den Rücktritt (als rechtliche Figur) aus einer Föderation, bzw. diese Tatbestände – die *de facto* gewöhnlich ausgelöst sind, unter der Schirmherrschaft des Rechts zu bringen.

5. Der ‚*Brexit*'

Nach der Betrachtung der genannten Auffassungen, wird nun der Fall *Brexit*, bzw. des Austritts aus der EU seitens des Vereinten Königreiches kurz analysiert [45]. Es ist vor allem zu erinnern, dass dieses Land nicht zu dem Kreis der Unterzeichner der Römischen Verträge von 1957 gehörte, sondern Mitbegründer der konkurrierenden Europäischen Freihandelsassoziation EFTA 1960 war. Dessen unbeachtet, beantragte das Vereinigte Königreich sowohl 1963 als auch 1967 in der EWG einzutreten.

In Wahrheit schon seit seiner Annahme im Jahr 1973, war dort eine sehr kritische Meinungsbewegung gegenüber dem Eintritt aktiv [46]. Eine erhebliche Anstellung hatte sich davon im Jahr 1980 – unter Margaret Thatcher, wo das höchste Ergebnis mit 65 % gegen 26 % für den Rücktritt erreicht wurde [47].

Der Nachfolger John Major ließ am 7. Februar 1992 den Vertrag von Maastricht unterzeichnen. Mit dem Vertrag wurde die Europäische Union als supranationalen Verbund für die bestimmte Gemeinsame Politik gegründet. Unter anderem, verpflichteten sich die Unterzeichnerstaaten, spätestens bis zum 1. Januar 1999 eine gemeinsame Währung einzuführen. Das Vereinigte Königreich und Dänemark alleine behielten sich vor - mit der sog. *opt out* Klausel, die Möglichkeit später in der Währungsunion beizutreten.

Aus dem tauchte in den 1990er Jahren erstmals die Hypothese eines Referendums über einen EU-Austritt des Vereinigten Königreichs auf. Selbst der damalige PM Gordon Brown, anlässlich der Unterzeichnung des Lissabonvertrages im Jahr 2007, sprach von *„einen Termin mit Vertretern von Ausschüssen"* [48].

Nach der Unterhauswahl im Jahr 2010 amtierte David Cameron als Premierminister, bzw. in der Eigenschaft als Vertreter der Konservativen. Daraufhin fassten die Skeptiker – die an die Idee eines EU-Mitgliedschaftsreferendums festhielten, wieder Mut. Dennoch wollte die britische Regierung mit den

---

[44] Nach dem *referendum* vom 1995, in dem die Föderalisten mit dem 50,6% der Stimmen gegen 49,4% der Sezession den Wahlkampf gewannen, entschied die kanadische Regierung sich an dem Obersten Gerichtshof zu wenden, in Bezug auf die Existenz eines realen Fragerecht von Sezession seitens der Französisch sprechenden Provinz. Das Gericht sprach sich im negativen Sinne, bzw. kein einseitiges Recht war noch dabei abzuspalten. Auch wenn die Bewohner von Quebec für die Trennung von Kanada gestimmt hätten, wäre jedenfalls weder eine rechtliche Verpflichtung für die Zentralregierung, noch die automatische Sezession entstanden.

[45] Der Fall ist ausführlich betrachtet in den Pressmitteilungen der wichtigsten Networkseiten. S. auch ELMER, HEBEL, *So gespalten ist Großbritannien*, in: Der Spiegel vom 24. 6. 2016, verfügbar auf http://www.spiegel.de/politik/ausland/brexit-die-ergebnisse-in-einer-karte-a-1099133.html; IBRAHIM, *Brexit: The Lessons and the Way Forward*, Independent Publ., 2016; LECHAT, *Brexit: The Isolated Island*, Independent Publ. 2016. Vor allem s. den Bericht des Britischen Parlaments: *Brexit: the next steps for the UK's with drawal from the EU*, verfügbar auf http://www.parliament.uk/eu-referendum.

[46] Beim EWG-Mitgliedschaftsreferendum 1975 hatten allerdings noch 67 % der Wähler für den Verbleib in der EWG gestimmt.

[47] Nachdem Thatcher 1984 einen Rabatt der britischen Beitragszahlungen bekam. Am 20. September 1988 hielt sie in Brügge noch einen Diskurs, in dem ein Europa von unabhängigen, souveränen Staaten, bzw. ein europäischer Bundesstaat nach dem Modell der USA, dargelegt wurde (über das Argument s. im Allgemeinen VON LEIPZIG, WELZ, *Zehn Jahre Jahrbuch der Europäischen Integration: Ein Vademecum für Theorie und Praxis*, in: Integration, 1991, 14, 1, 38-42).

[48] Vgl. HUMMER, *Von der „Verstaatlichung" der EU durch den Verfassungs-Vertrag (2004) zu ihrer „Entstaatlichung" durch den Vertrag von Lissabon (2007) – Das Scheitern des „Verfassungs-Konzepts"*, in: HUMMER, OBWEXER (Hrsg.), *Der Vertrag von Lissabon*, Baden-Baden, 2009, SS. 17-68; SEEGER, YÜZEN, *Und nun Blick nach vorn. Bilanz des Lissabon-Gipfels am 18./19. Oktober 2007*, in: CAP-Papers 13/2007, verfügbar auf http://edoc.vifapol.de/opus/volltexte/2013/4716/pdf/CAP_Aktuell_2007_13.pdf;

europäischen Partnern verhandeln, um eine Reform der EU, insbesondere in Bezug auf Einwanderung und staatliche Souveränität, zu erreichen[49].

Bei der Europawahl 2014 druckte die zunehmend EU-skeptische Grundstimmung jedoch gegen die Einführung des Gesetzes über das Referendum, welches im Dezember 2015 verabschiedet wurde[50].

Der EU-Austritt des Vereinigten Königreichs, auch als *„Brexit"* bezeichnet, wurde beim EU-Mitgliedschaftsreferendum am 23. Juni 2016 im Vereinigten Königreich beschlossen[51]. Der entsprechende Rücktrittsprozess *ex* Art. 50 EUV ist bislang noch nicht im Lauf[52].

Es stehen nun deshalb einige Alternativen zu einer EU-Mitgliedschaft auf dem Tisch, die sich nach dem Grad der Austrittsverhandlungen unterscheiden. Eine von diesen könnte der Europäischen Wirtschaftsraum (EWR) sein. Dieser wird als vertiefte Freihandelszone zwischen EU und der EFTA (aber ohne Schweiz) beschrieben[53].

Infolgedessen sind die Mitglieder verpflichtet, die binnenmarktrelevanten Regeln, die in der EU gelten, in eigenes nationales Recht umzusetzen, ohne dass sie über ihr Zustandekommen wirklich mitentscheiden können[54].

Norwegen hat bspw. 75% aller EU-Gesetze übernommen, d.h. die Beteiligung an alle Initiativen im Bereich von gemeinsamen Binnenmarkt, Schengen-Raum, Innenpolitik, usw.

Dem Vereinigten Königsreich würde jedenfalls eine EWR-Mitgliedschaft die Pflicht mitbringen, sozial- und beschäftigungspolitische Regulierungen sowie die Arbeitszeitrichtlinie zu beachten (CBI, 2013, 141). Außerdem würden die EU-Finanzmarktregulierungen Geltung aufrechthalten, solang ein Kapitalverkehr besteht. Für den Rest, bleibt der EWR keine Zollunion und deshalb sind beim Warenverkehr mit den EU-Staaten die Ursprungsregeln zu beachten, die Drittlandswaren vom Freiverkehr ausnehmen[55]. Dazu müsste das Vereinigte Königsreich mit Drittländern eigenständig Außenhandelsabkommen abschließen.[56].

Ein weiteres Modell ist die Zollunion 1996 zwischen Türkei und die Europäische Union, die den freien Verkehr für gewerbliche Waren und verarbeitete landwirtschaftliche Erzeugnisse umfasst. Die Ursprungsregeln im Warenverkehr zwischen den beiden Teilen der Zollunion haben dabei keine Geltung, so dass die vertraglichen Regelungen mit der Türkei im Vergleich zum EWR weit weniger weitreichende Vorschriften für Personen und Dienstleistungen (Tobler et al., 2010, 7) vorsehen. Im Gegensatz ist hervorzuheben, dass die Türkei nicht Mitglied des kompletten Binnenmarktes ist[57].

Diesem Schema zufolge, sei das Vereinigte Königreich Teil einer privilegierten Partnerschaft, mit dem Vorteil, die vielfach als unerwünscht empfundenen Politikbereiche wie die Gemeinsame Agrar- und die Fischereipolitik sowie die Strukturpolitik aufgeben zu können. Im Licht der oben gebrachten Auffassungen über die Verknüpfungen zwischen Rechtsordnungen[58], müsste man sich fragen, inwiefern die Beiträge zum EU-Haushalt, ebenso wie die Jurisdiktion des EuGH und der Einfluss anderer EU-Einrichtungen wie Ministerrat und Parlament wegfallen. Ob sich auch der nationale Finanzsektor wieder eigenständig regulieren lassen wird, ist deshalb bestritten. Das Vereinigte Königreich sollte aus diesem Grunde vorsichtig sein, um seine Finanzindustrie künftig nicht vom EU-Markt ausgeschlossen zu halten[59].

---

[49] Der britische Premier erklärte diese Auffassung in einer Rede am 29. Juni 2012 im Telegraph schon am nächsten Tag, wo er in Bezug auf die EU „das Beste für das Vereinigte Königreich" erreichen wollte. Dafür zog er unter Umständen auch ein Referendum in Betracht, wenn die Zeit dafür reif geworden sei (*„whenthe time isright"*). Dazu s. CAMERON, *David Cameron,We need to be clear about the best way of getting what is best for Britain*, in: The Telegraph vom 30. 6. 2012, verfügbar auf http://www.telegraph.co.uk/news/politics/david-cameron/9367479/David-Cameron-We-need-to-be-clear-about-the-best-way-of-getting-what-is-best-for-Britain.html.

[50] Im Artikel 1 wurde der Wortlaut der Abstimmungsfrage festgelegt: *„Soll das Vereinigte Königreich ein Mitglied der Europäischen Union bleiben oder die Europäische Union verlassen?"* Die Antwortmöglichkeiten waren *„Mitglied der Europäischen Union bleiben"* und *„Die Europäische Union verlassen"*.

[51] 51,9 % stimmten beim Referendum für den Austritt aus der Europäischen Union (EU) und 48,1 % für den Verbleib.

[52] Die schottische Ministerpräsidentin Sturgeon sagte nach der Bekanntgabe des Ergebnisses, dass ein erneutes Referendum in Schottland über den Verbleib in Großbritannien *„sehr wahrscheinlich"* sei. Das in Schottland erzielte Ergebnis von circa 60 % pro EU-Verbleib zeigte, dass das schottische Volk seine Zukunft als Teil der Europäischen Union sehe. Überdies gibt es seit 1923 zwischen der Republik Irland und Nordirland keine kontrollierte Grenze sondern ungehinderten Personenverkehr (Common Travel Area), der auch nicht während des Nordirlandkonflikts unterbrochen wurde. Nichtdestotrotz befürchten etliche, dass bei einem *Brexit* Nord- und Südiren durch eine echte Grenze getrennt würden. Die neue Premierministerin Theresa May hat der irischen Bevölkerung versichert, es wäre ihre Priorität, den freien Personenverkehr mit Irland festzuhalten. In der Zwischenzeit hat Spanien seine Ansprüche auf Gibraltar erneuert. Dafür wurde eine gemeinsame Verwaltung für eine Übergangszeit vorgeschlagen.

[53] Die Schweiz, die zusammen mit Norwegen, Island und Liechtenstein in der Europäischen Freihandelszone (EFTA) zusammengeschlossen ist, hatte das Abkommen nach einer ablehnenden Volksabstimmung 1992 nicht ratifiziert. Der am 1. Januar 1994 in Kraft getretene EWR-Vertrag, den die EFTA-Staaten mit der EU abgeschlossen haben, hat den Binnenmarkt auf die drei nordischen Länder ausgedehnt. Er gewährleistet den freien Waren-, Personen-, Dienstleistungs- und Kapitalverkehr. Das EWR-Abkommen umfasst dagegen nicht die Agrar- und Fischereipolitik, die Handelspolitik, die Außen und Sicherheitspolitik, die Innen und Rechtspolitik und auch nicht die Zollunion. Über das Argument s. *Die Ursprungsregeln im Warenverkehr mit EG und EFTA*, (Bericht von Exportakademie der Bundeswirtschaftskammer), Wien, 1986; BALDWIN, KIANDER, *Expanding Membership of the European Union*, Cambridge, 1995; METZ, *Globalization. Advantages and Disadvantages*, München, 2013.

[54] OPPERMANN, CLASSEN, NETTESHEIM, *Europarecht*, München, 2016, S. 52 ff.

[55] Gerade solche Vorschriften, die im Vereinigten Königreich besonders kritisiert werden, würde das Land beibehalten müssen. Es würde mangels effektiver Mitgestaltungsmöglichkeit hier noch mehr Souveränität abgeben müssen als bislang.

[56] Dies ist das sog. *‚insideand outside* EU' Modell.

[57] TOBLER, HARDENBOL, MELLÁR, *Internal Market beyondthe EU: EEA and Switzerland*, Briefing Paper der Komitee des Europäischen Parlaments, 2010, 7 ff., verfügbar auf http://www.europarl.europa.eu/RegData/etudes/note/join/2010/429993/IPOL-IMCO_NT(2010)429993_EN.pdf.

[58] S. Fn. 36.

[59] TOBLER, HARDENBOL, MELLÀR, *zit.*, S. 7 ff.

Mit Bezug auf die Dienstleistungsfreiheit, müssten die für den freien Warenverkehr erforderlichen EU-Normen - wie Vorschriften zum Produktursprung, zur Zollbewertung, Zollerklärung, usw., sicherlich beachtet werden [60]. Aus dem bleibt zur Zeit unklar, ob es angemessen ist, die wirtschaftlichen Beziehungen zwischen dem Vereinigten Königreich und der EU mit einer Zollunion zuzustimmen. Ohne Präferenzregelungen und Harmonisierung von handelspolitischen Maßnahmen, die Angleichung des Zollrechts und die Angleichung anderer Rechtsvorschriften, hätte diese wahrscheinlich keinen Sinn (geistiges Eigentum, Wettbewerb, Steuern).

Ein anderes Schema könnte den Beziehungen zwischen Schweiz und EU inspiriert sein. Die Schweiz hatte den EWR-Vertrag im Jahr 1992 erst unterzeichnet, dann aber durch eine Volksabstimmung abgelehnt. Heute ist das Verhältnis zur EU nach dem Freihandelsabkommen von 1972 grundsätzlich reglementiert. Eine wichtige Rolle spielen hier die Abkommen im Rahmen der sog. Bilaterale I und Bilaterale II, welche unter anderem den freien Personenverkehr, technische Handelshemmnisse, das öffentliche Beschaffungswesen oder den Verkehr mit verarbeiteten Agrarerzeugnissen vorsehen [61].

Im Allgemeinen, folgt das Integrationsniveau der Schweiz die Entwicklung der Beziehungen der EWR mit der EU. Etliche Abkommen über den freien Dienstleistungsverkehr zwischen der EU und der Schweiz wurden aber in Wirklichkeit nie umgesetzt. Es ergibt deshalb ein sehr kompliziertes Bild, da der freie Dienstleistungsverkehr nur sehr bedingt durch bilaterales Recht geregelt ist [62]. Formal bleibt die Schweiz bei den bilateralen Abkommen mit der EU zwar souverän, auch wenn sie kein Mitspracherecht im Entscheidungsprozess der Union selbstverständlich trägt. Die Beziehungen scheinen also rein vertraglichen Charakter zu haben, wo die Schweiz an die von der EU gesetzten Regelungen anzupassen halten wird, sofern diese Vorschriften den bilateralen Abkommen Materien disziplinieren [63].

Überdies ist zu bemerken, dass die bilateralen Abkommen keine automatische Anpassung an neue EU-Regeln vorsehen. So dass es den nationalen Gesetzgeber und der Rechtslehre zustehe, von Fall zu Fall die EWR vertragliche Klauseln nach dem EU-Recht auszulegen. Im Fall des Vereinigten Königreiches, liegt ein weiteres Problem darin, dass die Rechtsanwendung die Wahl zwischen EU-Ursprungsregeln und die EWR-Option impliziert. Es ist eine Zollabfertigung im Rahmen der Freihandelspartnerschaft bspw. notwendig, wenn durch die Ursprungsregeln wahrgenommen werden soll, dass nur Waren mit Ursprung in den Vertragspartnerstaaten von den günstigen Normen profitieren. Im Gegensatz sei das Vereinigte Königreich von der Pflicht befreit, sozial- und beschäftigungspolitischen Regulierungen der EU zu unterwerfen und auch nicht in die Gemeinsame Agrarpolitik und die Regionalpolitik einbezogen wäre [64].

Jedenfalls und nebensächlich bliebe dem Vereinigten Königreich seine Mitgliedschaft in der Welthandelsorganisation (WTO) bestehen, den Beitritt zum Binnenmarkt der EU nach dem Prinzip der Meistbegünstigung vorausgesetzt. Im dessen Sinne ist der Marktzugang nach den gleichen Regeln, bzw. wie allen anderen WTO-Mitgliedern vorgesehen. Aus dem würde das Vereinigte Königreich den Status eines Drittlandes bekommen müsste aber gleichzeitig viele Kompetenzen zurückholen, da solch eine Mitgliedschaft die Vergemeinschaftung vieler Politikbereiche an die EU impliziert [65].

Dieser Hypothesis nach, sollte der Waren-Export im EU-Markt den gemeinschaftlichen Einfuhrzöllen folgen. Darüber hinaus würde der Handelsverkehr von weiteren Faktoren behinderte, wie bspw. Zollprozeduren, Steuerregeln, technische Regulierungen, Standards, Konformitätsprozeduren, sanitäre Vorschriften, usw. Schliesslich wären somit die britischen Unternehmen gezwungen, ihre Produkte weiterhin an die entsprechenden EU-Vorschriften anzupassen.

Ohne zu sagen dass, auch die anderen Binnenmarktfreiheiten jedenfalls beschränkt würden. Man denke bspw. an den Dienstleistungsverkehr, welcher unter den General Agreement on Trade in Services (GATS) Normen ein viel geringerer Grad des Marktzugangs bekäme. Sowie das Niederlassungsrecht in einem Mitgliedstaat der EU nicht mehr selbstverständlich wäre, gegeben dass ein Ende der Personenverkehrsfreizügigkeit sowohl die britischen Staatsbürger als auch britische Unternehmen interessieren würde. In Abwesenheit von europäischen Festland- Geschäftsbeziehungen, sollten neue Regeln auch für den Verkehr mit Drittländern gelten [66].

---

[60] Weiterhin kommen insbesondere die wettbewerbsrechtlichen Regeln und den Beihilfevorschriften der EU in Betracht. Infolgedessen musste die Türkei im Rahmen des Abkommens über die Zollunion mit der EU ihre Produktstandards an die der Union anpassen (CBI – Confederationof British Industry, *Our Global Future, The Business Vision for a reformed EU*, 2013, verfügbar auf http://www.cbi.org.uk/campaigns/our-global-future/).

[61] Gegenstand der Bilaterale I ist in erster Linie Liberalisierungs- und Marktöffnungsabkommen, während mit der Bilaterale II die Zusammenarbeit im wirtschaftlichen Bereich verstärkt und weitere Bereiche ausdehnt wurden. Einer Veröffentlichung der EU Kommission zufolge, sind mehr als 120 Abkommen und zugehörige Protokolle – infolge der genannten Akten, in Kraft (TOBLER u.a., *zit.*, S. 9).

[62] Es gibt verschiedene Rechtsakten, die dafür unterliegen. Eine solche Situation könnte sich gerade im Fall des Vereinigten Königreichs als nachteilig beweisen.

[63] *Ad hoc* Ausschüsse können dafür bspw. zuständig sein, neue gesetzliche Bestimmungen in den Abkommen einzuarbeiten, gegeben dass, manche Abkommen eine buchstäbliche Übernahme von EU-Recht schon enthalten (TOBLER u.a., *zit.*, S. 10).

[64] Es ist allerdings zu bemerken, dass sich die Schweiz finanziell an der EU-Kohäsionspolitik beteiligt.

[65] Die britischen Zahlungen an den EU-Haushalt fielen dann ebenfalls weg (CBI, *zit.*, S. 135 ff.).

[66] Die durchschnittlichen EU-Außenzölle sollten mit rund 1 Prozent niedriger sein, auch wenn 90 Prozent der britischen Ausfuhrwerte in die EU von Zöllen weiterhin bestehen würden. Für bestimmte Produkte sind fernerhin zunehmende Zollsätze berechenbar: So beträgt der Zollsatz für den Import von Personenkraftwagen aus Drittländern 10 Prozent, 35 für Nahrungsmittelimporte sogar 15 Prozent (SPRINGFORD, TILFORD, *The Great British trade-off. The impact of leaving the EU on the UK's trade and investment*, policy paper, in: Centre for European Reform, 2014, 9 ff., verfügbar auf https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_britishtrade_16jan14-8285.pdf).

Schlussfolgerung

Der britische Austritt aus der EU hat sich schliesslich verwirklicht. Dieser Schritt war aus innerer Hinsicht weniger problematisch als vorgesehen. Der wirtschaftliche und politische Schaden scheint nur für die EU groß zu sein, da sie bezüglich der europäischen Integration einen herben Rückschlag bekommen hat und unter anderem Aspekt einen liberalen, weltoffenen und freihändlerisch orientierten Partner verloren hat.

Bei Abwägung aller Argumente, war dies eine Schmach vielleicht für den Premierminister[67] und für denjenigen, welche die Vorstellungen über die Vorteilhaftigkeit eines *Brexit* skeptisch sahen. Aber auch außerhalb der EU könnte das Vereinigte Königreich nicht auf die erhoffte Unabhängigkeit und Regulierungsautonomie rechnen, wenn man die gleichen Vorteile des EU-Binnenmarkteingangs sofort erhalten will. Nun seien die rechtlichen Beziehungen zwischen EU und das Vereinigte Königreich dergestalt verknüpft, dass eine Entflechtung nur möglich sei, wenn beide Parteien den Verlust erheblicher ökonomischer Vorteile annehmen[68].

Die Alternative liegt aus Sicht des Vereinigten Königreichs in der Umwandlung der genannten Beziehungen außerhalb der EU-Ägid. Es kann deshalb sein, dass neue Handelsverträge von Fall zu Fall – bzw. mit ehemaligen EU-Partner und dritten Länder, geschlossen werden. Diese Strategie zeigt allerdings enge Grenzen.

Seinerseits scheint ein Europa *à la carte* kaum vorstellbar, gegeben dass, es mit dem Grundgedanken der europäischen Integration unvereinbar wäre. Hier handelt es sich um das rechtliche Gleichgewicht zwischen verschiedenen Akteuren, weshalb man dazu noch eine gewisse Reaktion erwarten könnte. Die Frage ist: Inwiefern könnte man eine Situation tolerieren, wo ein Land mehr oder weniger nach Belieben die Gleichheitsprinzipien verletzen könnten und deshalb eine Vorzugsstellung unrecht erreichen würde?

Der Punkt ist festzulegen, was das Austrittsrecht eigentlich mit sich bringt, da es eine Wahl darstellt, die zwar die mitgliedsstaatliche Souveränität sowohl berühren, als auch - wenn ein Verbleib in der EU nicht mehr tragfähig ist- etwa keine Rolle spielen kann. Wenn es als Drohmittel immer nicht instrumentalisiert wird, bleibt die Gefahr gegen die Stabilität der wirtschaftlichen und politischen Integration Europas, welches, abgesehen von einem starken rechtlichen Grund, zustehen könnte.

Unter juristischer Hinsicht, kann man durch eine Reihe von spezifischen Normen – bzw. eine *ad hoc* rechtliche Produktion, den Knoten lösen. Aus dem historischen Aspekt, ist aber zu erwarten, dass eine politische Lösung (die mehr Flexibilität ohne Zweifel garantiert) vielleicht eintritt, um den Rücktritt des Vereinigten Königreiches zu vereinfachen und weiteren Schaukeln des labilen Gleichgewichts der EU zu vermeiden.

[67] Am 23. 1. 2013 sagte David Cameron: „*Leaving the EU is not in our national interest*“ und „*outside, we would end up like Norway, subject to every rule for the single market made in Brussels but unable to shape those rules*“ (der Diskursistverfügbar auf https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech).

[68] Das bestätigtaucheineimJuni 2014 vorgelegteUntersuchung des Londoner Centre for Economic Reform (SPRINGFORD, WHYTE, *The Consequences of Brexit fort he City of London*, policy paper, in : Centre for European Reform, 2014, 5, verfügbar auf https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_city_brexit_js_pw_8may14-8816.pdf).

History of Law or History of State and Law. (On the Subject of Pedagogical and Scientific Work of Legal Historians)

I. Departments of Legal History

In Slovakia legal historians are organized within pedagogical and scientific departments of law faculties under various titles. There are three departments called the Department of History of State and Law (Matej Bel University in Banská Bystrica, Pavol Jozef Šafárik University in Košice and Pan-European University in Bratislava). There is one such department with the title Department of History and Theory of the State and Law (private Danubius University in Sládkovičovo). However, this department should be categorized with three previously mentioned departments, because only difference is, that history is in its title also combined with the theory of state and law. Therefore, we may conclude, that there are four departments of history of state and law in Slovakia. The title of other two relevant departments is one-dimensional. The category or concept of "history of state" was omitted and their title includes only one attribute of its activities – history of the law. There are two variants of this title: the Department of Legal History (Comenius University in Bratislava) and the Department of History of Law (Trnava University in Trnava). Which of these titles describes the activities and work of legal historians in the most appropriate and suitable terms? Can we apply here democratic principles and conclude that the majority is always right? Or the title used by the majority of institutions is anachronism, which lost its suitability under new societal circumstances? Or the development of this scientific discipline did require its new classification?

While solving the problem, which title is the most suitable, we may observe the situation in the Czech Republic. There are the Department of Legal History at the Faculty of Law of Charles University in Prague, the Department of the History of the State and Law at the Faculty of Law of Masaryk University in Brno, the Department of Legal History at the Faculty of Law of the University of West Bohemia in Pilsen and the Department of Theory of Law and Legal History at the Faculty of Law of Palacký University in Olomouc. If we abstract away from the theory of law in the departmental title in Olomouc, we will come to the conclusion that there are three departments of legal history and only one department of history of state and law in the Czech Republic. The departments of legal history have thus not only absolute majority, but also qualified three-quarter majority.

Total sum, summary of departmental titles in Slovakia and the Czech Republic is following: there are five departments of history of state and law and there are also five departments of legal history (including one department of history of law). The outcome of this summary is therefore draw, the same number of departments called with both of these title variants.

Does this mean that there is irresolute or even stalemate position concerning the theoretical understanding of subject matter of legal history in its two manifestations – as scientific discipline and pedagogical subject? Does it express pluralistic understanding of this subject as well as diversity in an atmosphere of tolerance?

II. Textbooks of Legal History

Another factor, under which we may consider the subject of these disciplines, is the content of textbooks produced and published by authors, members of above mentioned departments. The Department of Legal History in Prague edited and published textbook named *Dějiny českého a československého práva do roku 1945*[1] [History of Czech and Czechoslovak Law until 1945], which is focused on the history of law, but secondarily includes also the chapters with the category "history of state" in title. Then there is textbook named *Vývoj československého práva 1945 – 1989*[2] [Development of Czechoslovak law 1945 – 1989], which is handled by its authors explicitly as history of law abstracting away from passages dedicated to the development of state. Another works authored by the department in Prague within the edition of university textbooks are *Dějiny angloamerického práva* [History of Anglo-American Law] and *Dějiny kontinentálního evropského práva*[3] [History of Continental European Law], which are both solely drafted as legal history, not as history of state and law.

On the basis of this brief overview we can already come to the important conclusion that the subject matter of scientific work of the Department of Legal History in Prague as well as the subject matter of their pedagogical work is according to their textbooks history of law or legal history. This has been the case for at least 25 years. An evidence for this crucial change was the first edition of the above mentioned textbook *Dějiny českého a československého práva do roku 1945* in 1997. It manifested and documented this new quality, which commenced in practice during previous decade. We could and should emphasize important change in the subject matter of scientific and pedagogical work, which is an omission of "history of state". This is significant modification in contrast to the textbooks published by the department

[1] MALÝ, Karel et al, Dějiny českého a československého práva do roku 1945, Praha, 1997.

[2] KUKLÍK, Jan et al, Vývoj československého práva 1945 – 1989, Praha, 2009.

[3] KUKLÍK, Jan, SELTENREICH, Radim, Dějiny angloamerického práva, Praha, 2007. KUKLÍK, Jan, SELTENREICH, Radim, Dějiny kontinentálního evropského práva, Praha, 2010.

in Prague during previous, pre-November period under the title "History of state and law".[4] The same subject focus on the "history of state and law" was present also in works and teaching texts, which were published as common statewide university textbooks for law students in both republics of the Czechoslovak Federation.[5] The essential inference is that scientific and pedagogical disciplines of legal history narrowed the subject matter of their research and didactic activity down from the two-dimensional or binary subject area (state and law) to the one-dimensional subject area (legal history or history of law).

How did evolve and change pedagogical and scientific work of the Department of the History of the State and Law at the Faculty of Law of Masaryk University in Brno? This question is especially interesting, because this important workplace of legal historians is as the only instance in the Czech Republic still called in the way, which was symptomatic for the previous period. However, the scientific and pedagogical production convinces us, that the adage *nomen omen* is in this case not entirely valid. Members of this department authored significant number of textbooks, which are according to their titles and its contents proving a shift and reorientation towards legal history while omitting history of state. We ought to mention particularly *České právní dějiny do roku 1945* [Czech Legal History until 1945] written by Ladislav Vojáček and Karel Schelle (Ostrava, 2007), three-volume *Právní dějiny* [Legal History] and *Encyklopedie českých právních dějin* [Encyclopedia of Czech Legal History], which is produced by probably one hundred authors, mostly from the Czech Republic, but also from Slovakia, and which is envisioned to consist of ten volumes. Also at this department the subject matter of scientific research and pedagogical communication is legal history.

What was the development and what is the situation at the Department of Legal History (since 2015 with the extended title including "Comparative Law") at the Faculty of Law of Comenius University in Bratislava? After the foundation of independent Slovak Republic it was necessary to adequately react to new constitutional and international situation of Slovakia by creating separate university subject supported also by appropriate textbook of history of (still) state and law. For this purpose the above mentioned textbook authored by K. Malý and F. Sivák was translated into Slovak language and published in 1992. The first didactic text focused solely on Slovak legal history was written by F. Sivák in 1998 at the newly founded Faculty of Law of Matej Bel University in Banská Bystrica. During years 1998 and 1999 teaching texts of Slovak legal history were completed. *Dejiny štátu a práva na území Slovenska do roku 1918* [History of State and Law on the territory of Slovakia until 1918] was subsequently followed by the textbook titled *Slovenské a české dejiny štátu a práva v rokoch 1918 – 1945* [Slovak and Czech History of State and Law 1918 – 1945]. They were both authored by F. Sivák. In 1992 two-volume textbook *Moderné dejiny štátu a práva krajín strednej a východnej Európy* [Modern History of State and Law of Central European and Eastern European Countries] was prepared by J. Beňa for new subject at the Faculty of Law in Bratislava. Their title was binary, but the content was different. Under the title "history of state" the development of constitutional systems and legal aspects of economic development in those states were covered. The first textbook written and published by the department in Bratislava concerning Slovak legal history was *Dejiny práva na území Slovenska I. (do roku 1918)* [History of Law in Slovakia I (until 1918)] authored by T. Gábriš a J. Beňa. Therefore the full transformation of this legal historical subject to the separate subject on history of law in Slovakia was completed and it was not constructed as history of state and law, but only as history of law, consistently with the title, contents and chapters of this textbook. This was fundamentally perfected in 2015, when new textbook with the title *Právne dejiny na Slovensku* [Legal History in Slovakia] was published. The passages dedicated to the pre-state formations in Slovakia and to the legal history of Great Moravia were anew reworked and national and state demands of Slovak nationalists (Demands of the Slovak Nation and Memorandum of the Slovak Nation) were entitled as the Slovak constitutional proto-law of 1848 and 1861. Also the department in Bratislava thus finished the reorganization of this subject into the strictly legal-historical subject. This process of transformation possibly lasted longer than in Prague or Brno. Besides the emancipation of Slovak legal development in textbooks it was caused also by the different situation concerning the personnel development of the department in Bratislava. The former subject on general history of state and law was completely and qualitatively transformed, altered and divided into the history of public law and the history of private law. These subjects were supported by the three-volume collection *Pramene k dejinám práva* [Documents of Legal History] (Antiquity, Middle Ages, Modern Times) published since 2007 until 2009. The current focus of activities of departmental members is to prepare and publish teaching texts or textbooks for these pedagogical subjects.

The course of transformation of pertinent subjects at the Department of History of Law of Trnava University was partially different. Originally, textbooks and teaching texts authored by F. Sivák were used also in Trnava. In 2008 new head of department P. Mosný together with L. Hubenák wrote textbook titled *Dejiny štátu a práva na Slovensku* [History of State and Law in Slovakia]. In 2010 P. Mosný together with M. Laclavíková published teaching text titled *Dejiny štátu a práva na území Slovenska I. – od najstarších čias do roku 1848* [History of State and Law on the territory of Slovakia – from the earliest times until 1848]. According to the title of this work members of the department preserved

[4] VANĚČEK, Václav, Dejiny státu a práva v Československu do roku 1945, Praha, 1974.

[5] MALÝ, Karel, SIVÁK, Florián, Dějiny státu a práva v Československu. I. díl do r. 1918, Praha, 1988. This textbook was also published in Slovak translation as Dejiny štátu a práva v Česko-Slovensku do roku 1918 (Bratislava, 1992). As a statewide and federal textbook was published: KINCL, Jaromír et al, Všeobecné dějiny státu a práva, Praha, 1983.

the original title and binary understanding of "history of state and law", together with the attribute "on the territory of Slovakia". However, this is no longer the original understanding and treatment of "history of state" as an explication of state of economic base and superstructure, of basic production and societal relations, of social and class structure within its context relating to corresponding historic type of state, its substance and form. History of state is currently treated as political history relating to the institutions of state law. However, the title stayed the same. Members of this department preserved its binary title and are still faithful to it. It is evident also from another pedagogical work of this department titled *Svetové dejiny štátu a práva* [World History of State and Law] (2013, P. Vyšný et al). Significant shift towards the transformation of this subject and its title was manifested in extensive and high-quality four-volume work *Pramene práva na území Slovenska* [Sources of Law on the territory of Slovakia] authored by M. Laclavíková a A. Švecová. Therefore we may summarize that "history of state and law" remained within the title of textbooks, but its contents acquired new quality and features.

At the Faculty of Law of private Pan-European University in Bratislava the textbook titled *Československé právne dejiny* [Czechoslovak Legal History] by L. Vojáček et al was published in 2013. It is not an expression of Czechoslovak sentiment, but of scientific orientation of its authors as well as of this faculty activities in the Czech environment. Similar scientific and pedagogical expansion on the territory of Slovakia was manifested by members of the department in Brno through the publication of the textbook titled *Právní dějiny na území Slovenska* [Legal History on the territory of Slovakia] in 2007.

At the Department of History of State and Law in Banská Bystrica subjects "Dejiny štátu a práva na území Slovenska" [History of state and law on the territory of Slovakia] and "Svetové dejiny štátu a práva" [World history of state and law] are incorporated within its didactic program. These subjects are taught according to the textbooks by P. Mosný and L. Hubenák and by P. Vyšný, while textbooks from other faculties are also recommended. Similar subjects are also included within the study program at the Faculty of Law of Pavol Jozef Šafárik University in Košice. However, it must be noted, that they were relegated from the category of compulsory subject to the category of compulsorily optional subject. The department in Košice teaches two subjects, which are close to legal historical subjects – "Inštitúty vecných práv" [Institutions of real rights] and "Justiniánske Digesta a ich vplyv na vývoj moderného práva" [Justinian Digest and its influence on the development of modern law]. Also here the substance transformation of these subjects took place. According to the published examining questions from the area of history of state and law only few questions focused on political or societal history remained (e. g. foundation of state superstructure). However, we must conclude that they did not solve the problem of the content transformation of the subject "history of state and law" to the subject "legal history" or "history of law"[6] and currently, it is not one of their concerns.

At departments of legal history in Slovakia, specifically in 4 out of 6 instances, the transformation process of subjects titled "history of state and law" into the subjects titled "legal history" is not occurring and even departments in question or faculty administrations do not realize the necessity of such transformation.

III. Classification of Legal History as Scientific Discipline

As a principal proof of not solving the transformation of legal historical departments and subjects we may also introduce the title of corresponding PhD. degree program approved by the Slovak ministry of education: "theory and history of state and law".[7] Not only became binary title "history of state and law" scientifically outdated, but there are also two separate scientific disciplines ("theory of state and law" and "history of state and law") interfused into one. However, the titles of all other PhD. degree programs are simplified into constitutional law, administrative law, civil law, labor law etc. This was product of representatives of Slovak academic legal science or academic juristic management at that time. Residues of past times were proposed as "light for future" by administrations of law faculties, rectors' conference, accreditation commission and it was granted legal relevance by the ministry of education. On the basis of uncomprehend past in the name of future they have control over present. And legal positivists in administrations of law faculties are in this regard inflexible. We consider primary coupling of PhD. degree program titled "theory and history of state and law" unacceptable.

But not even this metalegal creativity represents culmination and crowning point within the taxonomy of scientific disciplines during the era of Slovak independence. It was achieved only by the taxonomy of scientific fields (and its code list) published by the Slovak ministry of education. Legal historical science was formulated there in exceptional way under the code "050501" and the title "theory of history of state and law". You are reading right! The title is constructed not for two fields of study (theory and history), but for one – "history of state and law" with the title "theory

[6] See this textbook written by a member of this department: ŠTENPIEN, Erik, Svetové dejiny štátu a práva, Košice, 2013.

[7] Taxonomy of study fields in the Slovak Republic is published by the decision of the Ministry of Education of the Slovak Republic no. 2090/2002-sekr. from the 16th of December 2002 as amended by later decisions of the ministry of education and contains study fields, in which universities in Slovakia may provide university education. According to the appendix no. 2: the list of scientific fields evaluated within the complex accreditation and of corresponding study fields is PhD. degree program "theory and history of state and law" classified under no. 3.5.2. See: Directive no. 27/2006-R from the 21st of December 2006 on the taxonomy of scientific and on the code list of scientific fields.

of history of state and law".[8] Neither ministry of education, its jurists nor colleagues from legal positivist fields of study comprehended what phantasmagoric performance they were able to produce. However, the practice is going its own way regardless of code lists and numerologists of science. Relevant scholars are teaching or researching respectively either in the area of theory of law (some departments use nominal title "theory of state and law") or independently in the area of legal history or history of state and law. Above mentioned field of study within the category of sciences has to be created by the exceptional figure of Slovak legal science, we could even say, renaissance personality of post-modern development of jurisprudence. If a legal provision is unreal, contrary to the reality and to the existing state of sciences, it cannot be rendered as legally relevant and cannot be observed. Such legal provision is thus obsolete. Due to these reasons this legal provision promulgated in 2006 is already ten years completely obsolete, inapplicable, inanimate, burnt out and, more precisely, stillborn, even though it is still formally valid.

Slovakia is entirely exceptional and isolated regarding the composition of scientific disciplines. This can be manifested also by the comparison with respective regulation in the Czech Republic. Among PhD. degree programs in the Czech Republic there is "legal history and Roman law" and separately also "theory of law, philosophy and sociology". Other programs of positive legal fields are titled identically as in Slovakia.

IV. Genesis of Current Situation and Solution of Contradictions

By what arguments is it possible to justify indefensibility of this situation and urgency for change in Slovakia? There are at least two such arguments. Firstly, there is a development within the scientific fields and a requirement for change of its classification and categorization. Secondly, there is persisting, although already forgotten, and unknowingly existing ideological and also quasi scientific inertia. It was for the first time implanted in deformational way during the years of the worst Stalinist period and later it was renewed during the period of neo-Stalinism or normalization.

Historically, at the end of the 18th century and also during the next century in the fragmented Germany there were history of state and history of law, from which emerged theory of state and theory of law. This was the case also in our geographical area. Residual relic of it is the law faculty in Budapest, which is still called the Faculty of Law and Political Sciences (*Állam- és Jogtudományi Kar*) at the Eötvös Loránd University. Similarly are called also law faculties in Debrecen, Szeged and Miskolc. In Germany there used to be and somewhere still are faculties for legal and political sciences (*für Staats- und Rechtswissenschaft*). Or they were renamed as schools for law and public administration.

In 1933 J. Kallab wrote, that "political science is a traditional name for the science of state and state activities. It is rather used in plural form as political sciences in order to include valid constitutional law, historical and comparative law, international law, national economy, financial science, many branches of administrative law etc."[9] Right in this period emerged controversial issues concerning classification and methodology of science by the creation of the so-called theory of state, which later developed under the influences of legal positivism and legal sociology. These controversies were resolved by the conclusion that legal science as a theoretical discipline has to be differentiated from the practical discipline called legal politics and dogmatics. There was also different opinion, according to which legal science was a part of social sciences and theory of state was a part of sociological sciences. Outcome of above mentioned controversy were thus recorded by an author of this relevant encyclopedic entry in 1933.[10] We may therefore summarize that a state (as a subject of study, research and teaching) and its attributes, dimensions and forms was considered to be a subject of theory of state and not of legal science during the period of the pre-Munich Czechoslovak Republic. The first rigorous examination within the rigorous procedure at the Faculty of Law of Comenius University in Bratislava consisted of subjects such as "history of public and private law in Central Europe" and "history of law on the territory of Czechoslovakia". Not even one subject was from theory of state or history of state.[11] There was no such subject.

During this period there was new scientific field evolving in Europe and was since known as theory of politics (political science). It developed under the influences of theoretical sociology, law and developing constitutional theories. Political science was finally defined and differentiated from other sciences only after the Second World War. In 1949 the International Political Science Association was founded. In Czechoslovakia under the direct influence of the Soviet Union political science was not permitted and it was labelled

[8] Ministry of Education of the Slovak Republic produces this taxonomy of scientific disciplines including its code list according to the Art. 6 par. 2 of the Act no. 172/2005 Coll. on the organization of the state subvention for research and development and on the amendment of the Act no. 575/2001 Coll. on the organization of governmental activities and of central state administration as amended by later statutes. On this legal basis the Appendix no. 1 to the directive no. 27/2006-R was promulgated and in which the scientific field with the title "theory of history of state and law" was included under the code 050501.

[9] Ottova encyklopedie nové doby: díl 8, p. 1218.

[10] Ottova encyklopedie obecných vědomostí: díl 20, p. 560.

[11] As a condition to obtain doctorate of law it was required to pass three exams known as rigorous examinations. The first examination consisted of roman and church law, history of public and private law in Central Europe and history of law on the territory of Czechoslovakia. The second exam included Czechoslovak private law, commercial law, exchange law, civil procedure, Czechoslovak criminal law and criminal procedure. The third examination contained constitutional law, administrative law and science, international law and political economy. Rigorous examinations were public and each of them lasted for two hours. Examination committee was presided over by dean, vice dean or professor. See: Päťdesiat rokov Univerzity Komenského, Bratislava, 1969, p. 213-214.

personally by J. V. Stalin as a bourgeois pseudoscience or a fallacious science.[12]

Under these conditions, which included party and political dictate and commanded knowledge as an ideological religion, the scientific discipline known as Marxist-Leninist theory of state and law and associated discipline history of state and law were constructed.[13] The theory of state replaced former discipline known as political science, but under the dogmatic and vulgar historical materialist understanding at that time. It analyzed state as power organization of governing class as well as its social and class structure, methods of government, assessment of societal interests, determining and protection of public order, which is viewed as being constructed in favor of governing class and in detriment of suppressed class or other social classes. It studied formation and evolution of state, its historical typology, purpose of state as a dictatorship of governing class, performance of suppressive exploitative function of state and other terms.[14] These were terms and categories of historical, sociological, political and politically economical nature. They were interconnected with a subject titled "scientific communism", which was considered to be one of three components of Marxism. Study field "scientific communism", departments of scientific communism and their graduates were after Velvet Revolution in 1989 transformed into study field of "political sciences" and into graduates known as political scientists. This new field includes or should include also content and issues formerly covered by scientific communism, including also theories of state and politics. The development of social and sociological sciences after 1990 did not recognize justifiability of science of state and law.

This change was manifested by the creation and publication of textbooks for new subject known as "theory of law" (with different level and content of transformation). These textbooks were authored by A. Gerloch in Prague, but also by doyen of Marxist-Leninist philosophy of law V. Knapp, by J. Prusák in Bratislava, M. Večeřa in Brno, A. Bröstl in Košice and also by others. Changes in education and in textbooks concerning legal history were covered in the previous part of this paper.

During 1990s theory of state was also reestablished and new relevant textbooks were published. List of PhD. degree programs in the Czech Republic was supplemented by the inclusion of "theory of state" as secondary program alongside constitutional law. Therefore "theory of law" and "theory of state" are separate fields of study within the 3rd degree of university education. This modification did not happen in Slovakia and it concerns not only theory of state, but also theory of law, which is not constituted as a separate PhD. degree program. Theory of state is in somehow competitive relation with political science and concretely with one of its components, which is also classified by theory of politics as "theory of state".[15] Especially in Slovakia there were publications with pedagogical orientation, which stayed on the previous title[16] and/or are mostly designated for students of non-legal study fields.[17]

Main current of development is special scientific research in the area of "theory of law" as well as special scientific research in the area of "history of law" or legal history. Connection of legal history with categories of theory of state is due to the closeness of both of these disciplines, their contacts and context appropriate and required. These are not two pure, reciprocally self-reliant and separate scientific disciplines. In normative understanding the term "law" is considered as tied with state and expresses societal or general will, which is promoted and promulgated as binding legal provision. Simplified proposition, which claims that state and law are two sides of the same coin and the substance and content of this coin is political power, probably would not be accepted. Simplified theorem that law is tool for governance of society by state or tool for transformation of society would not be accepted as well. The category of law is more complicated, more dimensional with several layers while simultaneously evolutional. It has not only normative dimension, but also social dimension in social relations regulated by law, psychological dimension in the form of lawmaker's will, legal awareness of recipients of legal norms, which accept and also do not accept, interpret, alter and apply law. We assume that within this framework of three-dimensional understanding of law, history of law and its normative, sociological and psychological dimensions and unquestionably also another aspects and factors the science of legal history will work scientifically and communicate pedagogically during present times as well as in imminent future.

Legal history deals with public and private law during Antiquity and Middle Ages, since the 18th century with mainly history of constitutional law, criminal law, civil law and other branches of law. It analyses, evaluates and interprets legal facts, events and actions while focusing on separate legal institutes in their concrete historical forms, meanings as well

[12] See: Wikipedia, the free encyclopedia, Czech version: https://cs.wikipedia.org/wiki/Politologie Russian version: https://ru.wikipedia.org/wiki/ (Retrieved 23 May 2016).

[13] The first relevant work, which was available for Czechoslovak public and law students, was a translation of Soviet textbook titled *Theorie státu a práva* [Theory of state and law], Praha, 1951. It was authored by M. A. Aržanov, S. F. Kečekjan, B. S. Maňkovskij and M. S. Strogovič.

[14] See for more details: KUKLÍK, Jan et al, Vývoj československého práva 1945 – 1989, Praha, 2009, p. 709-727.

[15] According to the description by theorists of political science its aim is to describe and evaluate political phenomenons such as functioning of state, political system, power organizations and authorities. Theory of state is considered as separate discipline of political science and studies foundation, functioning and features of state as well as relations between its institutions. See: Wikipedia, the free encyclopedia, Czech version: https://cs.wikipedia.org/wiki/Politologie (Retrieved 23 May 2016).

[16] ŠMIHULA, Daniel, Teória štátu a práva, Bratislava, 2010. KROŠLÁK, Daniel, ŠMIHULA, Daniel, Základy teórie štátu a práva, Bratislava, 2013.

[17] ZOUBEK, Vladimir, Právověda a státověda, úvod do právního a státovědního myšlení, Praha, 2010.

as in their evolutional connections with legal, philosophical and political thinking, under determination by social and economic development and in the context of given political circumstances and during later periods also in coherence with geographical factors. Legal historiography is using categories and terminology produced by theory of state relating to the interpretation of constitutional law, formation of state as well as its historical types, evolutional phases, state forms and forms of state regime.

We do not consider assertions and arguments of some representatives of the theory of state, that it is necessary to keep subjects and departments titled "history of state and law" or "theory of state and law" due to the need and necessity to use and explain mainly to students terms such as form of state, state regime and state establishment as sufficiently persuasive. After all, co-operation of these two as separate scientific disciplines does not exclude their collaboration and mutual usage of their respective terminologies.

Therefore we may conclude that the development of scientific disciplines is not linear process. In the Czech Republic it is completely accepted and exercised attitude that the scientific discipline titled "history of state and law" is historical and scientific past. Similarly, recognition of tandem – theory of state and theory of law – as a single scientific discipline is nowadays obsolete. Legal science is generally accepted and one of its components is also "history of law" or "legal history". Only secondarily is scientific discipline of constitutional law supplemented by theory of state. The content of political science, which considers also theory of state as one of its parts, represents partially contradictory moment in the development of scientific disciplines. Can we consider this relationship as co-existing, competitive or excluding?

In Slovakia departments and subjects using the title history of state and law are still prevailing. However, they definitely rejected and refused neo-Stalinist understanding of "history of state and law" as it is obvious from the content of their textbooks. The component of "history of state" within their textbook is closer to another scientific discipline – theory of state. We assume that deeper examination of development of legal institutes and legal branches will also lead to the complete transformation of relevant subjects from the "history of state and law" to the "history of law". This should be supplemented by the changes within the taxonomy of sciences and titles of the PhD degree programs. The titles such as "theory of history of state and law" and "theory and history of state and law" ought to be renamed as "history of law" or legal history.

Summarily, this is the development of legal historical science, change of its content, change of its title and classification within the taxonomy of scientific fields after 1989 and at the beginning of the 21st century. We attempted to diagnose the mainstream current as well as existing secondary currents. Monolithic unity in the title and content will not be and is not required. But what positions towards above discussed problems from scientific and pedagogical point of view do have our legal historical colleagues? We would welcome their opinions.

Jozef Beňa*

* Prof. JUDr. Jozef Beňa, CSc., Department of Legal History and Comparative Law, Faculty of Law, Comenius University, Bratislava, Slovakia.

Peter Landau

Deutsche Rechtsgeschichte im Kontext Europas. 40 Aufsätze aus vier Jahrzehnten.

Badenweiler: Wissenschaftlicher Verlag, 2016, 1050 S., ISBN 978-3-940523-14-3

Das zu besprechende Werk mit 40, in den Jahren 1977 bis 2014 publizierten, Aufsätzen ist sowohl reich an Seiten als auch reich an interessantem, rechtshistorischem Lesestoff. Der Sammelband ergänzt vorbildhaft Peter Landaus früheres Konvolut von Abhandlungen, das vor drei Jahren unter dem Titel „Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter" im gleichen Verlag herausgegeben wurde.

Als fundierter Rechtshistoriker hatte sich Landau seit seiner ersten Berufung nach Regensburg vor fast 50 Jahren mit der deutschen Rechtsgeschichte und der Geschichte des kanonischen Rechts befasst. Auf diese Weise war er immer stärker daran interessiert, das eng verflochtene, kontinentale Netzwerk der nationalen Rechtsgeschichte als wesentliche Voraussetzung für einen europäischen Vergleich zu knüpfen. In dem zu rezensierenden Buch ist diese Voraussetzung vom frühen Mittelalter bis in die Gegenwart verfolgt worden. Der Autor führte sie folglich zu unzählbaren Ansichten, die fortwährend und erstaunlich intensiv in der neueren Rechtsgeschichtsforschung erörtert werden.

Wie es sich für einen Rechtshistoriker gehört, sind die 40 Beiträge chronologisch geordnet. Die Sammlung der Aufsätze beginnt mit einem Aufsatz über das Frühmittelalter. Namentlich kann der Lex Baiuvariorum als älteste Rechtsquelle erwähnt werden. In der frühen Zeit der germanischen Volksrechte sind gerade diese Quellen wichtig; in der Karolingerzeit ist es Landau, der glaubt, Indizien für eine „Experimentalgesetzgebung" zu finden. Als bedeutungsvolle Charaktere dieser Zeit, schenkt man dem Autor Glauben, kann Ludwig der Fromme namentlich genannt werden. Dem Sohn Karl des Großen, der die Reformpolitik seines Vaters anfangs erfolgreich weiterführte, wurde eine persönliche Studie gewidmet.

Es folgen 13 interessante und lesenswerte Aufsätze, die die Rechtsgeschichte des hohen Mittelalters zum Inhalt haben. Hier betont Landau die augenscheinliche Schnittstelle der deutschen Rechtshistorie mit dem gelehrten römischen und kanonischen Recht, die seiner Meinung nach von den germanistisch orientierten deutschen Rechtshistorikern bislang nur bruchstückhaft berücksichtigt wurde. Bereits für das 12. Jahrhundert kann man von den Grundlagen der Rezeption gelehrten Rechts in Deutschland sprechen.

Zu den Inhalten der Aufsätze können beispielsweise die Prozess- und Strafrechtswissenschaft in der Ära Friedrich Barbarossas und die ersten deutschen Rechtsschulen erwähnt werden. Landau glaubt, dass um 1170 die Kölner Institutionenglosse verfasst wurde. Weitere, direkte Einflussnahmen des gelehrten Rechts findet man in der Gelnhäuser Urkunde, die als wesentlicher Beleg im Prozess Heinrichs des Löwen angesehen werden kann.

Überdies setzt sich Landau mit dem Sachsenspiegel und dessen Autor Eike von Repgow auseinander. Dabei kommt die These, die auf dem Bonner Rechtshistoriker Tag 2004 vertreten wurde, zur Geltung. Landau sprach davon, dass dieses bedeutungsvolle Rechtsbuch des deutschen Mittelalters in dem sächsischen Zisterzienserkloster Altzelle niedergeschrieben worden sein muss. Diese Ansicht hat in den letzten Jahren, wenn man den einführenden Worten des zu besprechenden Werkes Glauben schenken mag, zu einem Meinungsaustausch geführt.

Auf diese Weise ist es Landau selbst, der nach seiner Einschätzung in von Repgow weniger den Kämpfer überkommener Rechtsgewohnheiten als einen Neuerer, einen ‚juristischen Erfinder' sieht. Wenn wir temporär weiter voranschreiten, erkennen wir, dass dem Spätmittelalter und der frühen Neuzeit fünf Abhandlungen gewidmet sind. Hierbei geht es um den Beginn der Testierfreiheit in Deutschland und um die Genese des Rechtsmittels der sogenannten Läuterung im sächsischen Recht. Diese ist nach Landaus Ansicht auf die Appellation des kanonischen Rechts zurückzuführen. Dass die Kanonistik am Ausgang des rund 1000 Jahre andauernden Mittelalters wichtig ist, wird in einer Studie über das Werk von Peter von Andlau belegt.

Blicken wir ins 18. Jahrhundert. Dabei legt Landau das Zentrum seines Interesses auf die Ausgangspunkte von spezifischen Rechtsinstituten des deutschen Privatrechts. Von Belange ist gewissermaßen die eheliche Gütergemeinschaft. Eine erstklassige Untersuchung von Landau, welche im zu rezensierenden Werk nachzulesen ist, hat die verlorene Dissertation Goethes, die möglicherweise im Bereich des Staatskirchenrecht im zeitlichen Zusammenhang mit Einflüssen des Pietismus entstanden ist, zum Inhalt.

Die letzten 16 Artikel des Buches befassen sich mit Forschungsgegenständen der deutschen Rechtsgeschichte im 19. und 20. Jahrhundert. 1933, das Jahr der Hitlerschen Machtergreifung, bildet den Endpunkt. Landau versteht es geschickt, die historische Rechtsschule des vorvorigen Jahrhunderts in gleich mehreren Artikeln zu thematisieren. Auf diese Weise wird der zumeist von der Literatur vernachlässigte Hauptvertreter Georg Friedrich Puchta aus der Vergessenheit geholt. Der Autor sieht in dem bedeutsam-

sten Vertreter der Pandektenwissenschaft. auch einen Vertreter einer modernen Prinzipienjurisprudenz und nicht einen Repräsentanten einer Begriffsjurisprudenz. Überdies kann man das 19. Jahrhundert mit einer Blütezeit der deutschen Rechtswissenschaft und deren Gesetzgebung gleichsetzen. Landau betont diese in einem Text über die Reichsjustizgesetze. Diese haben bis heute die Gerichtsverfassung und die prägenden Schöffengerichte nachhaltig beeinflusst.

Weitere Abhandlungen wurden einzelnen herausragenden Juristen gewidmet. Dabei wurden durchwegs Rechtslehrer der Universität München, darüber hinaus auch der bedeutende Heidelberger Staatsrechtler Georg Jellinek erwähnt. Bei letzterem spürte Landau die interessante Vorwegnahme der Radbruchschen Formel zur Charakterisierung eines Unrechtsstaates auf. Vervollständigt wird das Werk Landaus mit einigen Aufsätzen, die sich mit der Genese und den Inhalten der NS-Rechtsideologie beschäftigen. Auf diese Weise wird klar, dass damals das römische Recht negativ bewertet wird und die Beschwörung eines „deutschen Gemeinrechts" im Programm der NSDAP von 1920 zu finden ist. 1993, sechs Jahrzehnte nach Hitlers Übernahme der Regierungsgewalt, referierte der Autor in Leipzig. In diesem, ebenfalls abgedruckten Referat, akzentuierte Landau, dass viele Juristen 1933 das rechtskulturelle Niveau verloren gegangen sei.

Und heute? Landau hofft, dass Deutschland in naher Zukunft mit anderen Ländern dieser Erde zu einer humanen Weltrechtskultur beitragen kann. Bleibt zu hoffen, der Rezensent schließt sich gerne an, dass dieses hehre Ziel keine leere Worthülse bleibt und dass der Autor Recht behält.

Andreas Raffeiner *

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Henning Kästner

Der Weimarer Landtag 1817-1848. Kleinstaatlicher Parlamentarismus zwischen Tradition und Wandel (= Handbuch der Geschichte des deutschen Parlamentarismus).

Düsseldorf: Droste, 2014, ISBN 978-3-7700-5320-9

Wenn man sich politische und rechtshistorische Werke ansieht, erkennt man, dass die Erforschung der Geschichte des Parlamentarismus eher erst im Entstehen ist als sich in einer Hochkonjunktur befindet. Dennoch ist die Schnittmenge zwischen politischen Feinheiten und rechtsgeschichtlichen Aspekten durchaus interessant und für regionalhistorisch bewanderte und interessierte Leser nicht zu verachten. Vielen ist vielleicht noch das Projekt von Gerhard A. Ritter in Erinnerung, der ein Handbuch der Geschichte des deutschen Parlamentarismus verfasst hat. doch das ist schon nahezu vier Jahrzehnte her.

Folglich traten einige Autoren mit Büchern über den preußischen bzw. süddeutschen Parlamentarismus vor der Gründung des deutschen Kaiserreichs 1871 in Erscheinung. Am Ende der 1980er Jahre trat eine thematische Flaute ein, ehe erst 2009 Hans-Peter Becht eine äußerst detaillierte und imponierende Übersicht zur badischen Landtagsgeschichte zwischen 1819 und 1870 vorlegte und die Thematik sozusagen aus dem Dornröschenschlaf holte.

So ist es sehr schön, dass Henning Kästner sich mit der Thematik des Weimarer Landtags in der Zeit zwischen 1817 und 1848 beschäftigt hat. Der Autor, dessen Dissertation die Basis des zu besprechenden Werks ist, hat eine Studie vorgelegt, die sich nicht nur mit der wechsel- und in mancher Hinsicht auch leidvollen Zeit vor der Revolution, sondern auch mit, will man dem Klappentext Glauben schenken, dem Kernland der deutschen Parlamentarismusgeschichte beschäftigt.

Der Verfasser gliederte sein Werk in fünf große Kapitel, die einen guten und durchaus gesunden Mix aus Zeitfolge und methodischer Gliederung darstellen. Bevor er überhaupt auf das Jahr 1817 eingeht, befasst er sich intensiv mit den landständischen Traditionen von den Formen des Rheinbundes nach 1806 bis zur Verfassungsgebung zehn Jahre später. Des Weiteren widmet sich Kästner auch dem Einmaleins der parlamentarischen Praxis und Kultur im Landtag, ehe das Hauptaugenmerk auf die allgemeine Wirkungsgeschichte von 1817 bis 1848 geschwenkt wirkt. Abgerundet wird das Buch mit zwei lesenswerten und gut aufgearbeiteten Kapiteln über das Abgeordnetenhaus als Legislative und die Finanz- und Haushaltspolitik in den drei angeschnittenen Dezennien.

Im Prolog versteht es Kästner blendend, seine Untersuchung in den gegenwärtigen Stand der Forschung einzubetten und benennt anschaulich die Bedingungen einer zeitgemäßen Parlamentarismusanalyse. Darüber hinaus gelingt es ihm, sozial- und kulturhistorische Mängel älterer Publikationen zu verhindern. Wichtige geschichtliche Aspekte wie Erbhuldigungen, Landtagseröffnungen oder Ordensverleihungen, werden in der gleichen Weise zur Aussprache gebracht wie beispielsweise politische Kernelemente wie Landtagswahlen oder berufliche und soziale Strukturen der Angehörigen der Ständeversammlungen.

Mit kurzen und überschaubaren Kapitelüberschriften und einer fein zu lesenden, reflektierten Sprache weiß der Autor zu überzeugen und seinen Leser stets zu fesseln und an der Hand zu führen. Was in einer anderen Besprechung als mögliches Umschla-

gen in Banalität erwähnte Nüchternheit, ist keinesfalls zu erkennen, selbst wenn der untersuchte Landtag des Großherzogtums Sachsen-Weimar-Eisenach nicht als das Paradebeispiel für Innovation dient. Neben dem fehlenden Modernisierungswillen stehen in Weimar wohl eher, schenkt man dem Autor Glauben, konfliktfreie, kooperative Prozesse des Aushandelns und Entscheidens an der Tagesordnung. Wer dessen ungeachtet meint, dass er daher ein langweiliges Parlamentarismusleben beschrieben bekommt, irrt sich. Es ist zwar nicht einer in die Moderne strebender Prozess, aber ein sich langsam wandelndes Politsystem mit wenig Reformen. Das Fazit Kästners fällt fast freundlich aus, wenn er von einer gesellschaftlichen Transformation kleinstaatlicher Rahmenbedingungen spricht.

Während in den 30 Jahren des Untersuchungszeitraums in vielen Staaten des damals noch nicht vereinten Deutschlands und auch im restlichen Europa, die dunklen Gewitterwolken der Revolution fast schon vor der Haustüre stehen, kann das Parlament in Weimar auf Stabilität und Beständigkeit zählen. Der Verfasser, und das ist vielleicht ein kleines Manko der ansonsten guten Arbeit, lässt einige Fragen offen. Ein wenig durcheinander kommt der Leser, wenn zum einen die Existenz parlamentarischer Gruppierungen verneint und andererseits von liberalen Kreisen erzählt wird.

Diese kleinen Mängel werden aber nur den rechtshistorisch und politisch interessierten Lesern auffallen. Trotzdem kann man das Werk Kästners als solide und detailliert charakterisieren. Es ist löblich, dass der Autor das Thema des Parlamentarismus wieder salonfähig gemacht hat. Regionalgeschichtlich ist das Buch gewiss ein Gewinn, neue Aspekte bereichern das Wissen des Rezensenten im Bereich der Historie des Parlamentarismus in der deutschen Staatenwelt. Vielleicht kann das Werk auch eine Triebfeder für andere Dissertanten sein, sich mit der Geschichte des eigenen Landtages zu beschäftigen und somit der Nachwelt eine Dokumentation des politischen Alltagslebens in eine Zeitepoche vor der unsrigen zu gewähren.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Viktor Winkler

Der Kampf gegen die Rechtswissenschaft. Franz Wieackers „Privatrechtsgeschichte der Neuzeit und die deutsche Rechtswissenschaft des 20. Jahrhunderts“ (Studien zur Rechtswissenschaft, Bd. 313).

Hamburg: Verlag Dr. Kovač, 2013, zugl. jur. Diss. Frankfurt a. M., ISBN 978-3-8300-7310-9

Bevor der Autor der vorliegenden Rezension auf das Buch zu sprechen kommt, möchte er anhand eines biografischen Exkurses erklären, wer Franz Wieacker überhaupt ist. Wieacker kam 1908 in Stargard in Pommern (heute in der polnischen Woiwodschaft Westpommern und Teil der Agglomeration Stettin) auf die Welt. Er studierte nach dem Besuch des Humanistischen Gymnasiums, das er 1925 mit dem Abitur abschloss, in Tübingen, München und Göttingen Rechtswissenschaften. Im Sommer 1929 schloss er das erste juristische Staatsexamen mit Auszeichnung ab, absolvierte aber das zweite Staatsexamen. Ende 1930 wurde er promoviert und im Alter von 25 Jahren habilitiert. Die Dissertation hatte den *Erfüllungszwang und Widerruf im römischen Kaufrecht*, die Habilitationsschrift *Hausgemeinschaft und Erwerbsgesellschaft – Untersuchungen des römischen Gesellschaftsbegriffs* zum Inhalt. Er lehrte in Freiburg im Breisgau, Frankfurt am Main, Kiel, Leipzig und Göttingen Privatrechtsgeschichte und wurde 1973 emeritiert. Wieacker starb 1994 im hohen Alter von fast 86 Jahren.

Viktor Winkler befasst sich in seiner an der Frankfurter Johann-Wolfgang-von-Goethe-Universität eingereichten Dissertation mit Franz Wieacker und seinem wechselvollen und durchaus auch erfolgreichen Leben, aber auch mit dem Hintergrund der Privatgeschichte der Neuzeit. Winkler hat sowohl in der hessischen Finanzmetropole als auch im US-amerikanischen Harvard seine rechtswissenschaftliche Ausbildung genossen und kann auf eine ausgezeichnete Schule zurückgreifen.

Die Einleitung des zu besprechenden Werkes ist relativ kurz und beinhaltet neben Erklärung, den augenblicklichen Forschungsstand und darüber hinaus die publizierten Quellen. Dazu dienen die erste Auflage von Wieackers Privatgeschichte und weitere Auszüge aus dessen schier unendlich wirkenden Schriftgut. Winkler selbst versucht der Frage, ob Wieackers Werk eine authentische Erzählung einer Geschichte enthält, einer berechtigten und positiven Antwort zuzuführen. Die Antwort liegt im Detail, denn er versucht den Wesensinhalt, aber darüber hinaus auch die Einflussfaktoren und schließlich die Feststellungen zu rechtsdogmatischen und methodisch durchdachten Inhalten zu finden.

Winkler versteht es geschickt, in vielschichtiger Manier unter dem Blickwinkel des Selbstverständnisses Anlage, Natur und Ziel des Buches herauszukristallisieren. Dabei kommt die Erzählung der Geschichte zum Vorschein. Formalismus und Rationalismus sind in der Summe furchtbar wirkende Richtungen der Methodik. Anstrengungen werden gelobt, die so die Anschaulichkeit und die Sättigung der Wirklichkeit positionieren, damit in der Zeit zwischen dem frühen und hohen Mittelalter und der Jetztzeit nur

das germanische Rechtdenkmuster ein Daseinsrecht hatte. Wenn man das Rad der Zeit zurückdreht, versteht man, dass sich dies seit den Glossatoren zu Lasten der Methodenlehre der Juristerei und ungefähr nach 1900 auswirkte.

Im zweiten Teil befasst sich Winkler mit dem Ausgangspunkt der Geschichte Wieackers und ihren rechtlichen Wertigkeiten. Auf diese Weise kommen viele Freiburger Professoren, die Wieacker nachhaltig prägten, zum Vorschein. Selbst der Einfluss Max Webers und seine Handschrift in Bezug auf Wertfreiheit, Wissenschaft der Realität und den Idealtypus sind erkennbar. Winkler versteht es gut, auch die Entwicklung der neuzeitlichen Privatgeschichte im Dritten Reich in seine Arbeit miteinfließen zu lassen. Dabei dürfen beispielsweise die Eckardtsche Studienreform von 1935, die wahrscheinlich keinesfalls so angegriffene Lage des römischen Rechts nach der Machtergreifung Hitlers 1933 und die Rechtswissenschaft als Entfremdung vom Recht angeführt werden.

Winkler legt im dritten Teil seiner Arbeit die Nachwehen der Geschichte Wieackers in das Zentrum seines Forschungsinteresses. Dabei kommt der Verfasser mit rechtsdogmatischen Kernelementen mit der Schnittpunktmenge Eigentum und Kampf gegen das Bürgerliche Gesetzbuch bis zum Ende des Zweiten Weltkriegs in Berührung. Diese werden mit den dogmatischen Werken nach 1945 konfrontiert. Auch die Methodenlehre vor und nach dem Ende des Zweiten Weltkriegs, der keineswegs bloß in juristischer Hinsicht eine Zäsur darstellt, wird geprüft und verglichen.

Im vierten Teil des zu besprechenden Werkes versucht Winkler zwei Bilanzen zu ziehen. Dabei geht es um die nicht immer harmonisch verlaufende Begegnung der NS-Herrschaft mit der neuzeitlichen Privatrechtsgeschichte. Wieackers Verhalten im Dritten Reich wird hierbei untersucht. Dem gegenüber steht die deutsche Juristerei im Kampf gegen die Rechtswissenschaft nach dem Krieg, die Privatrechtslehre nach 1945, die Auswirkungen nach 1968 und die Gegenwart im Dreh- und Angelpunkt.

Alles in allem kann man das vorliegende Werk Winklers als gelungen bezeichnen. Interessant ist auch das Personenregister mit über 30 Einträgen. Alle haben auf ihre Weise Franz Wieacker dazu verholfen, jeder für sich, dass das Buch über die Privatrechtsgeschichte der Neuzeit eine Errungenschaft war. Winkler überzeugt in seinen Ausführungen, wählt einen stringenten und spannenden Schreibstil und hat das beständige, aber zu jeder Zeit rastlose Gelehrtencharakterbild Franz Wieacker keinesfalls beeinflussen können. Mehr noch: Das zu rezensierende Buch ist mehr eine Hommage an den Juristen, der routiniert und immer anpassungsfähig war.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Martin P. Schennach

Neuere italienische Rechtsgeschichte: 19. und 20. Jahrhundert.

Wien: facultas Verlag, 2015, 142 S., ISBN 978-3-7089-1301-8

Martin P. Schennach ist ein Phänomen. Er schreibt Bücher und Aufsätze wie am Fließband. Der Leiter des Innsbrucker Instituts für römisches Recht und Rechtsgeschichte studierte an der Alma Mater Oenipontana sowie in Jena und Wien Geschichte, Germanistik und Romanistik und dazu Rechtswissenschaften in Innsbruck und Wien und habilitierte sich 2008 für Rechtsgeschichte und 2011 für Österreichische Geschichte.

Bei Schennachs neuem Werk handelt es sich um ein Studienhandbuch, das eine umfassende Einführung in die neuere italienische Rechtsgeschichte ab dem 18. Jahrhundert zum Inhalt hat. Neben einer straffen und trotzdem vielseitig dokumentierten Ereignisgeschichte werden Gesichtspunkte der Verfassungs-, der Privatrecht- und der Strafrechtsgeschichte skizziert. Innerhalb dieser Kapitel erfolgt die Darstellung streng chronologisch. Der Autor thematisiert die Rechtszustände am Ende des Ancien Régime und darüber hinaus die Einflüsse der französisch-napoleonischen Expansion auf die italienischen Rechtsströmungen ab 1796, aber auch die präunitarische Legislative in den verschiedenen italienischen Staaten bis zur Einigung Italiens in der Mitte des 19. Jahrhunderts.

Ebenfalls informiert wird der Leser über die Rechtsvereinheitlichung nach der Schaffung des geeinten Königreichs Italiens sowie die Auswirkungen des Faschismus auf das Werden des Privat-, Verfassungs- und Strafrechts und die Rechtsentwicklungen nach dem Zweiten Weltkrieg, als (fast alle) italienischen Staatsbürger mittels Referendum über die Staatsform entscheiden durften und sich knapp für die Abschaffung der Monarchie und das Inkrafttreten der Republik entschieden.

Bedeutend ist auch, dass der Verfasser auf fast vier Seiten die Entstehungs- und Entwicklungsgeschichte der Südtirolautonomie beschreibt. Ausgehend von den Hoffnungen Österreichs und der deutsch- und ladinischsprachigen Bevölkerung des seit dem Ende des Ersten Weltkriegs an Italien abgetretenen südlichen Teils von Tirol, die Ausübung des Selbstbestimmungsrechts zu erreichen, spannt Schennach den Bogen über die Pariser Friedenskonferenz von 1946 mit dem Gruber-De Gasperi-Abkommen, das als Basis für die Südtirolautonomie angesehen wird, über das erste Autonomiestatut 1948 und die Internationalisierung des Konflikts. In späterer Folge werden auch die Kundgebung auf Schloss Sigmundskron 1957, die UN-Resolutionen 1960/61 und das stufenwei-

se zu realisierende und 1969 angenommene „Paket“ angeschnitten. Nicht zu vergessen ist auch die Zeit zwischen 1972 und der Streitbeilegung 1992, mit der die Südtiroler Autonomie in ihrer Ausgestaltung zum Zeitpunkt der Erklärung zwischen der österreichischen und italienischen Regierung völkerrechtlich verankert wurde.

Eine fünf Seiten starke Auswahlbibliografie lädt den Leser zum nachdrücklichen Studium ein, doch es ist erforderlich, dass man der italienischen Sprache mächtig ist, um ein differenziertes und trotzdem komplettes Rechtsgeschichtsbild Italiens zu bekommen. Schön wäre es gewesen, wenn Schennach, der seine nahezu makellose Arbeit, die mit mehreren Karten (Italien um 1796, um 1843, 1860-66, 1866-70 sowie ab 1919 und Europa um 1812) am Ende des Werkes versehen ist, die eine oder andere Fußnote mit einem Verweis auf die in der reichlich und fast gar nicht als Auswahl zu bezeichnenden Bibliografie angeführten Bücher oder Studien gesetzt hätte. Kurzum: Das besprochene Werk kann allen, die sich mit der neueren italienischen Rechtsgeschichte auseinandersetzen wollen, ans Herz gelegt werden, wohlwissend, dass es sich dabei nicht nur um historisch oder juristisch Interessierte oder in diesen beiden Kernfächern, die oft nicht miteinander auskommen, beheimatete Studierende handeln muss.

Außerdem freut sich der Rezensent schon auf das nächste Werk Schennachs, der gewiss in absehbarer Zeit wieder mit einem neuen Buch aufwarten wird.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Jiří Bílý

Christianizace římského antického státu (Stát – Právo – Náboženství – Společnost)
[Christianizing the Roman Ancient State (State – Law – Religion – Society)]

Praha – Ostrava: KEY Publishing – Metropolitan University Prague Press, 2015, 523 p, ISBN 978-80-7418-250-1

How did the early Christian church manage to win its dominant place in the Roman world? In his newest book an historian of ancient Rome examinus this question from a secular – rather than an ecclesiastical – view – point. Jiří Bílý's provocative conclusion is that mass conversions to Christianity were based more on the appeal of miracle or the opportunity for worldly advantages than simply on a rising tide of Christian piety.

Bílý's style is lucid, and the story of a period with its own innate interest is narrated with compelling feeling. The book has a full complement of notes to give depth to the text. Additionally, the full bibliography will be appreciated by the historian of this period. Finally, there is a very useful index. All this makes the text more meaningful.

The book conceives the overall structure of Christian history differently, from any of its predecessors. Within the cluster of beliefs making up Christian faith is an instability which comes from a twofold ancestry. Far from being simply the pristine, innovative teachings of Jesus Christ, it draws on two much more ancient cultural wellsprings, Greece and Israel. The story must therefore begin more than a millennium before Jesus, among the ancient Greeks and the Jews, two races which alike thought that they had a uniquely privileged place in the world's history. More surprising is the fact that the Jews' constant experience of misfortune did not kill their faith in their own destiny. Instead it drove them to conceive of their God not simply as all-powerful, but as passionately concerned with their response to him, in anger as well as in love. Such an intensely personal deity, they began to assert, was nevertheless the God for all humanity. He was very different from the supreme deity who emerged from Greek philosophy in the thought of Plato; all-perfect, therefore immune to change and devoid of the passion which denotes change. The first generations of Christians were Jews who lived in a world shaped by Greek elite culture. They had to try to fit together these two irreconcilable visions of God, and the results have never been and never can be a stable answer to an unending question.

After the period of Jesus's life and its immediate aftermath, the history of Christianity can only be a unified narrative for around three centuries before it begins to diverge into language-families: Latin-speakers, Greek-speakers and those speaking Oriental languages (the chief among them being of course Jesus Christ himself). As a result, after the three or four centuries which followed the birth of Jesus, the story of Christianity told here is divided three ways. One split emerged because a section of Christianity, the Church within the Roman Empire, found itself suddenly receiving patronage and increasingly unquestioning support from the successors of the emperors who had formerly persecuted it. Those to the east of that empire did not. Within the imperial Church, there was a further division between those who, when looking for a formal language in which to express themselves, habitually chose Greek and those who turned to Latin. This tripartite split became institutionalized after the Council of Chalcedon in 45I.

In the Latin West, the prominence of the Bishop of Rome, already often referred to as *papa* ('Pope'), was becoming apparent during the fourth century, as the emperors abandoned Rome, and he was increasingly left to his own devices at a time when more and more power was flowing into the hands of churchmen. After this Western story has reached the point in the fourteenth century when the papal project of monarchy ran into difficulties, we move eastwards to meet the third story, of Orthodoxy. Like Rome, the

Orthodox are the heirs of the Roman Empire, but whereas Western Latin Christians emerged out of the ruins of the western half of that empire, the Greek-speaking Eastern Church was shaped by the continuing rule of the Eastern emperor.

For most of its existence, Christianity has been the most intolerant of world faiths, doing its best to eliminate all competitors, with Judaism a qualified exception, for which (thanks to some thoughts from Augustine of Hippo) it found space to serve its own theological and social purposes. Even now, by no means all sections of the Christian world have undergone the mutation of believing unequivocally in tolerating or accepting any partnership with other belief systems.

Deeply embedded in Christian tradition is a vocabulary of 'repentance' and 'conversion', both words which mean 'turning around'. So this book describes some of the ways in which individuals were turned around by Christianity, but also the ways in which they could turn around what Christianity meant. We will meet Paul of Tarsus, suddenly struck down by what he heard as a universal message for all human beings, who then quarrelled fiercely with other disciples of Jesus who saw their Lord as a Messiah sent only to the Jews. There is Augustine of Hippo, the brilliant teacher whose life was turned around by reading Paul, and who, more than a thousand years later, deeply influenced another troubled, brilliant academic called Martin Luther. There is Constantine, the soldier who hacked his way to total control of the Roman Empire and became convinced that the Christian God had destined him to do so – for Constantine, his side of the bargain was to turn Christians from a harried, suppressed cult, accused of ruining the empire, into the most favoured and privileged of all Roman religions.

Ideas, once born, often develop lives of their own within human history, and they need to be understood in their own terms as they interact with societies and structures. Christianity in its first five centuries was in many respects a dialogue between Judaism and Graeco-Roman philosophy, trying to solve such problems as how a human being might also be God, or how one might sensibly describe three manifestations of the one Christian God, which came to be known collectively as the Trinity. After much ill-tempered debate on such matters, the outcome of the Council of Chalcedon in 451 was dictated by political circumstances and did not carry the whole Christian world with it.

It is an important book, and highly recommended for the general reader of history as well as the Christian who wonders how the Jesus movement came, by Constantine's time, to be the church we know.

Written in a fresh and vigorous style, gently provocative, this book offers an admirable survery of some major aspects of the history of the early Christian church.

Jiří Bílý has written an instructive and enjoyable book on a great theme.

Karel Schelle *

* Doc. JUDr. Karel Schelle, CSc., Department of the History of the State and Law, Faculty of Law, Masaryk University, Brno, Czech Republic.

Michael Stolleis (Hrsg.)

Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert (= Band 1: Rumänien, Bulgarien, Griechenland).

Frankfurt a. M.: Vittorio Klostermann, 2015, ISBN 978-3-465-04246-4

In Zeiten wie den heutigen ist der Rechtstransfer ein brandaktueller Forschungsgegenstand. Man ertappt sich immer wieder, wenn man das eigene Recht transferiert oder das fremde durch Veränderungen in bestehende oder dem Anschein nach neu zu bewerkstelligende Rechtsordnungen und Grundgesetze einführt. Jedoch weiß man keineswegs, ob diese Versuche ausschlaggebend sind oder auf fruchtbaren Boden stoßen. Die Errungenschaften positiver Natur sind daher keinesfalls vorhersehbar und schon gar nicht gewährleistet. Demzufolge gewinnen in Annahme und Anwendung des Öfteren Faktoren wie etwa Bedrohung und Unsicherheit Überhand.

Herausgeber Michael Stolleis hat sich zur hehren Aufgabe gemacht, die Rechtsordnung der Länder Rumänien, Bulgarien und Griechenland zu charakterisieren. Diese drei aufgezählten Länder sind erst im 19. und 20. Jahrhundert unabhängig geworden und sind selten bis gar nie richtig, rein rechtshistorisch gesehen, erforscht werden. Dabei muss man wissen, dass alle Staaten in diesem Gebiet ihre Rechtsordnungen im Hinblick auf Regelungen und juristische Einrichtungen der Länder West-, Mittel- und Südeuropas oder auch Russlands errichtet haben. Stolleis ist es gelungen, dieses Großprojekt anzugehen und er hat sich mit akribischer Kleinstarbeit ans Werk gemacht und den detaillierten Transfer des Rechts skizziert.

Das zu rezensierende Buch ist schematisch in vier Teile gegliedert. Den Anfang macht eine sehr lebhaft und formvollendet dokumentierte Bestandsaufnahme des osmanischen Rechts an der Schwelle vom 19. zum 20. Jahrhundert. Die drei Staaten, die alle ein Länderkapitel für sich beanspruchen, sind Inhalt der drei nächsten Abschnitte. Interessant ist der Ausflug in das Recht der Moderne, und auch das Jahr 1989 kann durchaus für viele Staaten als Zäsur angesehen werden. Die niemals versiegende Feder Stolleis' geht präzise auch auf die Rechtsmethodologie ein.

Es liegt auf der Hand, dass die anfangs angeschnittene Bestandsaufnahme nicht so viel hergibt wie ein Länderbericht. Trotzdem müssen die Basis, die Ordnung und die Kultur des Rechts im Spannungsfeld zwischen Aufbruch und Gegenwart erwähnt werden. Der Teil Griechenlands ist in sechs Unterkapitel eingeteilt. Die Autoren Ivi Mavromoustakou und Dimitros Parashu behandeln in exzellenter und sehr gut strukturierter Weise die Schnittmenge zwischen Verfassungsordnung nach der Unabhängigkeit und dem Transfer des Verfassungsrechts. Interessant und für den Rezensenten bis dato unbekannt war die Geltung der britischen Verfassungsgebung auf den Ionischen Inseln. Diese Beeinflussungen werden gut dokumentiert und geben klar und deutlich Auskunft, was ein geopolitisch gesteuerter Transfer im Recht ist und was dahintersteckt. Dimitra Papadopoulou-Klamaris und Dimitrios Tsikrikas untersuchen die Konstruktion eines Zivil- und Zivilprozessrechts im 19. Jahrhundert. Das Zivilrecht selbst findet Referenzen in Frankreich und Deutschland. Der Aufbau von Rechtskultur ist das Thema von Theodora Antoniou, ehe Styliani-Eirini Vetsika mit ihrer resümeeartigen Abhandlung über die Modernisierungsmaßnahmen und -bestrebungen des letzten Jahrhunderts das Beispiel Griechenland abschließt. In diesem Abschnitt wird die gesetzgebende Gewalt unter Eleftherios Venizelos auf keinen Fall außer Acht gelassen.

Der Länderbericht Rumäniens wird mit sieben Studien behandelt. Dan Berindei, Bogdan Iancu und Cătălin Turliuc haben sich zur Aufgabe gemacht, das Verfassungsrecht näher zu beleuchten. Ferner kommen auch Irritationen etwas zum Vorschein, die die damalige Rezeption ungewollt hervorrief. Die post-sozialistische Modernisierung des Rechts musste auf die Rezeption des Rechts Rücksicht nehmen und eine Verknüpfung eingehen. Andrea Iancu gibt ein klar strukturiertes Bild über das zivilrechtliche Erbe der Phanariotenfürstentümer Walachei und Moldau wieder und macht mehr als nur deutlich, auf welchem Fundament der Latinisierungsprozess im Recht in die Wege geleitet werden konnte. Manuel Guţan versteht es in seiner Untersuchung blendend, den Transfer des Rechts als Sozialgestaltungsmittel zu deuten, ehe Andrei Florin Sora und Paul Vasilescu sich der Strafrechts- und Sachenrechtsentwicklung Rumäniens verschrieben haben.

Und Bulgarien? Dem Land mit der Hauptstadt Sofia wurden sieben Kapitel gewidmet. Nadia Danova beschreibt die Entwicklung im 18. und 19. Jahrhundert. Diana Mishkova diskutiert die hochinteressante Theorie und erwähnt auch rechtstransfergesteuerte Funktionen, die imstande sind, den Blickwinkel auf Südosteuropa auszuweiten. Ralitsa Kostadinova hat sich in ihrem Aufsatz mit dem bulgarischen Strafrecht befasst. Svetla Baloutzova untersucht familien- und erbrechtliche Fragen Bulgariens, während Teodora Parveva sich mit dem Justizwesen beschäftigte. Martin Belov legte in seiner sehr guten Untersuchung das Hauptaugenmerk auf das Verfassungsrecht in der Târnovo-Verfassung. Den Abschluss der allesamt lesbaren und erstklassig recherchierten Abhandlungen machte Ivo Hristov, der die Restaurierung des bulgarischen Rechts beschreibt. Dieses versuchte bekanntlich, den Abgrund zwischen Behandlung und Gesellschaft zu überbrücken.

Bleibt das Schlusswort: Stolleis und sein Team haben sich sehr intensiv mit der nicht einfachen und durchaus komplexen Thematik auseinandergesetzt. Es ist klar, dass der zu beschreibende Sammelband keineswegs lückenlos die Rechtshistorie Südosteuropas des 19. und 20. Jahrhunderts aufarbeiten kann und will. Es geht eher um die Einzelstudien und hier um den vorher angedeuteten Transfer des Rechts, Resultate, die Funktion als Werkzeug der Sozialgestaltung und auch der Rezeption des Rechts. So oder so ist das Buch mehr als nur ein Gewinn für die (rechts)-geschichtliche Forschung der Staaten Bulgarien, Rumänien und Griechenland. Wenn der Rezensent neue Erkenntnisse erfahren und gesammelt hat, haben Stolleis und sein wissbegieriges Autorenkollektiv und ihre didaktische Herangehensweise an die Materie mehr als nur überzeugt. Und davon ist auszugehen.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Julia Maria Gokel

Sprachliche Indizien für inneres System bei Q. Cervidius Scaevola, Freiburger Rechtsgeschichtliche Abhandlungen, N.S., 70.

Berlin: Duncker & Humblot, 2014, ISBN 978-3-428-14112-8

1. Dalla Sua tesi di dottorato discussa presso la facoltà giuridica di Heidelberg nel semestre estivo del 2012, la giovane ricercatrice Julia Maria Gokel ha tratto la Sua monografia di esordio scientifico, pubblicata nella prestigiosa collana di ricerche di storia del diritto dell'Università di Friburgo (Julia Maria Gokel, *Sprachliche Indizien für inneres System bei Q. Cervidius Scaevola*, Freiburger Rechtsgeschichtliche Abhandlungen, N.S., 70, Duncker & Humblot-Berlin, 2014, ISBN 978-3-428-14112-8).

Si tratta di un lavoro altamente teoretico, nel senso che l'approfondita esegesi compiuta dall'Autrice è funzionale all'interrogativo che costituisce l'oggetto del libro, e che il lettore mi vorrà perdonare se espongo nella forma interrogativa diretta (non del tutto consona a una trattazione scientifica): è dato riscontrare un „sistema interno" in quanto la selezione giustinianea ha tramandato dell'opera di Quinto Cervidio Scevola?

Lo studio si inserisce in un rinnovato interesse che la più recente dottrina italiana ha mostrato per Scevola, e che si è tradotto nell'ultima monografia del compianto Mario Talamanca (perché di volume si tratta, al di là della veste grafica di articolo contenuto nell'ultimo numero del Bullettino diretto dal Maestro: *I clienti di Q. Cervidio Scevola*, BIDR, 103-104, 2000-2001, 483-701) e in quella d'esordio della giovane Studiosa Alessia Spina (*Ricerche sulla successione testamentaria nei* responsa *di Cervidio Scevola*, Milano-Giuffrè, 2012).

Essa si articola in due lunghi capitoli, *Einführung und Hintergründe* (21-125, suddiviso a sua volta in tre paragrafi, rispettivamente d'introduzione, di posizione del problema circa la visione sistematica dei giuristi romani, e sulla vita ed opere di Scevola) ed *Exegesen* (126-355, suddiviso in sette paragrafi, i primi sei afferenti all'eventuale sistematica di Scevola, ricercata tramite l'indagine di forme linguistiche – una per paragrafo – sintomo di una possibile costruzione concettuale, l'ultimo di conclusione e sintesi).

Ai due capitoli, seguono gli indici.

„À rebours", quello delle fonti (411-424), l'analitico (402-410), mentre addirittura impressionante è quello bibliografico (organizzato in questa veste piuttosto che quale indice degli autori), che si estende per 46 pagine (356-401) e rende l'idea del lodevole (a dire poco, vista l'inflazione dell'aggettivo, impiegato pure quando di lodevole vi sarebbe ben poco) lavoro di scrutinio e discussione critica della letteratura – anche la più *inconnue* – compiuto dalla Studiosa (e su cui si tornerà al punto 3).

2. La ricerca verte intorno ad un problema che è stato colto dalla romanistica soltanto nella seconda metà del XX secolo, in particolare, ricorda l'Autrice, da Wieacker e da Kaser. Precedentemente alle codificazioni, il punto non costituiva oggetto di approfondimento né da parte di chi studiava le fonti romane per la costruzione del diritto con cui regolare la comunità in cui l'interprete viveva né da chi le indagava con un approccio di pura storia giuridica. Vale a dire, quello se le „soluzioni" dei giuristi romani (usando un termine per ora molto generico) fossero espressione di una visione concettuale, discendessero (deduttivamente) da una costruzione teorica elaborata o, quanto meno, approvata, dal giurista, oppure se fossero date, come scriveva Betti, quasi per intuito, senza una precisa elaborazione di pensiero, che potesse ad esempio guidare in futuri casi simili, eliminando la necessità, in ipotesi del genere, di rimettersi *ab imis* davanti alla fattispecie.

A partire dalle pionieristiche ricerche di Wieacker, la questione ha costituito oggetto di notevole attenzione nella recente letteratura, soprattutto italiana, ma non si può dire che sul tema si sia raggiunta ancora un'ampia convergenza di consensi. In certi casi, anzi, ricerche simili hanno deluso le aspettative che era lecito attendersi.

Il rischio è ben presente all'Autrice, la quale intende superarlo non lasciando nulla di inadempiuto rispetto all'obbligo di serietà scientifica. Serietà che conduce l'A. a condurre la ricerca sull'intero *corpus* scevoliano tràdito nel Digesto (344 frammenti, osserva la Studiosa) e ad individuare, in tale insieme, alcuni indici linguistici, da verificare, di una possibile costruzione concettuale da parte del giurista. Verifica che la romanista di Heidelberg compie con esegesi paziente, pienamente documentata nonché sicura dei brani del *corpus* scevoliano, classificati linguisticamente come subito si dirà.

Prima però di procedere a tale esegesi, la giovane ricercatrice compie importanti precisazioni.

La questione della costruzione sistematica non va affrontata con approccio monistico: essa deve essere sceverata a seconda della tipologia di genere letterario in cui si trova il passo suscettibile di porla. Ciò non implica il distinguere fra opere casistiche e scritti teorici, che espongano in ipotesi la materia giuridica in forma astratta e deduttiva, e dove la menzione del caso possa al più inserirsi quale elemento rafforzativo. La giovane Studiosa nota infatti come soltanto le Istituzioni di Gaio rispondano, peraltro in parte, al modello di esposizione deduttivo-astratta della materia giuridica. Il tutto va invece ambientato nella metodologia casistica tipica della giurisprudenza romana. Nei generi letterari della casistica, per antonomasia i *Responsa*, ci si potrebbe aspettare che la sollecitazione del caso concreto sottoposto al giurista, unito all'assenza di un'indefettibile norma scritta previgente nel quale incasellarlo (direttamente o per analogia), sfavorisse una costruzione sistematica, vuoi nel senso di trarre considerazioni generali dal caso o di invocare queste ultime, altrimenti elaborate, per la soluzione della fattispecie. Al contrario, come mera presupposizione generale, le opere meno legate all'attività di consulenza, in cui la casistica è creata o recepita *aliunde* dal giurista, si prestano meglio a trascendere la fattispecie concreta, per muovere considerazioni generali, in ultimo idonee a orientare la soluzione di simili che dovessero presentarsi in futuro, così soddisfacendo l'esigenza di certezza a cui ogni sistema legale dovrebbe tendere, quanto meno nella prospettiva moderna. Naturalmente il paragone con il sistema del precedente nella *common law* viene spontaneo, e la stessa A. ne fa menzione (25 nt. 19), ma la sua ricerca si sviluppa tutta all'interno del diritto romano (con metodo storico), senza volere proporre una comparazione fra tipologie di ordinamenti che oggi si direbbero „aperti".

A questo punto alla giovane Studiosa di Heidelberg si poneva un dubbio: quello cioè se condurre una ricerca sulla metodologia della giurisprudenza romana, a carattere pertanto quanto mai ampio, oppure se restringere il fuoco dell'indagine su un singolo giurista. Ella lo ha risolto in quest'ultimo senso. Il primo, infatti, da un lato è di ampiezza tale da fuoriuscire da qualunque ragionevole limite soggettivo, dall'altro rischia di appiattire le singole individualità dei *prudentes*, in nome dell'infungibilità savigniana dei giuristi romani, a parole oggi ripudiata, ma spesso nei fatti data per presupposta.

Alla scelta di concentrarsi su un singolo giurista, invece, l'A. è stata condotta non soltanto dal ripudio dell'assunto di fungibilità dei giuristi romani, ma dalla metodologia da Lei seguita nella sua monografia di esordio. La romanista di Heidelberg nota infatti come l'unico modo per valutare se l'opera di un giurista sia informata e tenda alla costruzione di un sistema è studiarla approfonditamente, dunque analizzare a fondo il residuo dell'opera giuridica che la modernità ha a disposizione. Bisogna, allora, procedere ad un'esegesi approfondita, faticosa e che richiede molta pazienza, ma che è l'unico modo per evitare, da un lato di costruire gli

skyscrapers senza fondamenta stigmatizzati da De Francisci, dall'altro, come acutamente motteggiava Betti nell'inchiesta pubblicata su *Labeo*, 2, 1956, di proporre costruzioni da *doctor umbratilis* (che soltanto il cimento dell'esegesi può scansare).

Come ovvio la Studiosa non propone al lettore l'esegesi dell'intero *corpus* scevoliano, ma, dopo averlo scrutinato „per conto suo", da esso ha tratto una serie di passi che, come già detto, potrebbero a suo avviso essere spia di una costruzione sistematica.

La spia *de qua*, rileva la giovane A., è costituita dagli elementi linguistici. Soltanto su questi, in una materia (quella giuridica), dove ogni individuazione di un dover essere, dunque di una norma, avviene tramite parole (scritte o pronunciate), sebbene volte a conferire un determinato significato a dati comportamenti (espressi anche solamente per fatti concludenti), unicamente sui segni linguistici, si diceva, ci si può basare per ricostruire il significato della regola, nel caso di specie per verificare se il pensiero del giurista proceda tramite elaborazioni sistematiche. L'A. non richiede pertanto alla fonte di esplicitare la *ratio decidendi*, accontentandosi invece pure di una *ratio* tacita, da Lei per l'appunto individuata nell'incedere del brano, consapevole dell'inevitabile attività di mediazione dell'interprete moderno (senza la quale nemmeno avrebbe senso mantenere in vita la materia del diritto romano), dato che entrare nella mente del giurista antico è, al contrario da quanto da parte di molti a dir poco ingenui si pretenderebbe, impossibile (33 i.f.).

A questo proposito mi ha procurato non poche difficoltà comprendere come la Studiosa intenda il proprio fine sistematico rispetto agli studi in materia compiuti, fino a Labeone, da Horak e, con riguardo alla giurisprudenza classica, in specie a Celso e Giuliano, da Jan Dirk Harke, su una ben tracciata linea di continuità con il Maestro austriaco. La ricercatrice di Heidelberg così si esprime: „Gegenstand der vorliegenden Untersuchung sind daher nicht nur – wie etwa in den Arbeiten von *Horak* oder *Harke* – die expliziten, vom Juristen als solche gekennzeichneten, *rationes dedicendi*, sondern gerade die kleinen, auf den ersten Blick eher unscheinbar wirkenden Worte und Konjunktionen, welche möglicherweise systembildende Entscheidungsgrundlagen verschlüsseln könnten" (32).

Se infatti si assume in senso letterale l'inciso fra lineette, si evincerebbe che Ella concepisce la propria metodologia su una linea di continuità con quella di Horak (nelle celeberrime *Rationes decidendi*) ed Harke (dei cui studi sulla giurisprudenza classica basti qui citare l'apice rappresentato dagli *Argumenta Iuventiana* e *Argumenta Salviana*), secondo quanto acclara il „wie" senza un'avversativa quale „stattdessen". Il contesto complessivo (e cfr. in particolare 32 nt. 51: „*Horak* (Rationes decidendi, S. 5) stellt in seiner argumentationskritischen Analyse nochmals klar, dass er nicht die „Gründe", sondern die „Begrundüngen", d.h. die Gründe, die die römischen Juristen ihren Entscheidungen selbst gegeben haben, untersucht") mi fa tuttavia temere che la Studiosa sia incorsa in un tipico errore linguistico dei giuristi europei (il difetto di conoscenza delle lingue diverse dalle cinque principali dell'Unione Europea non mi consente di dire alcunché relativamente a giuristi che si esprimono in altri idiomi), errore, si diceva, consistente nell'esprimere la differenziazione con la similitudine (in italiano, „come", senza aggiungere „invece", e senza adottare più propriamente „al contrario di…»). Se allora ben intendo, Ella vorrebbe dire che Horak ed Harke ricercano indici linguistici che più univocamente riconducono a una motivazione, mentre quelli intravisti dall'Autrice – di cui subito si dirà – sono di primo acchito meno concludenti in tal senso.

Tutto quello che sento di dire in proposito è che Horak precisa, come ben visto dalla Studiosa, di limitarsi alle motivazioni espressamente adottate dai giuristi, esplicitate, secondo il romanista austriaco, dalle congiunzioni finali „wie *ergo*, *itaque*, *igitur*, (*et*) *ideo*" e soprattutto da quelle causali „wie *quia*, *quoniam*; *nam*, *enim* etc." (*Rationes decidendi*, 5). Ad Horak non è però ovviamente ignoto che „daneben kommen noch zahlreiche andere syntaktische Verknüpfungsformen vor, sofern nicht überhaupt ausdrücklich von einem Grund (*ratio*) die Rede ist" (*Rationes decidendi*, 5). La sua fondamentale opera non mostra infatti una cernita dei passi direttamente o indirettamente riferibili ai giuristi che Egli definisce preclassici ristretta a quelli che instaurano un nesso eziologico o finale. Per fare un solo esempio, l'argomentazione *ad absurdum* (sulla quale v. oltre, circa il richiamo che ne fa Julia Gokel quale indizio di costruzione sistematica) è ben presente all'A. (267-275).

Harke elabora poi un sistema ancora più complesso: esso si basa sì, sulla scia di Horak, sulle motivazioni addotte dal giurista nell'interpretazione di un testo eteronomo (ufficiale quale la *lex* o l'editto magistratuale o negoziale quale il *contractus* o il testamento) oppure in quelle trovate nella disciplina di un caso rientrante in quello che Pomponio definiva il *proprium ius civile*, non disciplinato da fonti diverse rispetto all'interpretazione giurisprudenziale: agli indici verbali causali o consecutivi (Harke cita in particolare quelli che adottano le congiunzioni *quia* e *nam* nonché *enim*) che si rinvengono nei due contesti sopra citati Harke aggiunge però pure quelli che lo Studioso di Jena riconduce all'„Auslegung", di fonti eteronome (ufficiali o negoziali) o del „Juristenrecht", con esiti di notevole complessità, che abbracciano per fare un solo esempio l'uso della congiunzione *alioquin*, vista dalla Studiosa di Heidelberg come esempio di costruzione sistematica, secondo quanto si avrà subito modo di precisare.

Se quindi non fraintendo il delicato punto, la Gokel avrebbe potuto prendere in materia una posizione maggiormente avvertita, il che, del resto, si sposa a quanto si avrà conclusivamente modo di vedere circa il carattere non sempre pienamente sicuro circa l'uso della nozione di „sistema" da parte della romanista tedesca.

Ciò detto, prima di giustificare la scelta del giurista Scevola – e di passare in rassegna vita ed opere dello stesso – la ricercatrice tedesca espone al lettore un ultimo chiarimento preliminare, relativo alla nozione di „sistema" che Ella pone ad oggetto della ricerca. Tenuto conto della collocazione della trattazione in un sistema giuridico aperto, non è il pensiero analogico, avverte l'A., oggetto dello studio, in quanto questo non si risolve nel criterio di chiusura, di annullamento delle lacune, proprio del sistema chiuso. Al contrario, in un ordinamento giuridico che non pretende di ricondurre qualsiasi decisione a una previgente norma astratta, il pensiero analogico si invera in una concatenazione di pensieri, non necessariamente a carattere sistematico. Ancora, sempre la

peculiarità di sistema aperto di natura casistica proprio del diritto romano, almeno classico, fa sì che la nozione di „sistema“ accolta dall'A. sia quella della decisione del caso collocata in un ambito più generale, quello dell'ordinamento giuridico, piuttosto che della costruzione di quest'ultimo („dass Gegenstand der vorliegenden Untersuchung keineswegs die Erforschung eines inneren Systems im Sinne eines dem Aufbau der einzelnen Werke zugrundeliegenden inneren Ordnungsschemas [etwa eines *ordo iuris*] ist, sondern allein die konkrete juristische Entscheidung im Kontext der Rechtsordnung im Vordergrund steht“; 38).

La scelta del giurista le cui abilità sistematiche vagliare cade su Scevola perché, da un lato, è tramandata la sua intensa attività rispondente, ancora dopo la seconda metà del II secolo (quando si potrebbe cominciare ad attendere una significativa concorrenza da parte della cancelleria imperiale, e del resto il giurista faceva come noto parte del *consilium* di Marco Aurelio); dall'altro, il pensiero giuridico di Scevola era contrassegnato, almeno a giudicare dalla selezione giustinianea (la quale, avverte l'A., potrebbe restituire un quadro non del tutto attendibile), da una notevole concisione, ai limiti della cripticità, quanto meno nella sua attività rispondente, editorialmente trasmessa (anche da suoi allievi). Proprio quest'ultimo dato, lungi dal produrre l'effetto opposto, deve invece, per la romanista del Baden-Württemberg, stimolare la ricerca di una logica interna al pensiero del giurista. La laconicità, infatti, potrebbe derivare non da una soluzione data intuitivamente, quasi „a casaccio“ verrebbe da malignare, bensì discendere da una griglia di princìpi che guidavano la visione giuridica di Scevola, e che, specie in un parere reso ad un cliente, non avevano bisogno di essere esplicitati.

Per quanto concerne i dati essenziali relativi a Cervidio Scevola, la Studiosa ritiene che il suo arco di vita vada compreso fra il 135 e qualche anno dopo il 200. La sua attività nel campo del diritto viene pertanto da Lei genericamente compresa fra la dinastia degli antonini e quella dei Severi.

Relativamente alla *vexata quaestio* della provenienza di Scevola (italiana o provinciale), se ho ben compreso il pensiero dell'Autrice (non molto efficace su questo punto), Ella non ritiene indicativi, in favore di un'origine greca o africana del giurista, i molti grecismi o africanismi che ricorrono nel *corpus* tramandato. La Gokel osserva infatti che tali grecismi sono per lo più impiegati nella domanda del postulante, e normalmente non ricorrono nella risposta di Scevola. Allo stesso modo, l'interesse per i diritti provinciali (non è stata ancora emanata la *Constitutio Antoniniana*, bene rammentarlo) si inserisce in un contesto ambientale che i giuristi romani della seconda metà del II secolo d.C. non potevano continuare ad ignorare, considerato altresì il crescente numero di cittadini romani – spesso con doppia cittadinanza – che vivevano nelle città in varie forme autonome dell'Impero.

Purtuttavia la Studiosa conclude nel senso di un'origine africana, di Cartagine, come confermerebbe la *Tabula Banasitana*.

L'attività giuridica di Scevola non si sarebbe comunque svolta in provincia: egli svolse infatti la funzione di *praefectus vigilum* nel 175, oltre, come detto, a fare parte del *consilium* di Marco Aurelio.

A lui si rivolgevano soprattutto richiedenti stranieri (delle città autonome) o delle province, i cui nomi sono però nella riproduzione scientifica del parere reso dal giurista stilizzati e romanizzati (Tizio, Mevio, etc.), quasi, verrebbe da dire, come oggi avviene nella pubblicazione scientifica di atti procedurali (con le sole iniziali del nome: alla romanizzazione e all'occultamento del nome presiedevano le stesse esigenze di riservatezza?). L'A. segue la visione di Talamanca, e afferma dunque che i pareri fossero richiesti per iscritto, senza che i postulanti fossero costretti a recarsi, dalle province, a Roma.

Rammentata la feconda attività didattica di Scevola (forse allievo di Giuliano, ma sussistono altresì indicazioni di stampo diverso), la quale diede vita alla scuola in cui emersero (almeno a giudicare dai materiali tràditi) Paolo e Trifonino, la Studiosa propone una rassegna esterna della sua produzione scientifica. In questa quanto rileva sono soprattutto le due opere casistiche, non solo i sei libri *responsorum*, ma soprattutto l'*opus magnum* costituito dai *Digesta* (in 40 libri), mentre carattere didattico hanno i 20 *libri quaestionum*. Questa comunanza di assetto casistico fra i *Digesta* – che, quale genere letterario, hanno altrimenti carattere maggiormente teoretico (quelli di Scevola non fanno peraltro nemmeno menzione di altri giuristi, in quanto di essi è sopravvissuto) – e i *Responsa* ha posto molti dubbi in letteratura circa i rapporti fra i due testi. L'A. le ricorda doviziosamente, lasciando anch'Ella (come di recente la Sua collega Spina) la questione conclusivamente aperta. Dunque al lettore è ricordato – sempre con diffusa discussione critica della letteratura – come secondo un'opinione i *Digesta* sarebbero un'estensione posteriore dei più concisi libri *responsorum*, ad avviso di un'altra, invece, i *Responsa* sarebbero un'epitome dei più estesi *libri digestorum*, mentre un'ulteriore vede i due scritti promanare da un'altra opera di Scevola, tesi verso la quale la ricercatrice tende alla fine a propendere. Le *Quaestiones* nascono nella scuola, nell'attività didattica di Scevola, e sono marcate da un maggiore approfondimento, sempre condotto, comunque, sul filo di un sapiente uso del metodo induttivo-casistico. Riguardo alla datazione di queste ultime, l'A. non propone riflessioni autonome, ma si limita a ricordare l'opinione che le collocano fra il 180 e il 192 e quella che le anticipa invece fra il 170 e il 175.

Poste tutte queste premesse, l'A. può finalmente passare all'esegesi dei passi di Scevola che, a Suo avviso, potrebbero recare indizi di una costruzione sistematica, secondo una partizione linguistica che la Studiosa aveva già esposto.

Dunque l'A. propone sei indici gergali rinvenibili nelle opere di Scevola, alla luce dei quali vagliare la possibilità di una costruzione sistematica da parte del giurista.

Si tratta dell'argomento per duplice eccezione (*nec… nec*, *neque… neque*), il quale pone all'A. il dubbio se i due lemmi congiunti assumano, se ho ben compreso, valore endiadico, oppure se la crasi costruisca un ordine di priorità fra i due enti, una sorta di gerarchia che non valga a collocarli sullo stesso gradino (particolarmente rilevante in tal senso la congiunzione negativa *nec ius nec aequitas*).

Ancora, dell'*argumentum ad modum*, introdotto dall'avverbio *huiusmodi* (o *eiusmodi*), il quale vale ad introdurre un'esemplificazione e concretizzazione di quanto precede (ad esempio, in un caso relativo al contenuto e alla portata di un testamento, rispondere con il riferimento alla *scriptura huiusmodi*).

Dell'*argumentum*, poi, *ex genere*, che nella produzione scientifica di Scevola si esprime con i sintagmi *vel alio* o *aliove* e che ad avviso dell'A. è in astratto idoneo a costruire un sistema generale, con il rinvio a casi indicati come simili (da questo profilo non sarebbe esclusa la costruzione per *genera et species*).

L'*argumentum per consequentiam*, inoltre, espresso dal participio presente *consequens* (*cui consequens est*), e che Masiello descrive come quella relazione logica che si instaura „quando tra due o più assunti si stabilisce un nesso di dipendenza, in modo tale che la 'verità' del secondo ha il suo fondamento nella 'verità' del primo".

L'*argumentum per absurdum* rimarca invece, spesso in maniera ironica, le conseguenze assurde che deriverebbero da un'interpretazione diversa da quella proposta dal giurista, ed è espresso con la congiunzione avversativa '*alioquin*', spesso seguita dal tempo verbale al futuro.

Infine l'*argumentum per generalem modum* viene distinto dall'A. da quello *ex genere* sopra proposto. Se quest'ultimo si basa sul rapporto *genus/species*, quello per *generalem modum* è volto all'individuazione di generi, non di *species* all'interno di questi ultimi. Si tratta così delle grandi partizioni generali, dei *genera* (si rammentino i notissimi *genera tutelarum* muciani), espressi da Scevola con l'avverbio *generaliter* o con l'aggettivo *generalis*.

Tutti questi indizi linguistici portano l'Autrice – tramite un'analitica esegesi dei passi relativi, che non può ovviamente essere ripercorsa in sede di recensione del lavoro di cui qui si dà conto – sostanzialmente alla medesima conclusione: essi non si rilevano mezzi tramite i quali Scevola propone una costruzione sistematica del diritto, in particolare del diritto privato romano. Solamente nelle *Quaestiones*, l'opera a carattere maggiormente teoretico scaturita dalle riflessioni di scuola (dove peraltro Scevola mostra di avere superato la dialettica fra proculiani e sabiniani), vi è qualche traccia di una riflessione del giurista della seconda metà del II secolo di stampo maggiormente generale. Riflessione, sempre scaturita dal caso (concreto o immaginato), all'occorrenza idonea a trascendere quello tipizzato, onde fungere da norma per quelli simili che dovessero presentarsi in futuro. Rimane conclusivamente la regola aurea della giurisprudenza romana – pienamente seguita nel pensiero giuridico di Scevola – '*non ex regula ius sumatur, sed ex iure quod est regula fiat*' (D. 50. 17. 1 Paul. 16 *ad Plaut*.), e che nel giurista la cui opera è approfondita nello studio qui passato in rassegna si traduce anche nell'asserto '*nihil in perpetuum neque generaliter definire possumus* (*consistunt enim in sola aequitate*)' (D. 44. 3. 14 pr. Scaev. *lib. sing. quaest. publ. tract.*).

3. Prima di esprimere una valutazione dell'opera qui recensita, va subito sgombrato il campo da un equivoco.

Quello cioè che, pervenendo a risultati sostanzialmente negativi („Bezüglich des Nachweises von innerer Systembildung im Werk des Scaevola hat die Untersuchung ein mageres und in weiten Teilen negatives Ergebnis zu Tage gefördert"; 347), taluno possa tacciare l'esordio scientifico della ricercatrice di Heidelberg come un lavoro in fondo inutile.

Simili critiche possono solamente provenire da chi non abbia afferrato la nozione di „scienza", scambiando quest'ultima per un dogma (seppure non di rado professandosi, con frase di avvilente banalità, „antidogmatico"). Oltre allora a consigliare a costoro la lettura di Karl Popper, va semplicemente ricordato che uno studio è, nel fine, scientifico, in quanto abbia un contenuto verificabile e, se del caso, confutabile. La stessa ricerca di Julia Gokel non pretende di fornire un risultato a tutti i costi positivo rispetto all'interrogativo intorno al quale essa ruota, ma, con rigore, onestà e serietà scientifica da imitare, sostiene che il più delle volte non è dato riscontrare una costruzione sistematica nell'opera di Scevola.

Proprio allora nel mezzo usato per raggiungere il fine (la risposta, per lo più a contenuto negativo, alla domanda messa al centro dello studio) risiede a mio avviso il pregio maggiore della monografia d'esordio di Julia Gokel. L'A. dimostra innanzitutto viva intelligenza nello scrutinio del *corpus* scevoliano, e nell'individuare i possibili indizi di costruzione sistematica tramite gli indici linguistici sopra esposti. Indici linguistici che l'A. riconduce alla teoretica retorica, anche in ciò mostrando di avere compreso che l'argomentare giuridico è di stampo retorico. Ciò che, ancor oggi, non viene afferrato da quanti, pratici o teorici, vedono nell'aggettivo „retorico" quasi un marchio d'infamia. Ancora una volta si trascura che un'argomentazione retorica non potrà mai avere carattere sminuente, se chi argomenta lo fa con metodo franco ed onesto, avulso per l'appunto dal volere sostenere a tutti i costi una tesi (ciò che va lasciato allo stile forense, dove è inevitabile che ciò accada).

Classificati tali segni gergali nelle fonti promananti da Scevola, l'A., messa di fronte alla necessità di sviscerare il contenuto del passo, lo fa con forza, pazienza e dedizione. La Studiosa di Heidelberg ha infatti ampliato il raggio della sua ricerca a tutti gli aspetti involti dai brani, tanto che le singole esegesi hanno tutte il contenuto sostanziale di brevi monografie. Da questo punto di vista non posso trattenermi dall'esprimere la mia ammirazione per le capacità dell'A. di compiere la ricerca scientifica: Ella dimostra infatti di avere una conoscenza bibliografica quasi sterminata, nel senso che ha la capacità di fare uso dei contributi anche meno facilmente accessibili e in circolo su un determinato argomento. Il tutto in maniera aggiornata e, a mia conoscenza, senza lacune sul punto. Non si può che lodare pubblicamente la giovane ricercatrice per la Sua capacità di accedere alle informazioni bibliografiche: in ciò Ella dimostra una propensione alla ricerca scientifica veramente spiccata. Non soltanto: Julia Gokel compie giustamente gli approfondimenti bibliografici nelle note, dimostrando una rilevante capacità di architettare una trattazione giuridica. Mi spiego bene: le sue lunghe note, lungi dal consistere in irritanti florilegi dossografici, non si risolvono nemmeno in *excursus* inconferenti con il tema d'indagine, anch'essi da giudicare negativamente. Al contrario l'A. rimane sempre sull'argomento, e allora è giustamente nelle note che approfondisce minuziosamente il dibattito circa il punto in questione e le sue rifrazioni, lasciando nel testo quanto è essenziale per il Suo argomentare, normalmente in stile dialettico con le opinioni circolanti in letteratura (anche questo lodevole: l'A. non si limita infatti ad esporre nel testo la Sua tesi, in maniera autoreferenziale). Questo stile, a mio avviso, rimane quello che

deve contrassegnare la produzione in materia giuridica, senza cedere alle suggestioni della metodologia anglo-sassone, al contrario di quanto sta avvenendo purtroppo nella romanistica sopra le Alpi.

Non si può infine sottacere un ulteriore merito del libro qui recensito: si tratta di una ricerca perfettamente bilingue, italo-tedesca. L'A. dimostra una non comune padronanza della letteratura italiana e della stessa lingua italiana, frutto senz'altro anche del soggiorno scientifico nella terra di Dante grazie alla fruizione della prestigiosa borsa DAAD (a Siena, presso il Prof. Stolfi, e a Trento, presso i Professori Miglietta e Santucci: la Studiosa ha altresì compiuto un soggiorno Erasmus a Bologna), ma portato pure di una personale propensione alle lingue, senza la quale non sarebbe possibile maneggiare con simile sicurezza un idioma complesso e difficile da apprendere, come è l'italiano. L'aspetto qui messo in risalto non può essere sottovalutato: la tanto, al contrario, svalutata ricerca romanistica si dimostra anche in ciò molto più al passo con i tempi che i suoi provinciali e mediocri detrattori. La necessità di avere una conoscenza attiva di almeno due lingue, e una passiva delle cinque principali lingue dell'Unione Europea, è sempre stata presente alla (almeno un tempo) elitaria comunità scientifica romanistica, che ne ha fatto uno strumento del suo operare. Se allora l'obiettivo a cui tendere è quello di una progressiva fusione verso uno Stato unico europeo, con una legislazione unitaria, anche in ciò la metodologia romanistica – nonché il suo tesoro dottrinario comune, messo a frutto per l'elaborazione degli attuali codici civili europei – si rivela attualissima e, anzi, precorritrice dei tempi. Libri come quello di Julia Gokel ne rendono perfettamente la dimensione, nel caso di specie dal punto di vista metodologico.

Certo, come in ogni trattazione scientifica, non mancano aspetti criticabili nel pensiero dell'A.

In particolare mi sembra che il profilo altamente teoretico della ricerca proposta dalla Studiosa non sia da Lei sempre padroneggiato con sicurezza.

I miei pensieri continuano a correre sull'asserzione dell'A. relativa all'analogia nel sistema aperto, che, come detto, secondo Ella assumerebbe ivi solamente l'aspetto di una concatenazione di pensieri, senza intenti sistematici. Ovviamente l'analogia non avrà qui contenuti normativi nel senso di un sistema chiuso (modo per colmare le lacune dell'ordinamento), ma mi domando se la concatenazione di pensieri non abbia per sé stessa una funzione sistematica, anche in un ordinamento aperto. E mi conforta leggere che due Studiosi del calibro di Horak ed Harke riconducono infatti l'argomentare analogico agli intenti sistematici, alla costruzione di un sistema (v. Horak, *Rationes dedicendi*, 242-261 nonché Harke, *Argumenta Iuventiana – Argumenta Salviana*, 19-25, 65-155).

Con ciò si ricade in un ulteriore aspetto, più importante, su cui la ricerca di Julia Gokel non mi sembra sempre sicurissima: mi riferisco in particolare alla nozione di „sistema" individuata dall'A., come detto, non nella costruzione di un *ordo iuris*, di uno schema ordinamentale, bensì nella collocazione della singola soluzione „im Kontext der Rechtsordnung" (38). Si può senz'altro trattare di miei limiti, ma questa distinzione non riesce del tutto a convincermi, e non la vedo appunto ben separata nella successiva mastodontica esegesi dell'A. Per fare un solo esempio: il modo in cui Ella descrive il primo argomento sistematico da Lei ritracciato, quello *per duplicem exceptionem* (*nec… nec*, riferito all'*ius* e all'*aequitas*, si rammenti), mi sembra per l'appunto poco chiaro, e tradire così una non compiuta padronanza del tema („Unter Systemgesichtspunkten besonders interessant ist die Frage, wie sich die unterschiedenen Fälle zueinander verhalten und ob die doppelte *exceptio* dem Juristen zu einer Systemaussage dient. Dabei soll vor allem untersucht werden, ob Scaevola in der Negation Gleichwertiges verbindet oder etwa mittels *exceptio* eine Art Rangfolge in den Alternativen bildet, welche durch die doppelte Verneinung möglicherweise verstärkt wird"; 126 i.f.).

4. Le osservazioni appena sopra compiute non intendono sminuire in alcun modo il lavoro di Julia Gokel, tenendo altresì conto della complessità e dell'alto carattere teorico dell'argomento d'indagine, il quale non si può sensatamente esigere sia pienamente dominato in una ricerca che trae spunto, va ricordato, da una tesi di dottorato, e che rappresenta pertanto l'approccio alla materia giuridica della sua Autrice.

La propensione alla ricerca dimostrata nell'esordio scientifico della Studiosa di Heidelberg rimane pertanto in tutta la sua nettezza, di modo che dell'opera qui recensita il giudizio positivo si impone quasi da sé.

Stefano Barbati *

* Dr. Habil. Stefano Barbati, Lehrstuhl für römisches Recht, Wirtschafts- und Rechtsfakultät, Katholische Universität vom Heiligen Herzen, Mailand, Italien.

Die Gründung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte in Pécs. Beweggründe – Motive – Visionen

1. Der Stellenwert osteuropäischer Staaten in der rechtshistorischen Forschung des 20. Jahrhunderts

In der Einführung des *Lehrbuchs European Legal History* von *Olivia Robinson, David Fergus* und *William Gordon* (1994) formulieren die Verfasser klar, warum sie sich in den Kapiteln ihres Buches mit der europäischen Rechtsgeschichte beschäftigen: In geographischer Hinsicht zählen sie insbesondere jene Staaten zur europäischen Rechtskultur und -tradition, die ein gemeinsames juristisches Erbe haben; ein Erbe, das auf der Vermischung des römischen und des kanonischen (gelehrten) Rechts, beziehungsweise des feudalen Rechts und des Gewohnheitsrechts basiert. Die Verfasser wollen damit eine allgemeine Beschreibung der Rechtsentwicklung geben: Ihre Darstellung und Behauptung trifft damit mehr oder weniger auf die Heimat der Leser aus dem Umfeld des geographischen Europas zu. Die Verfasser des Lehrbuchs führen aber ihre einschränkenden und gleichzeitig ausschließenden Gedanken noch weiter: Obwohl Skandinavien, Polen und Ungarn, und auch beispielsweise Spanien dem westlichen Christentum angehörten, waren diese Länder dennoch keine zentrale Gebiete der Entwicklung des juristischen Denkens und der Praxis, welche einen nachhaltigen Einfluss auf den Großteil des Westens ausübte. Die Verfasser stellen fest, dass auch England an dieser Entwicklung nicht unmittelbar beteiligt war, halten jedoch fest, dass eine Beschäftigung mit der relativ isolierten englischen Rechtsentwicklung aus zweierlei Gründen notwendig ist. Zum einen wegen der engen Beziehung von England zu Frankreich und Schottland, zum anderen wegen der Transformierung der europäischen Entwicklung in den ehemaligen Kolonien und damit verbunden in andere Kulturen. Kein Zweifel besteht ihres Erachtens jedoch darüber, dass das Herz Europas, worunter sie Italien, Frankreich und Deutschland, die Länder des Heiligen Römischen Reichs verstehen, genau definiert ist.[1]

Das Lehrbuch erörtert die Rechtsentwicklung der oben erwähnten „nicht zentralen Gebiete" der europäischen Rechtsentstehung gar nicht. Daher ist es für den Leser weiter nicht verwunderlich, dass die ehemaligen Ostblockstaaten, ohne Zweifel ein bedeutender Teil des geographischen Europas, auch im letzten Kapitel über die Tendenzen im 20. Jahrhundert mit Rücksicht auf den europäischen Vereinigungsprozess nicht erwähnt sind. Es ist das Vorrecht der Wissenschaftler den Gegenstand und den Umfang ihrer Untersuchung – mit oder ohne scharfe Grenzen – zu bestimmen. Die Entscheidung und warum diese so und nicht anders getroffen wurde ist von der Forscherin beziehungsweise dem Forscher zu begründen und hat sich in der Regel auch im Titel des Werkes nieder zu schlagen. Jedoch, die Verfasser bleiben zumindest dieses Mal den, den Gegenstand des Buches widerspiegelnden Titel schuldig, wobei sich natürlich zu fragen ist, welches Bild von Europa die Verfasser in dem Lehrbuch den Studierenden vermitteln wollten.

In den rechthistorischen Fachbibliotheken findet man jedoch einige Beispiele, aus unterschiedlichen Epochen, die sich der Frage was unter „europäischer Rechtsgeschichte" zu verstehen ist, behutsamer nähern. Diese Beispiele sind zumeist Monographien oder Sammelbände, die sich dem Forschungsthema aus vergleichender Sicht annähern. Der Europabegriff von *Heinrich Mitteis* (1947) erstreckt sich vom Heiligen Römischen Reich Deutscher Nation über Italien, Frankreich und England auch auf die Ostländer: In seiner vergleichenden Verfassungsgeschichte der Feudalzeit widmet er Osteuropa gerade einmal zehn bescheidenen Seiten,[2] und innerhalb dieses Kapitels Ungarn vier Seiten – von der Staatsgründung bis zur Vertreibung der Türken (1000-1686). Die Struktur von *Mitteis'* Werk ist aber sehr Durchdacht. Die geringe Seitenanzahl, welche er den osteuropäischen Ländern allgemein und Ungarn im Besonderen widmet, ist einerseits durch die dem Verfasser nur spärlich zugängliche, in nationalen Sprachen publizierte Fachliteratur und andererseits auch in der von ihm beigemessenen Rolle des Lehnswesens im östlichen Europa geschuldet. Die Liste der Beispiele, wie wenig die Rechtsentwicklung in den Oststaaten beachtet wurde und wird, kann man mit folgender Monographien und folgendem Beitrag belegen. *Helmut Coings* „Europäisches Privatrecht" ist ausschließlich auf Westeuropa fokussiert (1989), wie es auch im Untertitel, welcher am inneren Titelblatt abgedruckt ist, belegt.[3] Der Beitrag *Walter Pintens* über die Beschreibung der ehelichen Güterrechtssysteme der osteuropäischen Staaten widmet diesen gerade einmal einen einzigen Absatz, wobei er – zumindest theoretisch – über Europas Güterrechtssysteme schreibt (2008).[4]

[1] *Olivia F. Robinson – T. David Fergus – William M. Gordon,* European Legal History. London – Dublin – Edinburgh, 1994, S. V.

[2] *Heinrich Mitteis,* Der Staat des hohen Mittelalters. Grundlinien einer vergleichenden Verfassungsgeschichte des Lehnszeitalters. Weimar 1940, S. 448-458.

[3] *Helmut Coing*, Europäisches Privatrecht Band II: 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern, München 1989.

[4] *Walter Pintens,* Ehegüterstände in Europa, in: Die Zugewinngemeinschaft – ein europäisches Modell? 7. Göttinger Workshop zum Familienrecht 2008, Göttinger Juristische Schriften, Hrsg. Volker Lipp – Eva Schumann – Barbara Veit, Göttingen 2009, S. 23-38.

Im historischen Europa, wo die Herrscherhäuser untereinander heirateten, Mitglieder von ausländischer Dynastien auf den Königsthron berufen wurden und dann aufgrund dynastischer Thronfolge über Jahrhunderte den Thron innehaben konnten, Hospes-Gemeinden auf Grund von versprochenen Privilegien in neue Heimaten aufbrachen, Handelsleute ihre Waren in andere Kontinente lieferten, Priester, Prediger, Popen und Rabbiner die theologischen Kenntnisse ihrer jeweiligen Religion in ihre neue Heimat brachten, Studenten, die an namenhaften Universitäten studierten und die Kultur und Wissen des Gastlandes mit nach Hause brachten, sich religiöse und säkulare Ideen in Windeseile verbreiteten, gab es keine geistigen Mauern zwischen Ländern und Völkern. Es gab einflussreichere und weniger prägende Staaten, besteht doch eine Verbindung immer aus zumindest zwei Seiten, aus Wirkung und Gegenwirkung. Die gemeinsamen Wurzeln zu erforschen, indem das Unterschiedliche und Verbindende dargestellt wird, die Gemeinsamkeiten herauszuarbeiten und damit die zukünftige Richtung der Rechtsentwicklung im vereinigten Europa im Idealfall zu beeinflussen, ist eine der wichtigen Aufgaben von Rechtshistorikern. Die Verantwortung der Rechtshistoriker der nicht englisch- oder deutschsprachigen Länder ist dabei sogar noch größer: Ihre Aufgabe ist es die Ergebnisse der nationalen (Rechts-) Geschichtswissenschaft in Englisch oder in Deutsch zu publizieren und damit die Rechtsvergleichung zwischen den „Kernländern" Europas – wie sie im Lehrbuch *European Legal History* – genannt wurden und den Rechtstraditionen der osteuropäischen Staaten der Gegenwart, zu ermöglichen.

2. Der Anspruch Rechtsvergleichung in der ungarischen Rechtsgeschichte und -wissenschaft anzuwenden

Der Anspruch die komparative Methode in der ungarischen Rechtsgeschichte- und -wissenschaft anzuwenden geht auf die zweite Hälfte des 19. Jahrhunderts zurück, als auch der Unterricht der europäischen Rechtsgeschichte seinen Anfang[5] nahm: „Es gibt nur manche Teile unserer Rechtsgeschichte, wichtige Institute unseres Rechtssystems, die durch die vergleichende Rechtswissenschaft nicht erklärt werden könnte" – meinte *Gustáv Wenzel* 1875.[6] Die Gründe für die Anwendung der vergleichenden Methode findet man in erster Linie im öffentlich-rechtlichen Bereich, aber auch im rechtshistorischen Erbe von Ungarn. Es war für die Rechtshistoriker klar, dass „die ungarische Rechtsentwicklung zahlreiche germanische Elemente enthält und seit dem Kodex *Stephans des Heiligen* auch immer enthalten hat".[7] Dennoch betonte man in der zweiten Hälfte des 19. Jahrhunderts in erster Linie das starke Eigenleben des ungarischen Rechts, denn die fremden Elemente – so der Tenor – sind in das Vorhandene integriert worden und damit ist de facto verändertes neues nationales Recht entstanden.[8] Als aber 1905 *Hans Schreuer*, der Rezensent des Lehrbuches von *Ákos Timon* über die ungarische Verfassungs- und Rechtsgeschichte, in der Savigny-Zeitschrift dieses Buch als „erstes zusammenfassendes Werk" zur ungarischen Rechtsgeschichte beschrieb, brachte er seine Wahrnehmung der ungarischen Rechtsgeschichte als „spezifisch-germanistisch" fundierte Disziplin zum Ausdruck. Er war der Meinung, ein großer Teil der ungarischen Rechtsgeschichte sei nichts als „ein Ausläufer der Entwicklung im fränkischen und deutschen Reich" in Form einer Mischung von slawischen und germanischen Elementen.[9]

Ohne eine aktuelle, tiefgehende Analyse dieser vereinfachenden und verallgemeinernden Stellungnahme von *Schreuer* kann man daraus trotzdem zwei wichtige Tatsachen klar ersehen. Die erste ist die Ausrichtung des Ungarnbilds in der deutschen Historiographie[10] an der Wende vom 19. zum 20. Jahrhundert und die zweite ist der ungarische Ursprung der Impulse zur Ungarnforschung zur Zeit der Österreich-Ungarischen Monarchie: Die Triebkraft war in diesem Fall die deutschsprachige Publizierung von *Timons* Werk, dann später, in den ersten Jahrzehnten des 20. Jahrhunderts, die privatrechtliche Kodifikationsbewegung in Ungarn, welche die deutsche Erforschung der ungarischen Rechtsentwicklung – im Rahmen eines Gedankenaustausches – wesentlich intensiver machte, als sie zuvor war.

Die Forschung zum ausländischen Privatrecht in Ungarn wurde durch die nationalen Kodifikationsbestrebungen motiviert, und der Gedanke einer historische Rechtsvergleichung schlug sich auch in der Juristenausbildung nieder: Statt der nach der Niederlage im ungarischen Freiheitskampf (1849) eingeführten deutschen Rechtsgeschichte studierte man an der Universität Pest kurz danach schon allgemeine (europäische) Rechtsgeschichte. Das erste Lehrbuch dazu wurde noch im Jahre 1869 von *Gusztáv Wenzel* publiziert. Den Verbindungen des ungarischen Rechts zu der europäischen Rechtsentwicklung wurde von den Vertretern der ungarischen Rechtsgeschichte besonderes Augenmerk gewidmet. Das belegen unter anderem die Werke von *Imre Hajnik* (1875), *Mihály Herczeg* (1902), *Ákos Timon* (1902) oder *János Király* (1908). Obwohl die europäische Rechtsgeschichte

[5] Siehe im Weiteren *István Stipta*, A magyar jogtörténet-tudomány kétszáz éve [Zweihundert Jahre der ungarischen Rechtsgeschichtswissenschaft]. Szeged 2015, S. 85-87.

[6] Zitiert von *Stipta*, S. 91.

[7] Siehe unter anderem *Felix Schiller,* Das erste ungarische Gesetzbuch und das deutsche Recht, in: Festschrift Heinrich Brunner zum 70. Geburtstag, dargebracht von seinen Schülern und Verehrern. Weimar 1910, S. 379-404.

[8] *Antal Almási,* Ungarisches Privatrecht I. Berlin – Leipzig 1924, S. V.

[9] *Hans Schreuer*, Rezension zu Ákos von Timon: Ungarische Verfassungs- und Rechtsgeschichte, ZRG GA 26 1905, S. 326.

[10] *Katalin Gönczi,* Das historische Ungarnbild in der deutschen Rechtsgeschichtswissenschaft, Eine Geschichte der Forschung und der interkulturellen Wissenschaftsbeziehungen bis 1945, in: Das Ungarnbild der deutschen Historiographie. Hrsg. Márta Fata, Schriftenreihe des Instituts für donauschwäbische Geschichte und Landeskunde, München 2004, S. 234-235.

zwischen 1906 und 1948 aus dem Lehrplan gestrichen wurde, blieb die historische Rechtsvergleichung vor dem Hintergrund der privatrechtlichen Kodifikationsbewegung eine wichtige Methode.

Das geltende und das geplante ungarische Privatrecht wurden in der reichsdeutschen Literatur im Hinblick auf die praktische Brauchbarkeit und seine geschichtlichen Zusammenhänge geprüft. *Ernst Heymanns* Folgerungen 1917 waren viel behutsamer als *Schreuers* oben zitierte Sätze. Er meinte, das ungarische Privatrecht gehöre zusammen mit dem des Deutschen Reiches, Österreichs, der Schweiz und der nordischen Länder der germanischen Rechtsgruppe an, wenn man eine Gegenüberstellung mit dem französisch-römischen, anglo-amerikanischen und slawischen Bereich anstrebt. Ja, dem deutschen Betrachter erscheint es sogar als ein „etwas eigensinnig entwickeltes deutsches Partikularrecht" das bei alledem „sein starkes, mit dem Charakter des ungarischen Volkes zusammenhängendes Eigenleben hat".[11] Bedauerlich ist, dass die Lebensarbeit des genialen *Béni Grosschmids* und die grundlegenden Monographien von *Ferenc Nagy, Gusztáv Szászy-Schwarz* oder *Bálint Kolosváry* wegen der Sprachschwierigkeiten der deutschen Wissenschaft nicht zugänglich waren.

Die Motivation, ungarisches Recht zum Forschungsgegenstand zu machen, resultierte in den 50-er Jahren des 19. Jahrhunderts aus der politischen Zielsetzung einer Rechtsvereinheitlichung in den habsburgischen Herrschaftsgebieten. Die Impulse kamen von österreichisch-deutscher Seite, hatten aber zur unabdingbaren Voraussetzung, dass ungarische Fachjuristen, die nicht nur die Sprache und die Entwicklungsgeschichte der oft einzigartigen ungarischen Rechtsquellen, sondern auch die alltägliche Gerichtspraxis kannten, zur Mitarbeit gewonnen werden konnten. Es war noch die Zeit der deutschen Rechtsgeschichte als Fach in der Juristenausbildung. Die rechtspolitische Zielsetzung war klar: Den ungarischen Rechtsstudenten sollte die Rechtsentwicklung im deutschen Rechtskreis systematisch näher gebracht werden. Im Kreis der in Ungarn eingeführten österreichischen Rechtsquellen hatte das Allgemeine Bürgerliche Gesetzbuch eine besondere Bedeutung. Als es durch kaiserliches Patent am 29. November 1852 in Ungarn verkündet wurde und dann am 1. Mai 1853 in Kraft trat, wurde das traditionelle Privatrecht mit einigen im Verkündigungspatent genannten Ausnahmen (Art. III-XII) außer Kraft gesetzt. Freilich musste das ABGB auch im Lehrplan der Juristenausbildung Platz finden: So publizierte neben *Lajos Kallós* (1852) auch *Gusztáv Wenzel* (1854) in Pest ein Lehrbuch über das österreichische Privatrecht. Aber nur nach acht Jahren und nicht ganz zwei Monaten gehörte das immer für fremd gehaltene ABGB nach den Beschlüssen der Judex-Curial-Konferenz vom 23. Juli 1861 der Vergangenheit an. Die Folge war die teilweise Wiedereinführung des traditionellen ungarischen Rechts, so auch des Privatrechts in Ungarn, allerdings nicht in allen Ländern der Ungarischen Krone.

Die wissenschaftliche Beschäftigung mit dem ungarischen Privatrecht in Cisleithanien und dem des ABGB in Transleithanien hatte aber aus praktischen Gründen auch nach 1861 seine Bedeutung nicht verloren. Einerseits bildeten Österreich und Ungarn nach dem politischen Ausgleich im Jahre 1867 eine Doppelmonarchie bis zum Ende des Ersten Weltkrieges, die in kultureller, gesellschaftlicher, wirtschaftlicher und ja, allgemein genommen, auch in politischer Hinsicht eine positive Periode in der Geschichte der Völker der zwei Mitgliedstaaten war. Ein solches positives Zusammenleben innerhalb der *Habsburger*-Monarchie wäre aber ohne wechselseitige Kenntnisnahme von Recht und Kultur nur schwer möglich gewesen. Anderseits standen die Nebenländer der ungarischen Krone, in welchen das ABGB in Geltung blieben und zur Fortbildung kamen, unter der Kompetenz des ungarischen Höchstgerichts. Die Richter der königlichen Curia benutzten in ihrer Praxis parallel das restituierte, in der Gerichtspraxis weiterentwickelte ungarische Recht und das ABGB: Mangels Rechtseinheit war das ABGB ein nötiges Werkzeug alltäglicher juristischer Arbeit in der Hand der ungarischen Juristen. Ein ideales Rechtsvergleichungs-Milieu, wie dies eine lange Reihe der Werke von ungarischen Juristen zeigen. Diese historische und vergleichende Forschung in Ungarn erstreckte sich aber schon weit über das ABGB hinaus und erfasste auch andere westliche Gesetzbücher bis zu den Entwürfen des BGB. Aus dieser Epoche stammt die systematische Zusammenfassung des ungarischen Privatrechts in deutscher Sprache von *Antal Almási*,[12] der seine Monographie für das Ungarische Institut an der Universität Berlin 1924 im Hinblick auf den damaligen Stand der Privatrechtskodifizierung anfertigte.

Vielsagend erscheint die Tatsache, dass die Rechtsvergleichung einerseits am Anfang der 50-er Jahre des 20. Jahrhunderts nicht mehr als eine historische Analyse war: Man folgte den im sowjetischen Block herrschenden Prinzipien, die gezielt zur Leugnung der bürgerlichen Tradition führen sollten. Andererseits wenn die Rechtshistoriker sich mit europäischer Rechtsentwicklung beschäftigten, fokussierten sie sich meistens nur auf Mitteleuropa. Diese geographisch-politische Abgrenzung beziehungsweise Einschränkung hatte aber auch den Vorteil, dass sie die Erforschung des österreichischen Einflusses auf die ungarische Rechtsentwicklung ermöglichte.[13] *Pál Horváths* Monographie über die Grundelemente der vergleichenden Rechtsgeschichte[14] (1979) ist derart von marxistischer Diktion und marxistischem Blickwinkel geprägt, dass man dieses Buch heute leider nur sehr eingeschränkt und begrenzt als Richtschnur heranziehen kann. Diese Elemente können auch Ursachen dafür sein, weshalb sich die

[11] *Ernst Heymann,* Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn. Tübingen 1917, S. 92.
[12] *Almási*, S. 192-203.
[13] Sieh z.B. *Andor Csizmadia – Kálmán Kovács* (Hrsg.), Die Entwicklung des Zivilrechts in Mitteleuropa. Budapest 1970.
[14] *Pál Horváth,* Bevezetés az összehasonlító jogtörténet alapelemeibe [Einführung in die Grundelemente der vergleichenden Rechtsgeschichte]. Budapest 1979.

westliche, so auch die österreichische Fachliteratur in der zweiten Hälfte des 20. Jahrhunderts meistens nur tangential und ausnahmsweise mit dem ungarischen Recht im Rahmen der historischen Rechtsvergleichung beschäftigte.

3. Die Einrichtung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte in Pécs

2015 erschien die Monographie von *István Stipta* über die zweihundert Jahre der ungarischen Rechtsgeschichte und -wissenschaft. Der renommierte Rechtshistoriker stellt in seinen Publikationen fest, dass seit den Jahren des politischen Systemwechsels (1989-1990) die Mehrheit der Kollegen sich mit Themen aus der ungarischen Verfassungsgeschichte beschäftigen. Nur *Pál Horváth*, *István B. Kállay*, *Katalin Nagyné Szegvári, György Képes* und *Miklós Kelemen* sind diejenige, die in ihrer wissenschaftlichen Tätigkeit größeres Gewicht auf die universellen rechtshistorischen Fragen legen, und nur eine Minderheit [15] forscht in Ungarn Themen mit Rücksicht auf Europa, wie auch die ungarische Mitverfasserin dieses Berichtes. Darüber hinaus analysiert und vergleicht sie in gegebenen Bereichen [16] sowohl die Rechtsentwicklung als auch Lösungsansätze innerhalb der EU mit jenen in Ungarn. *Stipta* sieht einen Mangel der heimischen Rechtsgeschichtswissenschaft – seit den neueren Werken von *Pál Horváth* [17] – in der Abnahme des Interesses für methodische Fragen.[18] Als Fazit stellt er fest, dass der supranationale Charakter der Rechtsgeschichtswissenschaft, wie auch die Vereinheitlichung der Thematik, der Methoden, der Terminologie und des Sprachgebrauchs der rechtshistorischen Forschungen sich nicht im selben Maße wie in anderen Disziplinen entwickelt hat beziehungsweise zustande gekommen ist. Eine der Erwartungen, die er hegt, ist – neben der sprachlichen und methodischen Harmonisierung – die universale Approximation der Themen.[19]

Obwohl diese wissenschaftsgeschichtliche Behauptung von *István Stipta* die Stärkung der vergleichenden rechtshistorischen Forschungen nahe legt und gleichsam einmahnt, war der Auslöser für die Gründung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte im September 2016 an der Staats- und Rechtswissenschaftlichen Fakultät der Universität Pécs in Ungarn nicht primär dieses wissenschaftliche Desiderat, sondern die jahrzehntelange gemeinsame wissenschaftliche Kooperation mit Partnern, insbesondere jenen in Graz.

Der Kreis der wissenschaftlichen Kooperationspartner-(Institutionen) der Dezső-Márkus-Forschungsgruppe basiert auf folgenden, bisher gepflegten, bereits etablierten wissenschaftlichen Kooperationen. 1. Em. Prof. Dr. *Gernot Kocher* (Graz) – Em. Prof. Dr. *István Kajtár*: Jährliche Partnerschaftstreffen in Graz und Pécs seit mehr als 25 Jahren;[20] Verleihung des Ehrendoktorates an Prof. *Kocher* durch die rechtswissenschaftliche Fakultät der Universität Pécs; Übersetzung der Monographie „Zeichen und Symbole des Rechts" von Prof. *Kocher* (2008) ins Ungarische;[21] Rechtshistorikerporträt;[22] 2. Prof. Dr. *Markus Steppan* (Graz) – Doz. Dr. *Eszter Cs. Herger*: Seit zwölf Jahren gemeinsame Lehrveranstaltungen im Bereich Familienrecht, sowohl an der Universität Graz, als auch an der Universität Pécs; gemeinsames Lehr-und Forschungsprojekt im Familienrecht unter Einbeziehung von Prof. Dr. *Susanne Kissich* (Institut für Zivilrecht an der Universität Graz), PraktikerInnen aus Österreich und Ungarn (RichterInnen, AnwältInnen und VerwaltungsjuristInnen) und Studierenden beider Universitäten, in den Jahren 2016 und 2017, gefördert von der Stiftung Aktion Österreich-Ungarn; gemeinsame Erarbeitung beziehungsweise Erstellung des Gründungsstatuts der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte. 3. Em. Prof. Dr. *Werner Ogris* (Wien) – Em. Prof. Dr. *István Kajtár*: Bis zum Tode von Prof. *Ogris* im Jänner 2015, ständiger wissenschaftlicher Austausch und Kontakt zwischen den beiden Forschern; Rechtshistorikerporträt;[23] Verleihung des Ehrendoktorates an Prof. *Ogris* durch die rechtswissenschaftliche Fakultät der Universität Pécs. 4. Prof. Dr. *Thomas Olechowski* (Wien) – Doz. Dr. *Eszter Cs. Herger*: Wissenschaftliche Kooperation seit 2008;[24] Prof. *Olechowski* wird im März 2017 in Pécs zum Anlass des Jubiläums des österreich-ungarischen Ausgleichs einen Festvortrag halten. 5. Prof. Dr. *Eva Schumann* (Göttin-

---

[15] Stipta, S. 183.

[16] *Eszter Cs. Herger*, A nővételtől az állami anyakönyvvezetőig. A magyar házassági köteléki jog és az európai modellek [Von der Kaufehe bis zur staatlichen Matrikelführung. Das ungarische Eherecht und die europäischen Modelle]. Budapest – Pécs 2006; *Eszter Cs. Herger*, Polgári állam és egyházi autonómia a 19. században [Bürgerlicher Staat und kirchliche Autonomie im 19. Jahrhundert]. Budapest 2010.

[17] *Pál Horváth*, Introduction to the fundamentals of the comparative history of law. In: Legal Problems of Transition in Hungary. Hungarian National Reports Submitted to the Fifteenth International Congress of Comparative Law (Bristol, July 26 – August 1. 1998). Budapest 1998, S. 9-17.

[18] Stipta, S. 185-186.

[19] Stipta, S. 187.

[20] *Eszter Cs. Herger – Krisztina Korsósné Delacasse – Markus Steppan – Róbert Szekeres* (Hrsg.), Recht ohne Grenzen. Festschrift zum 15. Jubiläum der Zusammenarbeit der Grazer und Pécser Rechtshistoriker, Pécs 2007.

[21] *Gernot Kocher*, Szimbólumok és jelek a jogban. Történeti ikonográfia [Zeichen und Symbole des Rechts. Eine historische Ikonographie]. Übersetzt von Eszter Cs. Herger, lektoriert von István Kajtár, Pécs 2008.

[22] *Gernot Kocher*: Európai jogtörténészportrék 2. [Europäische Rechtshistorikerporträt 2]. Herausgegeben und übersetzt von Eszter Cs. Herger, lektoriert von István Kajtár, Budapest-Pécs 2013.

[23] *Werner Ogris*: Európai jogtörténészportrék 1. [Europäische Rechtshistorikerporträt 1]. Herausgegeben und übersetzt von Eszter Cs. Herger, lektoriert von István Kajtár, Budaepst-Pécs 2007.

[24] *Thomas Olechowski*, Das Oktoberdiplom 1860 – Ende des Neoabsolutismus und Wiederauferstehung des Föderalismus in Österreich, in: Gábor Béli – Eszter Cs. Herger – Zsuzsanna Peres (Hrsg.): Rechtshistorische Beiträge 10. Pécs 2010, S. 149-160.

gen) – Doz. Dr. *Eszter Cs. Herger* – Kooperationsbereitschaft angefragt; einjähriger Humboldt-Forschungsaufenthalt von Doz. *Eszter Cs. Herger* bei Prof. *Schumann* am Lehrstuhl für Deutsche Rechtsgeschichte und Bürgerliches Recht an der Universität Göttingen; 6. Em. Prof. Dr. *Kazimierz Baran* (Krakau) – Em. Prof. Dr. *István Kajtár*: Regelmäßige Partnerschaftstreffen; gemeinsame Publikation in *Krakowskie Studia z Historii Państwa i Prawa* in Krakau oder in *Jura* in Pécs beziehungsweise in Konferenzbänden;[25] 7. Prof. Dr. *Andrzej Dziadzio* (Krakau) – Doz. Dr. *Eszter Cs. Herger*: Wissenschaftlicher Austausch im Rahmen der internationalen Rechtshistorikerkonferenz *„Religion in the Public Space of the Legal State of the 19th through 20th centuries"* im April 2016 in Krakau; 8. JUDr. *Jaromír Tauchen*, Ph.D., LL.M. (Brünn) – Doz. Dr. *Eszter Cs. Herger*: Gastvortragender an der Universität Pécs.

4. Resümee und Einschätzung der Gründung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte

Die Schaffung der organisatorischen Voraussetzungen und die Einbindung der Dezső-Márkus-Forschungsgruppe für Vergleichende Rechtsgeschichte in das fakultäre Gefüge, sichtbar durch die Verschränkung mit der Doktoratsschule „Die Erneuerung des ungarischen Rechtssystems im Zeichen der Rechtsstaatlichkeit und der europäischen Integration" der Staats- und Rechtswissenschaftlichen Fakultät der Universität Pécs zeigt, dass fächer- und staatenübergreifende wissenschaftliche Forschung an der Rechtsfakultät in Pčcs für wichtig erachtet und unterstützt wird.

Eine wissenschaftliche Kooperation braucht aber vor allem, neben guten organisatorischen Grundlagen und Rahmenbedingungen als Voraussetzung um erfolgreich zu sein, Personen, die gewillt sind, gemeinsam zu forschen. Um eine wissenschaftliche Kooperation zum Leben zu erwecken, braucht es Forscherinnen und Forscher, die sich gemeinsame Forschungsziele setzen, diese verfolgen und nicht zuletzt auch gemeinsam versuchen, zusätzliche finanzielle Mittel einzuwerben, um ihre gesteckten Ziele zu erreichen. Einen wesentlichen Faktor, damit eine Kooperation nicht zur „Beutegemeinschaft" verkommt, wo jeder versucht seinen „Gewinn" ohne Rücksicht auf die/den andere(n) zu maximieren, stellen persönliche langjährige Kontakte, Partnerschaften und nicht zuletzt auch Freundschaften dar. Auf Grund der oben angeführten Rahmenbedingungen und der langjährigen Kooperationen mit den beteiligten Partnerinnen und Partnern sind wir davon überzeugt, die besten Voraussetzungen für eine erfolgreiche, wechselseitig befruchtende Forschungskooperation geschaffen beziehungsweise vorliegen zu haben.

Eszter Cs. Herger [*], *Markus Steppan* [**]

[25] Siehe die Beiträge von *Kazimierz Baran* (The message smuggled by the martyrdom of St. Stanislaus in the constitutional tradition of Poland), *Andrzej Dziadzio* (Zeremoniell und Symbolik bei den Besuchen Kaiser Franz Josephs I. in den Kronländern am Beispiel der Reise nach Galizien im Jahre 1880) und *Władysław Pęksa* (The offices, symbols and ceremonies applied by the Cossacks in their 17th century State-like decorum as reflective of Polish-Lithuanian patterns) in dem folgenden Sammelband: Gábor Béli – Eszter Cs. Herger – Zsuzsanna Peres (Hrsg.): Rechtshistorische Beiträge 10. Pécs 2010, S. 11-28, S. 47-54 und S. 161-166, wie auch *Kazimierz Baran* (Hrsg.), Costitutional Developments of the Habsburg Empire in the Last Decades before its Fall. The materials of Polish-Hungarian Conference Cracow, September 2007. Crakow 2010.

[*] Univ. Doz. Dr. habil. Eszter Cs. Herger, Lehrstuhl für Rechtsgeschichte, Juristische Fakultät, Universität Pécs, Ungarn.

[**] Ao. Univ. Prof. Mag. Dr. iur. Markus Steppan, Leiter des Instituts für Rechtswissenschaftliche Grundlagen, Fachbereich Rechtsgeschichte und Europäische Rechtsvergleichung, Universität Graz, Österreich.

„Prolegomena per una palingenesi dei libri di Paolo ad Vitellium"

Tagung vom 26.-29. Mai 2016 in Bologna/Ponte Ronca

Vom 26. bis zum 29. Mai 2016 veranstalteten *Giovanni Luchetti* (Universität Bologna), *Massimo Miglietta* (Universität Trient) und *Christian Baldus* (Universität Heidelberg) unter dem Titel „Prolegomena per una palingenesi dei libri di Paolo *ad Vitellium*" ein Seminar zur Methodik der modernen Romanistik am Beispiel der *libri ad Vitellium* des Paulus.

Die wenigen im *Corpus Iuris* überlieferten Fragmente dieses Werkes geben der Wissenschaft einige Rätsel auf. Schon die Identität des namensgebenden Vitellius ist ungeklärt. Denkbar ist, dass Vitellius ein Jurist war, dessen Werk Paulus kommentierte. Die *libri* könnten aber auch an ihn adressiert oder ihm gewidmet worden sein. Nicht nur die Bedeutung des Titels, sondern auch der Aufbau und die Inhalte der *libri* außerhalb der überlieferten Stellen sind unbekannt. Anhaltspunkte für das Verständnis des Werkes bieten aber die in den Fragmenten enthaltenen Zitate der *Responsa* und *Digesta* des Scaevola und Bezüge zu den gleichnamigen *libri ad Vitellium* des Sabinus. In den Räumlichkeiten des Palazzo

Malvezzi, des Sitzes der juristischen Fakultät der Universität Bologna, und des Kunstmuseums Ca' la Ghironda in Ponte Ronca versuchten die in deutscher und italienischer Sprache Vortragenden auf dieser Grundlage, neue Erkenntnisse über das Werk des Paulus zu gewinnen und dabei auch über die Methoden der modernen Romanistik zu reflektieren. So sollte ein inhaltlicher und methodischer Grundstein für eine möglichst originalgetreue Rekonstruktion, eine Palingenesie, der *libri ad Vitellium* gelegt werden.

Vor diesem Hintergrund sollte der erste Teil des Seminars eine Übersicht über die wichtigsten methodischen Instrumente der Romanistik bieten.

In seinem Eröffnungsvortrag führte *Giovanni Luchetti* mit einen Überblick über die palingenetischen Arbeiten des 19. Jahrhunderts und ihre Bedeutung für die heutige Forschung in den Tagungsgegenstand ein. Nach wie vor unerreicht in ihrer Qualität sei die Palingenesie von Otto Lenel. Einst als „Biographismus", der keinen praktischen Mehrwert biete, kritisiert und verdrängt durch die im 19. Jahrhundert aufkommende Jagd nach Textbearbeitungen der justinianischen Kompilatoren (Interpolationen), sei der Wert von Lenels Arbeit heute unbestritten. Aus der Synthese von Ergebnissen der neueren romanistischen Forschung, insbesondere der Massentheorie von Friedrich Bluhme und der darauf basierenden Bluhme/Krüger-Ordnung mit Lenels Palingenesie, könnten sich neue Erkenntnisse für das Verständnis der *libri ad Vitellium* gewinnen lassen.

Massimo Miglietta nahm diesen Faden auf und betonte den Charakter des römischen Rechts als *ius controversum,* das vor allem im Austausch zwischen Juristen entstanden und entwickelt worden sei. Die Untersuchung von Zitaten und den Bezügen zwischen Juristen und Werken berge daher ein großes Erkenntnispotential. Die vielen indirekten und direkten Zitate in den *libri ad Vitellium* seien für diesen Ansatz besonders ergiebig. Dabei seien Zitate auch immer im Kontext der allgemeinen römischen Geschichte zu betrachten. Die Schilderungen des Pomponius seien für diese Betrachtung eine der wertvollsten historischen Quellen.

Christian Baldus setzte sich in seinem Vortrag mit den Textstufen von Franz Wieacker und den Werktypen von Fritz Schulz auseinander. Diese Konzepte der Textkritik seien mittlerweile feste Bestandteile des romanistischen Instrumentariums geworden, aber insoweit problematisch, als sie die römische Klassik als untrennbare Einheit auffassten. Die *libri ad Vitellium* seien ein spannendes Beispiel dafür, dass die Annahme einer solchen Einheit unhaltbar sei, da durch die Zitate von Scaevola und Sabinus in dem Werk mindestens drei verschiedene Zeitebenen nachweisbar seien. Schulz versuche zwar, diesen Widerspruch durch die pauschale Behauptung nachklassischer Zusätze zu erklären. Selbst unter dieser Annahme müsse er aber zugeben, dass sich die *libri ad Vitellium* aufgrund der geringen Zahl der erhaltenen Fragmente einer klaren Einordnung entzögen. Die Konzepte der Textstufen und Werktypen könnten daher nicht unreflektiert in der Exegese als feststehende römische Kategorien herangezogen, sondern müssten stets aus der Quelle selbst hergeleitet werden.

Im zweiten Teil des Seminars standen die Bezüge der *libri ad Vitellium* des Paulus zu anderen Werken und Juristen im Fokus.

Tommaso Beggio (Universität Trient/Universität Helsinki/Universität Heidelberg) begann diese Untersuchung mit einer Annäherung an die verschiedenen Hypothesen zur Person des Vitellius. Wahrscheinlich sei, dass Vitellius, dessen Name nur durch die Werke des Sabinus und des Paulus erhalten sei, ein Zeitgenosse des Sabinus war. Unklar bleibe aber die Verbindung von Sabinus zu Vitellius. Auch bleibe offen, warum der deutlich nach Sabinus lebende Paulus ein Werk nach Vitellius benannte.

Pierangelo Buongiorno (Universität Münster/Universität Lecce) behandelte in seinem Vortrag ebenfalls die Identität des Vitellius. Ausgehend von der Annahme, dass Vitellius ein Zeitgenosse des Sabinus war, sei es wahrscheinlich, dass Vitellius Angehöriger der römischen *gens Vitellia* gewesen sei, deren Mitglieder mehrere hohe Staatsämter bekleideten. In Betracht komme vor allem L. Vitellius, der als Pontifex Experte für das religiöse ius sacrum gewesen sei und der von Sabinus kommentierte Vitellius gewesen sein könnte.

Gloria Viarengo (Universität Genua) verglich die im *Corpus Iuris* überlieferten, *ad personam* titulierten Kommentare römischer Juristen miteinander und mit den *libri ad Vitellium*. Im Vergleich falle auf, dass Juristen im Titel stets nur Juristen der eigenen Schule zu zitieren schienen (insbesondere gelte dies für die Schule der Sabinianer). Die meisten Kommentare *ad personam* seien an Juristen adressiert, was nahelege, dass auch Vitellius ein Jurist gewesen sei.

Im Anschluss ging *Fabiana Mattioli* (Universität Bologna) näher auf die Beziehung zwischen Sabinus und Paulus ein. Durch die Exegese von Fragmenten, die auf die *libri ad Vitellium* des Sabinus Bezug nehmen, lasse sich folgern, dass die *libri ad Vitellium* des Sabinus vor allem erbrechtliche Probleme behandelten. Es sei daher wahrscheinlich, dass sie eine Kommentierung eines erbrechtlichen Responsenwerkes des Juristen Vitellius darstellten. *Enrico Sciandrello* (Universität Turin) untersuchte in diesem Kontext die libri 20-22 des Ulpiankommentars *ad Sabinum*, die auf die sabinianischen *libri ad Vitellium* Bezug nehmen. Dabei stellte er auffällige Parallelen im Aufbau und Inhalt zwischen Ulpians *ad Sabinum* und den *libri ad Vitellium* des Paulus fest, die wertvolle Hinweise auf die nicht überlieferten Teile des Werkes und damit für eine Rekonstruktion der *libri ad Vitellium* liefern könnten.

Paola Biavaschi (Universität Insubrien, Varese) versuchte, durch Exegesen von D. 33. 7. 12.27 (Ulp. 20 *ad Sab.*) und D. 33. 9. 3.1 (Ulp. 22 *ad Sab.*) herauszufinden, ob auch die dort zitierten Juristen Cassius und Aristo das Werk des Vitellius kommentierten. Dies sei für die Anmerkungen des Cassius wahrscheinlich, für die des Aristo aber nicht nachweisbar.

Ivano Pontoriero (Universität Bologna) widmete sich ebenfalls Sabinus als Bezugspunkt des paulinischen Werkes und beleuchtete ausführlich die Sabinuszitate bei hochklassi-

schen Juristen. Auffällig sei, dass viele der Sabinuszitate ohne Angabe ihrer Herkunft Eingang in die Texte gefunden haben. Nach Lenel wiesen diese „loci incerti" darauf hin, dass die Juristen Sabinus nicht nur direkt aus seinen Werken, sondern auch aus den Werken und Berichten seiner Schüler (der *auditores*) zitiert haben könnten.

Philipp Bosch (Universität Heidelberg) ging auf die Parallelen zwischen *ad Vitellium* und den Werken des Cervidius Scaevola ein, die mehrmals direkt und indirekt als Zitate in den *libri ad Vitellium* nachweisbar seien. Die Frage nach der zeitlichen Abfolge der *Digesta* und *Responsa* des Scaevola strahle aufgrund vieler Parallelen dabei auch auf die Deutung der *libri ad Vitellium* aus. Wegen kleiner Unterschiede der Zitate, die sich nicht nur durch Kürzungen erklären ließen, sei es denkbar, dass alle Werke aus einer gemeinsamen Quelle schöpften. Von den Schriften des Scaevola leitete *Antonio Leo de Petris* (Universität Bologna) wieder zum eigentlichen Werk des Paulus über, das er kurz im Überblick darstellte. Durch Untersuchung der in den Werken des Paulus erwähnten Senatsbeschlüsse und Kaiser lasse sich eine ungefähre zeitliche Abfolge der Schriften rekonstruieren. Dabei seien auch Stilunterschiede zwischen den einzelnen Werken erkennbar, die aber keine Rückschlüsse auf die Datierung der *libri ad Vitellium* zulassen würden.

Sebastian Stepan und *Matthias Wolter* (beide Universität Heidelberg) gingen in ihrem Vortrag der Vermutung nach, dass die engen Bezüge der *libri ad Vitellium* zu den Werken des Scaevola dadurch erklärbar seien, dass Paulus Zugriff auf das Archiv des Scaevola gehabt haben könnte. Dieses könnte auch als Grundlage für die Erstellung der *Digesta* und *Responsa* des Scaevola gedient haben. Die Existenz eines solchen Archivs sei zwar plausibel, aber nicht beweisbar; die Annahme eines Zugangs des Paulus daher reine Spekulation.

Im letzten Teil des Seminars wagten einige der Referenten die direkte Annäherung an die überlieferten Fragmente der *libri ad Vitellium* des Paulus.

Filippo Bonin (Universität Köln) untersuchte wesentliche formale Merkmale der überlieferten Fragmente der *libri ad Vitellium*. Wegen der vielen Interpolationsvermutungen gestalte es sich schwierig, das Werk des Paulus treffend einzuordnen. Auch die *libri ad Vitellium* seien wahrscheinlich nachträglich bearbeitet worden. Die hohe stilistische Qualität der Fragmente spreche (auch unter Berücksichtigung der verwendeten Zitationstechniken) aber für bloße formelle Interpolationen und die generelle Authentizität der Fragmente.

Robin Repnow und *Aaron Stumpf* (beide Universität Heidelberg) versuchten, die überlieferten Fragmente in bekannte Strukturen anderer juristischer Werke, namentlich in das rekonstruierbare Edikts- und das zivilistische System, einzuordnen, um damit Aussagen über die mutmaßlichen Inhalte der *libri ad Vitellium* treffen zu können. Dabei stellten sie einige Parallelen zum zivilistischen System fest. Eine sichere Einordnung sei aber aufgrund der wenigen Fragmente und der darin behandelten Themen nicht möglich.

Der Wert der palingenetischen Arbeit zeigt sich in ihrem Nutzen für die konkreten Exegese, weshalb Andreas Nitsch (Universität Heidelberg) im letzten Vortrag die gewonnen Erkenntnisse in eine Exegese zu D. 32. 78. 6 (Paul. 2 *ad Vitellium*) einfließen ließ. Für diese bisher wenig beachtete Stelle könnten sich in der Zusammenschau mit Fragmenten der Werke des Scaevola in D. 32.78 neue Deutungsmöglichkeiten ergeben. Jedenfalls sei eine Einordnung der Stelle auf Grundlage von Lenels Palingenesie und den vorhanden Werkzeugen der Textkritik wie den Werktypen nur schwer möglich. Eine Neuordnung der *libri ad Vitellium* setze daher zwangsläufig eine gründliche Exegese aller Fragmente voraus.

An die einzelnen Vorträge schlossen sich lebhafte Diskussionen an. So wurde erwogen, ob die vielen Zitate in den *libri ad Vitellium* darauf schließen lassen könnten, dass es sich um ein Frühwerk des Juristen Paulus handelte. Letztlich fanden sich dafür aber keine belastbaren Indizien. Auch die mögliche Einordnung der Fragmente in das Edikts- oder das zivilistische System wurde kontrovers und ohne endgültiges Ergebnis diskutiert. Denkbar schien schließlich auch, dass es sich bei den *libri ad Vitellium* des Paulus um Auszüge seiner *libri ad Sabinum* handelt. Dies kann anhand der Quellenlage aber nicht überprüft werden.

In ihren Schlussworten zeigten sich die Organisatoren sehr zufrieden mit den gewonnenen Ergebnissen, stellten aber fest, dass noch viele Fragen zu beantworten seien. Auch wenn die Identität des Vitellius nicht zweifelsfrei zu klären sei, spreche doch Vieles dafür, dass Vitellius ein Jurist war, dessen Werk Paulus und Sabinus kommentierten. Von besonderem Interesse für die Erschließung der *libri ad Vitellium* sei ihr Verhältnis zu den Schriften des Scaevola, das weiterer Aufmerksamkeit bedürfe. Offen bleibe auch, warum Paulus viele Jahre nach Sabinus den Namen Vitellius in seinem Werktitel wieder aufgriff.

Aufgrund der aufgezeigten Grenzen der bekannten Konzepte sei bei der zukünftigen Arbeit mit Quellen ein kritischer und reflektierter Umgang mit den bekannten Instrumenten der Romanistik geboten. Es fehle derzeit aber noch an belastbareren Konzepten, die in der Exegese an ihre Stelle treten könnten.

Obwohl das Seminar viele Fragen klären und etwas Licht ins Dunkel bringen konnte, bleiben die *libri ad Vitellium* doch ein rätselhaftes Werk. Die geleistete methodische und inhaltliche Arbeit kann aber als Grundlage für weitere Untersuchungen und letztlich für eine neue Palingenesie der *libri ad Vitellium* dienen. Ein Tagungsband soll bald erscheinen.

Den Gastgebern gebührt herzlicher Dank für die hervorragende Organisation des Seminars.

Philipp Bosch [*]

[*] Stud. iur. Philipp Bosch, Institut für geschichtliche Rechtswissenschaft - Romanistische Abteilung, Juristische Fakultät, Ruprecht-Karls-Universität Heidelberg, Deutschland.

Forth Biennial Conference of the European Society for Comparative Legal History «Culture, Identity and Legal Instrumentalism» (Gdańsk-Gdynia, 28 June – 1 July 2016)

The end of the 2015/16 academic year was marked by the fourth Biennial Conference of the European Society for Comparative Legal History (ESCLH). The ESCLH was born in December 2009 out of discontent with the narrow nationalism and geographical segregation of legal history in contemporary European scholarship and professional organisations. True to its founding principles, the society organised three biennial conferences in Valencia (2010), Amsterdam (2012) and Macerata (2014), established dedicated journal 'Comparative Legal History' (since 2013) and proved to be an effective framework for investigating cross-cultural influences and hybridity of legal systems in European history.

This year the ESCHL conference, entitled «Culture, Identity and Legal Instrumentalism», was held in Gdańsk and Gdynia (Poland) from 28 June to 1 July 2016, in cooperation with the Chair of Legal History and the Faculty of Law and Administration of the University of Gdańsk.

As the conference title suggests, the focus was set on the issue of law as an instrument of transforming reality in the individual circles and sub-circles of Europe and the world. The organisers, building on the legacy of the earlier ESCLH meetings, aimed at providing the ground for as many legal historians as possible to understand the instrumentality of law through two broad themes. Law may be considered as an instrument functionally or axiologically, that is either through the prism of analysis of techniques or of objectives.

Within the functional approach, particularly welcomed were the papers which addressed how legal problems are identified and their solutions developed, whether autonomously or by transplantation and subsequent adaptation. Within the axiological approach, the papers explaining how law can transform reality were welcomed, especially as a tool of modernisation and / or as a means to shape and strengthen national identity or other goals defined from the viewpoint of national interest.

Papers addressed the conference theme, exploring doctrinal, theoretical, cultural or methodological aspects of comparative legal history. Addressing multiple cultures was encouraged. This included where a similar legal system functioned in two different cultural circles as a result of massive transplantation of foreign legal solutions and where a given homogenous cultural circle has been divided and various legal systems function in its individual parts.

In comparison to the previous ESCLH conference in Macerata (2014), this one witnessed a remarkable growth in the number of applications (over 130), actual participants and the agenda.

In fact, a single congress became a venue for at least three distinct meetings:

(1) a one-day summer school for young researchers, who were instructed on how to make their contribution to comparative legal history — during this session prof. Phillip Hellwege (University of Augsburg), Stefano Vinci (University of Bari Aldo Moro) and Aniceto Masferrer (University of Valencia) shared their views on methodological challenges and problems in this domain;

(2) the discussion boards on 28–30 June and 1 July with a closer look on the position of the host country, Poland, in Europe and on transformations in Polish Law and Legal Culture at the Turn of the 20th and 21th centuries in comparative perspective (featuring such special guests as the presidents of the Republic of Poland, Lech Wałęsa (1990–1995) and Bronisław Komorowski (2010–2015), and justices emeriti of the Polish Constitutional Tribunal, Ewa Łętowska and Jerzy Stępień);

(3) the annual general assembly of the ESCLH members to discuss the current issues of the society and to grant Van Caenegem Prize 2016 for best article in the ESCLH journal written by a scholar under the age of 30 (this year Frederik Dhondt from Free University of Brussels was distinguished);

and (4) the main forum on culture, identity and legal instrumentalism in history.

In order to give the participants a better idea of the historical and cultural diversity in Gdańsk area, the organisers changed the venues several times. On 28 and 29 June the conference was held in the Old Town of Gdańsk (the European Solidarity Centre, the Artus Court, i.e. the historical meeting place of merchants, and the Great Hall of the Main Town Hall). On 30 June the debate moved to Gdynia (the Pomeranian Science and Technology Park). On 1 July the participants met at the Faculty of Law and Administration of the host university.

The broad topic of the conference attracted over 113 participants (or about 150 with listeners) from many EU countries, Brazil, Israel, Russia, South Africa and North America. The best overview of the subject range of the presentations gives the list of the panels packed in four days: (http://www.esclhconference2016.pl)

Day 1 (28 June):

Summer School in the European Solidarity Center

Day 2 (29 June):

Official Opening and the 1st Plenary Session with the key presentation on the Polish and American legacy of Constitutional Rights by prof. Ulrike Müßig (University of Passau)

Panels:

1. 1. Functional Constitutionalism (I): High Points in the Low Countries

1. 2. The Legal Transplant and the Building of National Legal Identities in Central Eastern Europe

1. 3. New Vehicles and Transport Infrastructure International Influences and Instrumentalism in Nordic Law, 1890-1940

2. 1. Law, Totalitarianism and the Modern World

2. 2. Vectors of Legal Cultures and Identities? Legal Periodicals in Belgium, Estonia and France

2. 3. Thinking about Ourselves: Legal Historiography and Identity

3. 1. Self-Conception and Reform in the Early 20th Century

3. 2. Law, Gender and Local Legal Family

3. 3. Frontiers of Knowledge in Medieval and Early Modern Law

Day 3 (30 June):

The 2nd Plenary Session featuring the presentation 'Premodern divided ownership in modern legal history of Estonia' by prof. Marju Luts-Sootak (University of Tartu).

Panels:

4. 1. Identity Within and Across Legal Systems

4. 2. The Flow of Legal Doctrine in Time and Space

4. 3. Axiological Constitutionalism (II): 19th Century Identity Building

5.1 Codification as Nationalization or Denationalization of Law: Europe and America

5. 2. Commercial Law in Europe: Of Glaciers, Codes, Merchants and Consumers

5. 3. Strategies, Policies and Ideologies in the Field of Public Law

6. 1. Codification as Nationalization or Denationalization of Law in Europe (France, Belgium, Italy and Spain)

6. 2. Marriage in Different Cultures

6. 3. Commerce and Craft

6. 4. Private Law Movements from Rome to Today

Day 4 (1 July):

Panels:

7. 1. Constitutional History, Authoritarian Rule and Transition to Democracy in Brazil and Comparative Perspectives

7. 2. 19th Century Private Law 'Modernisation'

7. 3. Migrations of People, Ideas and Legal Power

8. 1. Legal History, the Interdisciplinary Challenge: a Discussion on Rights in Time of Crises

8. 2. Culture, Conformity and Coding in Legal Phenomena

8. 3. Law, Human Rights and Democracy

9. 1. 'Public' as Identity and as Locus of Change

9. 2. Institutions and Politics

9. 3. Mixed Legal Traditions and Identities

Each panel was chaired by a well-known legal historian who moderated the Q & A session and the closing discussion. In addition to the panels several coffee breaks were equally important to maintain and establish connections in the academic community. Additionally, the participants could familiarise themselves with the latest publications on legal history presented by Springer Publishing.

Given the multiplicity and variety of the panels and the presentations, it was hardly possible to attend most of them and to summarise the overall achievements by the end of this vibrant conference. The main outcome seems to be the massive evidence of an emerging discipline of internal and external comparative legal history, limited neither to Europeans nor to European past. Hopefully, many interesting theses from the conference will find their way into 'Comparative Legal History'.

This brief overview would not be complete without a word of gratitude to Anna Klimaszewska, Michał Gałędek and other organisers from the Faculty of Law and Administration of the University of Gdańsk for their hospitality and teamwork which made the conference both possible and intellectually inspiring.

The upcoming ESCHL conference is scheduled for early July 2018 in Paris. The interested prospective participants should check for announcement at the ESCHL blog by mid 2017. (http://esclh.blogspot.com)

Dmitry Poldnikov [*]

* Dmitry Poldnikov, Ph.D., Associate Professor of Legal History, Higher School of Economics, Moscow, Russia.

Guidelines for authors

The **Journal on European History of Law** publishes posts from the field of history of law, History of legal thought and Roman law. The length of a post cannot exceed 50.000 characters. It must be written in English or in German languages.

All the works are reviewed. The executive editor decides on whether to publish the materials and in which order. After the review, the decision will be sent to the author by email.

The authors are responsible for the lingual and formal level of submitted papers. These levels are checked by the editorial office and some small necessary changes can be done by the editor. Corrections are possible only upon prior request.

Corrections done by the author must be returned within 4 days and no significant changes are permitted.

Supplements must be sent to the email address of editor's office: info@historyoflaw.eu

The supplements must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

If your text contains pictures or tables (only black and white), mention their meaning in the text. If the pictures are sent by electronic mail, they must be in JPG, TIFF or EPS format. All the tables, pictures and graphs must be placed somewhere in the text and also sent separately.

Since The European Society for History of Law is a non-profitable organization, there would be no payment for manuscripts published in the Journal on European History of Law.

Each work must contain:

1. **Title**. It contains (in this order, always in a new row):
Short and understandable title;
The full name and last-name of the author/s including academic titles and working-place;
Address of the author/s, including the code of the country before the postal code (for example CZ). Afterwards write down your email address.
2. **Abstract.** Summarizes the content of the work. Usually up to 10 rows. It should describe clearly the main question of the research, solution, sources and methodology (according to the type of research).
3. **Key words.** Several terms (not more than 20 words) that characterize the work. Words from the title can be repeated.
4. **Division of the proper text.** For better orientation in the text, it should contain headings. The headings should be numbered.

Quotation from publications in German language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, S. 151–152.

Quotation from publications in English language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, p. 151–152.